OFFICIALLY SELECTED
CASES ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF THE

STATE OF KANSAS

Reporter:
SARA R. STRATTON

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COURT OF APPEALS

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SUBJECT INDEX
63 Kan. App. 2d No. 1

(524 P.3d 424)

No. 124,054

STATE OF KANSAS, *Appellee*, v. MARK SCHEETZ, *Appellant*.

Petition for review filed February 13, 2023

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Statutory Definition of Lewd and Lascivious Behavior—Presence Defined.* The term "presence" in the statutory definition of the crime of lewd and lascivious behavior, under K.S.A. 2021 Supp. 21-5513(a)(2), requires exposure of a sex organ within another's physical presence, so the digital transmission of a picture of a sex organ to another would not qualify.

2. SAME—*Admissibility of Prior Crimes—Evidence of Sexual Misconduct Must be in 60-455(g) Listing of Acts or Offenses to Be Admissible under 60-455(d).* K.S.A. 2021 Supp. 60-455(g) provides an exclusive listing of the acts or offenses which constitute an "'act or offense of sexual misconduct'" as that term is used in K.S.A. 2021 Supp. 60-455(d). Therefore, evidence of the defendant's commission of another act or offense of sexual misconduct must satisfy subsection (g)'s definition before it can be admissible under subsection (d).

Appeal from Norton District Court; PRESTON PRATT, judge. Opinion filed January 13, 2023. Reversed and remanded with directions.

Jacob Nowak, of Kansas Appellate Defender Office, for appellant.

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

Before CLINE, P.J., ATCHESON and COBLE, JJ.

CLINE, J.: Mark Scheetz challenges several sex crime convictions based on the improper admission of evidence under K.S.A. 2021 Supp. 60-455(d) and prosecutorial error in closing arguments. Because we find the cumulative effect of trial errors prejudiced Scheetz' ability to have a fair trial, we reverse his convictions and remand for a new trial.

FACTS

Scheetz was charged in Norton County District Court with two counts of aggravated criminal sodomy, two counts of rape, one count of sexual exploitation of a child, and one count of intimidation of a witness or victim. These charges arose out of

Scheetz' alleged conduct with M.C., the daughter of Scheetz' girlfriend. M.C. was under the age of 14 when the alleged offenses occurred, which was between December 2012 and September 2015.

Pretrial K.S.A. 60-455 hearing

In cases involving certain sex offenses, such as this one, "evidence of the defendant's commission of another act or offense of sexual misconduct is admissible, and may be considered for its bearing on any matter to which it is relevant and probative." K.S.A. 2021 Supp. 60-455(d). Such evidence of a defendant's other crimes and civil wrongs is commonly known as "propensity evidence."

The State moved in limine under K.S.A. 2021 Supp. 60-455(d) to admit evidence at trial of Scheetz' interactions with three other girls as well as evidence allegedly obtained from his internet search history on several electronic devices. This propensity evidence included: (1) evidence that Scheetz sent an image of his penis to G.H. over Snapchat; (2) evidence that Scheetz invited H.T. to "hang out" with him at his hotel room in exchange for alcohol and sent H.T. several pictures of his penis over Snapchat; (3) evidence that Scheetz asked C.K. to send him nude images of herself over Snapchat and when she refused, Scheetz sent her a nude picture of himself; and (4) internet searches for adult pornographic videos which portrayed "incestual-type" situations. The State argued Scheetz' actions qualified as acts or offenses of sexual misconduct under K.S.A. 2021 Supp. 60-455(d) and sought admission of the evidence to show Scheetz' propensity to commit the sexual offenses with which he was charged.

At the hearing on the State's motion, the district court heard testimony from several witnesses about Scheetz' alleged sexual misconduct.

The first witness, 13-year-old G.H., knew Scheetz as a family friend who worked for her father. She testified that she and Scheetz often communicated over Snapchat and these messages were always innocuous, such as wishing her "good luck" on game days. But once, when she was 12, Scheetz sent her "a picture of his private area." After Scheetz sent the picture, she claimed he

sent her messages saying it was an accident and asking her not to tell her father.

M.C.'s 17-year-old friend H.T. testified next. She met Scheetz through spending time with M.C. She and Scheetz exchanged messages for a time on social media, mostly through Snapchat. She described the messages as innocent at first but eventually Scheetz sent her two "male-part pictures," at which point she blocked him. H.T. testified that on another occasion, Scheetz offered to buy her alcohol if she would come to a hotel where he was staying, and he also offered to give her gas money if she would hang out with him.

The next witness, C.K., met Scheetz through her uncle when she was 16. She also exchanged Snapchat messages with Scheetz but not until after he moved away from town. She said at first he responded to pictures she posted on her account with complimentary emojis but eventually he asked her to send him nude pictures. She refused this request twice and sometime later Scheetz sent her an unsolicited nude picture of himself in the mirror.

Finally, Special Agent Nicholas Krug of the Kansas Bureau of Investigation (KBI) testified about his analysis of four iPhones belonging to Scheetz, which had been seized and searched under a warrant. Agent Krug said he managed to retrieve Scheetz' internet search history on the devices, which Krug claimed included searches for "incestual pornography, specifically, stepfather-stepdaughter type searches." No one claimed any of these searches included child pornography.

The State argued the proffered evidence showed a pattern of Scheetz targeting minor females over Snapchat and then sending them nude pictures of himself. The State claimed this evidence showed Scheetz had a propensity for sexual contact with underage females.

Scheetz addressed each piece of evidence in turn. He first argued G.H.'s testimony was "very non-specific" and claimed he sent the picture to her by mistake. He also pointed out that H.T. admitted he never asked her to send him pictures and his offers of gas and alcohol did not "indicate any kind of sexual content or any kind of sexual behavior on the part of [Scheetz or H.T.]." As to C.K.'s testimony and his internet search history, Scheetz argued

this evidence was inadmissible since the alleged conduct occurred after the charged crimes were alleged to have occurred, and thus were not *prior* bad acts but later ones.

The district court found all the evidence offered by the State relevant and probative to Scheetz' charged crimes and granted the State's motion. It also pointed out that while the phrase "prior bad acts" is often used as shorthand for the sort of evidence admitted under K.S.A. 2021 Supp. 60-455, the statute does not require evidence of a defendant's other crimes or civil wrongs to be *prior* crimes or civil wrongs.

Trial

The State detailed the propensity evidence it intended to present in its opening statement. And it began its case by calling B.C.—G.H.'s father and C.K.'s uncle—to the stand. B.C. discussed G.H.'s text messages to him after receiving the picture from Scheetz, and those messages were admitted as an exhibit and published to the jury. B.C. also testified about later learning Scheetz had sent inappropriate pictures to C.K. as well. B.C. described how he eventually learned from Norton Police Assistant Chief Jody Enfield that Scheetz was being investigated in connection with an allegation of electronic solicitation. After discussing what Enfield told him with a colleague, B.C. decided to contact the KBI about what he knew.

The jury next heard testimony from G.H. She testified that one night when she was babysitting she received a Snapchat from Scheetz of his penis. She said the photo accompanied a text that read "something along the lines of waiting for you to come over." Scheetz immediately messaged her, asking her not to tell her dad and apologizing for "scarring [her]." Other than this incident, which G.H. believed was an accident, G.H. testified Scheetz never acted inappropriately towards her.

Sheridan County Undersheriff Brian Diercks, who took G.H.'s initial statement, testified next. He said he and B.C. first brushed off the incident as an accident, assuming Scheetz had intended to send the picture to a girlfriend and sent it to G.H. by mistake. They based this conclusion on the way that Snapchat suggests potential recipients for messages according to who you have interacted with recently. He then explained that he and B.C. decided to contact

the KBI after learning Scheetz was under suspicion for sending inappropriate Snapchats to a 16-year-old girl. They thought perhaps the picture sent to G.H. was meant for this other girl.

KBI Officer Mark Kendrick, who interviewed G.H. about the picture she received from Scheetz, also testified. He said G.H. suggested that Scheetz reacted as if he sent the picture to her by accident, based on the messages Scheetz sent with and after the picture.

After calling those four witnesses to describe the incident with G.H., the State then called H.T., C.K., C.K.'s mother, and a law enforcement officer who had interviewed H.T. The testimony from H.T. and C.K. tracked their testimony at the hearing on the State's K.S.A. 60-455 motion. C.K.'s mother testified that C.K. told her Scheetz had asked her for nudes and sent her nude pictures of himself. And the officer explained he learned about Scheetz' communications with H.T. when he was interviewing H.T. about a possible relationship between her and another law enforcement officer with the Norton Police Department.

The State admitted records of Scheetz' Snapchat messages with C.K., G.H., and H.T. and his Facebook messages with C.K. into evidence. It also admitted records of his internet search history. Scheetz timely renewed his objections to the admissibility of the propensity evidence. As to the search history, he further argued there was no evidence he watched child pornography and nothing in the search history was illegal.

After all this propensity evidence, the jury finally heard from the alleged victim, M.C. She was 19 when she testified.

M.C. identified Scheetz as her mother's ex-boyfriend. When they started dating, M.C. and her mother lived with her grandfather. But around the time she was 11, they moved into their own place and Scheetz moved in with them. M.C. said living with her mother was "hell." She described her mother as an angry drunk, who would often kick her out of the house. She denied having much contact with her biological father at that point in her life. She said Scheetz was the one in the house who was really taking care of her and she saw him as a father figure.

M.C. testified that at some point she noticed Scheetz began lifting her shirt and rubbing her back and stomach at times while

she was sleeping. She said one night he picked her up after she had gotten into a fight with her mother and ran away. They spent the night at her grandfather's house, away from her mother. Scheetz comforted M.C. while her grandfather slept. At some point, Scheetz removed his penis from his shorts and persuaded her to give him oral sex.

M.C. also described another incident when Scheetz took her bird hunting. She said while they were sitting in the truck, Scheetz digitally penetrated her vagina and took videos of himself doing so. She explained that Scheetz kept videos of her in a photo vault application on his phone. M.C. testified she was 12 and Scheetz was 24 when these events occurred.

M.C. detailed another encounter with Scheetz when she was 13, during which they had sex at her mother's house while her mother was gone. And she testified Scheetz performed oral sex on her a different time.

M.C. eventually moved out of her mother's house when she was 13 and began living with her biological father in another town. She had very little contact with Scheetz at that point and they never saw each other in person. But she admitted sending Scheetz pictures over Snapchat after moving in with her father. M.C. said she never told anyone about Scheetz' actions until she found out KBI agents were looking for her.

The State admitted into evidence photographs recovered from a phone found in Scheetz' possession. These photographs were found in a photo vault application on the phone that was password protected. Among these photographs were several pictures of unclothed females whose faces were not visible. M.C. identified herself in all these photographs, noting such identifying features as a scar on her hand, the naval piercing in several of the photos, and the bedding visible in the background.

The State also admitted into evidence a Crown Royal bag found in Scheetz' bedroom containing six pairs of women's underwear. M.C. testified that Scheetz told her he took a pair of her underwear, but she did not recognize any of these as hers.

Lisa Burdett, a forensic scientist with the KBI, testified about the DNA analysis she performed on several pairs of the underwear. The samples taken from the underwear were compared against DNA samples taken from M.C., M.C.'s mother, and

Scheetz. DNA testing of one of the pairs of underwear revealed a major profile matching Scheetz. The partial minor profile obtained from the underwear matched M.C. but was not consistent with her mother.

The State also admitted into evidence a letter Scheetz tried to send to his brother from jail that was screened and intercepted by the Norton County Sheriff's Office. Scheetz' letter to his brother contained a separate letter addressed to M.C. that purported to be from an anonymous woman in her community. The letter reminded M.C. of the positive aspects of her relationship with Scheetz and the potential embarrassment of a trial for her and pleaded with her to change her story. In the letter to his brother, Scheetz asked his brother to mail the enclosed letter and follow up with M.C. to make sure she got it.

Scheetz testified in his own defense. He first outlined the progression of his relationship with M.C.'s mother. Scheetz testified that M.C.'s mother was a recovering alcoholic when they moved in together. He said their relationship was good at first, but eventually M.C.'s mother began drinking again and things deteriorated in the household. This included M.C.'s relationship with her mother, which became very contentious and violent at times. During this period, Scheetz would often leave the house and stay with his own mother, either by choice or because M.C.'s mother had kicked him out during a fight.

Scheetz denied M.C.'s allegations of sexual abuse. He testified that on the night of M.C.'s first allegation, he was living with his mother. M.C.'s mother called and told him M.C. had run away, so he agreed to look for her. His sister-in-law went with him. While they were out looking, they received a call from his mother that M.C. had shown up at Scheetz' mother's house. The police arrived and M.C. went to spend the night at her grandfather's, since she did not want to go back to her own home and confront her mother. A little while later, Scheetz received a call from M.C.'s grandfather, who said M.C. would not stop crying and was refusing to talk to him. M.C.'s grandfather asked Scheetz to come over and see if he could calm her down.

Scheetz said when he arrived, M.C. was in her grandfather's bedroom by herself, despondent. He went into the room and sat

on the bed with her with the door open and M.C.'s grandfather in the other room. After they talked for a while, M.C. eventually calmed down. She laid her head on his shoulder and they watched television. He denied anything sexual happened between them. He said he left after about two hours and went back to his mother's, and M.C.'s grandfather was awake when he left.

Scheetz also denied M.C.'s other allegations of sexual encounters. As for the women's underwear found in his house, he claimed they were from M.C.'s mother and other women. He explained that after his first sexual experience in junior high, the girl gave him a pair of her underwear as a keepsake. He has since kept underwear from many women he has been involved with.

Scheetz did not discuss the pictures found on his phone or the letters to M.C. and his brother, nor did the State cross-examine him about these topics. Scheetz was also not questioned about any of the propensity evidence.

Aside from his own testimony, Scheetz called several witnesses who had spent time around him and M.C. They all generally testified they had not seen or heard anything which caused them concern that M.C. was being sexually abused.

The State emphasized the propensity evidence again in closing, using it to discredit Scheetz' denial of M.C.'s allegations. And in its rebuttal closing, the State even recited the titles of some of the pornographic videos it claimed had been found in Scheetz' internet search history to establish Scheetz' alleged sexual interest in young girls, including M.C.:

"If you look at State's Exhibit 122, it's an entire spreadsheet where it has a lot of different sites that have been visited or searches. A portion of that is on, it's listed on the far left-hand side by number and then it has specific pages. Just a portion of what the defendant is searching for on his phone that the defense tried to characterize to you as, oh, he just looked at some porn, it's not a big deal. He's looking at Dad's Dick, Raw Confessions; Daughter Flirts With Me, Raw Confessions; My Stepdad Finally Touched Me, Raw Confessions. He's looking at, Sleeping with Stepdad, Horny for my Stepdaughter, My Dad Slid his Finger Down There, Stepdad Started Blowing Me at Age Five, Does Any Father Here Jack Off Thinking About Your Daughter, Dad Fucks Sleeping Stepdaughter, Daughter Belongs to Daddy, Free Little Stepdaughter Porn Videos, Little Stepdaughter Porn Videos, and Took my Stepdaughter's Virginity.

"If you have any question in your mind what he's interested in, this should answer that question for you. It's not a case of [M.C.] said it and he said. It's a case of [M.C.] said he spent the night there, and his Facebook records confirm

that. It's a case of he's talking to other underage girls, and he's sending them nude pictures of his erect penis, on accident, for [G.H.]. And he just denies that it happened with [C.K.] and [H.T.] at all. But they both told you what they saw.

"And when you take all of that into consideration along with the DNA results, along with his Snapchat records, along with the internet searches, you get a really clear picture of what happened."

The jury convicted Scheetz on all counts and the district court sentenced Scheetz to life in prison without the possibility of parole for 50 years.

ANALYSIS

Did the district court err in admitting propensity evidence under K.S.A. 2021 Supp. 60-455(d)?

Scheetz first argues the district court erred by admitting evidence under K.S.A. 2021 Supp. 60-455(d) that did not meet the definition of sexual misconduct provided in K.S.A. 2021 Supp. 60-455(g). He claims none of the State's propensity evidence should have been admitted since it all falls outside this definition.

To begin, the State urges us not to consider Scheetz' claim, arguing that he failed to properly preserve this argument for appellate review. While it concedes that Scheetz objected to admission of the propensity evidence below, the State claims he never raised this specific argument before the district court by referencing K.S.A. 2021 Supp. 60-455(g) in his trial objections.

Scheetz, on the other hand, contends his objections below were enough to preserve his arguments for review, since he satisfied the form and function of the contemporaneous objection rule by objecting at all appropriate times to the admission of this propensity evidence under K.S.A. 2021 Supp. 60-455(d).

K.S.A. 60-404 requires a timely and specific objection to the admission of evidence before a verdict can be set aside based on the erroneous admission of such evidence. *State v. King*, 288 Kan. 333, 348, 204 P.3d 585 (2009). Our Supreme Court has determined this rule aims to give the district court "'the opportunity to conduct the trial without using . . . tainted evidence, and thus avoid possible reversal and a new trial.'" 288 Kan. at 342 (quoting *Baker v. State*, 204 Kan. 607, 611, 464 P.2d 212 [1970]).

Scheetz actively litigated the admissibility of this evidence under K.S.A. 2021 Supp. 60-455(d) both before and during trial. As he points out in his reply brief, the State moved to admit the propensity evidence under subsection (d) and Scheetz disputed the application of that subsection. Although he did not specifically mention K.S.A. 2021 Supp. 60-455(g), the general theme underlying his objections was that so long as he was not soliciting underage girls for sex or watching child pornography, his conduct was not admissible as propensity evidence under K.S.A. 2021 Supp. 60-455(d). That is, Scheetz argued the propensity evidence did not establish that he committed any crimes involving the other girls or his alleged internet search history. Aside from subsections (g)(6)-(8), which list specific acts of sexual misconduct inapplicable here, all offenses of sexual misconduct listed in K.S.A. 2021 Supp. 60-455(g) are crimes. So Scheetz' argument on appeal is not altogether different from what he argued below. See 2021 Supp. K.S.A. 60-455(g)(1), (9).

The State argues we should find Sheetz' objection unpreserved under *State v. Bliss*, 61 Kan. App. 2d 76, 97-102, 498 P.3d 1220 (2021). But we find the State's reliance on *Bliss* to be misplaced. In *Bliss*, we held that a defendant's ambiguous objection for "'the record'" could not preserve his claim for review, since it did not identify the rule the objection was based on. 61 Kan. App. 2d at 101. Unlike that case, however, Scheetz' objection was much more specific. We therefore find the purpose of K.S.A. 60-404 was fulfilled, and Scheetz has preserved his claim for review.

Now, we must turn to an analysis of the district court's admission of this evidence. Since the court's decision hinges on its interpretation of K.S.A. 2021 Supp. 60-455, we are presented with a question of law over which we have unlimited review. *State v. Miller*, 308 Kan. 1119, 1166, 427 P.3d 907 (2018).

Admission of propensity evidence under K.S.A. 60-455

K.S.A. 2021 Supp. 60-455 governs the admissibility of propensity evidence. It generally bars the use of such evidence "to prove such person's disposition to commit crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion." K.S.A. 2021 Supp.

60-455(a). The Legislature carved out two exceptions to this prohibition. Subsection (b) allows the admission of propensity evidence "when relevant to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." K.S.A. 2021 Supp. 60-455(b). And in cases involving certain sex offenses, "evidence of the defendant's commission of another act or offense of sexual misconduct is admissible, and may be considered for its bearing on any matter to which it is relevant and probative." K.S.A. 2021 Supp. 60-455(d).

The scope of the potential evidence that may be admitted under subsection (d) is limited, though, by the statute's definition of what constitutes an "act or offense of sexual misconduct":

"(g) . . . [A]n 'act or offense of sexual misconduct' includes:

(1) Any conduct proscribed by article 35 of chapter 21 of the Kansas Statutes Annotated, prior to their repeal, or article 55 of chapter 21 of the Kansas Statutes Annotated, or K.S.A. 2021 Supp. 21-6419 through 21-6422, and amendments thereto;

(2) the sexual gratification component of aggravated human trafficking, as described in K.S.A. 21-3447(a)(1)(B) or (a)(2), prior to its repeal, or K.S.A. 2021 Supp. 21-5426(b)(1)(B) or (b)(2), and amendments thereto;

(3) exposing another to a life threatening communicable disease, as described in K.S.A. 21-3435(a)(1), prior to its repeal, or K.S.A. 2021 Supp. 21-5424(a)(1), and amendments thereto;

(4) incest, as described in K.S.A. 21-3602, prior to its repeal, or K.S.A. 2021 Supp. 21-5604(a), and amendments thereto;

(5) aggravated incest, as described in K.S.A. 21-3603, prior to its repeal, or K.S.A. 2021 Supp. 21-5604(b), and amendments thereto;

(6) contact, without consent, between any part of the defendant's body or an object and the genitals, mouth or anus of the victim;

(7) contact, without consent, between the genitals, mouth or anus of the defendant and any part of the victim's body;

(8) deriving sexual pleasure or gratification from the infliction of death, bodily injury or physical pain to the victim;

(9) an attempt, solicitation or conspiracy to engage in conduct described in paragraphs (1) through (8); or

(10) any federal or other state conviction of an offense, or any violation of a city ordinance or county resolution, that would constitute an offense under article 35 of chapter 21 of the Kansas Statutes Annotated, prior to their repeal, or article 55 of chapter 21 of the Kansas Statutes Annotated, or K.S.A. 2021 Supp. 21-6419 through 21-6422, and amendments thereto, the sexual gratification component of aggravated human trafficking, as described in K.S.A. 21-3447(a)(1)(B) or (a)(2), prior to its repeal, or K.S.A. 2021 Supp. 21-5426(b)(1)(B) or (b)(2),

and amendments thereto; incest, as described in K.S.A. 21-3602, prior to its repeal, or K.S.A. 2021 Supp. 21-5604(a), and amendments thereto; or aggravated incest, as described in K.S.A. 21-3603, prior to its repeal, or K.S.A. 2021 Supp. 21-5604(b), and amendments thereto, or involved conduct described in paragraphs (6) through (9)." K.S.A. 2021 Supp. 60-455(g).

Scheetz argues the propensity evidence admitted at trial did not meet the definition of an "act or offense of sexual misconduct" and was therefore not admissible under K.S.A. 2021 Supp. 60-455(d). He claims the evidence should have been barred under K.S.A. 2021 Supp. 60-455(a)'s general prohibition against propensity evidence.

Whether Scheetz' conduct falls within the definition in K.S.A. 2021 Supp. 60-455(g)

The district court relied on K.S.A. 2021 Supp. 60-455(d) when admitting the propensity evidence but did not reference K.S.A. 2021 Supp. 60-455(g) in making this ruling or identify which subsection it believed the evidence fell under. Neither did the State when seeking to admit the evidence.

On appeal, the only conduct which the State argues falls within the definitional listing in subsection (g) is Scheetz' transmission of nude photos to G.H., H.T., and C.K. It argues this conduct could constitute lewd and lascivious behavior under K.S.A. 2021 Supp. 21-5513. The State also claims his transmission of a nude photo to G.H. could constitute electronic solicitation under K.S.A. 2021 Supp. 21-5509.

Scheetz, for his part, agrees these offenses are in subsection (g)'s definition. But he argues the digital transmission of nude pictures to minors does not meet the statutory definition of either of those offenses. Instead, he claims this conduct is criminalized as promoting obscenity to minors under K.S.A. 2021 Supp. 21-6401, which is not among the crimes listed in K.S.A. 2021 Supp. 60-455(g).

Lewd and Lascivious Behavior

K.S.A. 2021 Supp. 21-5513, in relevant part, criminalizes the act of "publicly exposing a sex organ or exposing a sex organ in the presence of a person who is not the spouse of the offender and who has not consented thereto."

As Scheetz notes, the Kansas Supreme Court has interpreted the term "presence" under the predecessor statute to K.S.A. 21-5513, which used identical language in defining the crime of lewd and lascivious behavior. There, the court interpreted the term as including

"'the fact or condition of being present: the state of being in one place and not elsewhere: the condition of being within sight or call, at hand, or in a place thought of: the fact of being in company, attendance, or association: the state of being in front of or in the same place as someone or something: the part of space within one's ken [range of perception], call, or influence: the vicinity of or the area immediately near one: the place in front of or around a person.' . . . [and] . . . '[t]he state or fact of being in a particular place and time: [c]lose physical proximity coupled with awareness.' [Citations omitted.]" *State v. Bryan*, 281 Kan. 157, 160, 130 P.3d 85 (2006).

As Scheetz points out, these definitions all imply that physical proximity is a requirement of lewd and lascivious behavior, meaning the digital transmission of a picture would not qualify. Furthermore, since the Legislature separately criminalized the digital transmission of obscene material in K.S.A. 21-6401 (whose broad definition of "obscene material" would include a Snapchat picture of one's genitalia), it apparently intended to distinguish between exposure of one's genitalia in the physical presence of another and the digital transmission of a picture of the same. We therefore do not find that Scheetz' alleged digital transmission of nude pictures qualified as lewd and lascivious behavior, as that crime is statutorily defined.

Electronic Solicitation

K.S.A. 2021 Supp. 21-5509(a) defines electronic solicitation as "enticing or soliciting a person, whom the offender believes to be a child, to commit or submit to an unlawful sexual act [by means of communication conducted through the telephone, internet or by other electronic means]."

K.S.A. 2021 Supp. 21-5501(d) defines an "'[u]nlawful sexual act'" as "any rape, indecent liberties with a child, aggravated indecent liberties with a child, criminal sodomy, aggravated criminal sodomy, lewd and lascivious behavior, sexual battery or aggravated sexual battery, as defined [under Kansas law]."

Electronic solicitation is a severity level 3 person felony if the offender believes the person to be a child 14 or more years old but less than 16 years old and a severity level 1 person felony if the offender believes the person to be a child under 14 years old. K.S.A. 2021 Supp. 21-5509(b).

As with the offense of lewd and lascivious conduct, the State fails to explain why it believes Scheetz' conduct qualifies as electronic solicitation. It simply states: "The Snapchat could have been a precursor to any of those offenses." While Scheetz' claim that the State has insufficiently briefed this argument has some merit, in any case, the facts do not support a conclusion that Scheetz tried to solicit G.H. to commit an unlawful sexual act. And as the State tacitly admits by only addressing Scheetz' conduct towards G.H., his conduct towards H.T. and C.K. would not qualify since both girls testified they were at least 16 years old at the time.

First, all the witnesses who addressed Scheetz' conduct towards G.H. testified they believed Scheetz sent the photo to G.H. by accident, given the texts that accompanied the photo and immediately followed it. Second, even though a reasonable factfinder might be able to infer that Scheetz sent the picture intentionally, the immediate follow up messages and G.H.'s response make it difficult to conclude that this conduct rose to the level of solicitation. Scheetz did nothing, besides sending the picture, that could be construed as attempting to entice or solicit G.H. to engage in an unlawful sexual act. Instead, he tried to convince her that he sent the picture by accident. With no other attempt to entice or solicit the recipient, we find the apparent accidental transmission of a nude picture—by itself—does not qualify as electronic solicitation. Rather, we find it more likely that the Legislature intended such conduct to be criminalized as promoting obscenity to minors.

Promoting Obscenity to Minors

Scheetz argues that his alleged transmission of nude pictures to G.H., H.T., and C.K. qualified as promoting obscenity to minors, a crime not in the list of offenses in K.S.A. 2021 Supp. 60-455(g)'s definition of an "act or offense of sexual misconduct."

K.S.A. 2021 Supp. 21-6401(b) defines the crime of promoting obscenity to minors as "promoting obscenity, . . . where a recipient of the obscene material . . . is a child under the age of 18 years." "Promoting obscenity" is defined as "[m]anufacturing, mailing, transmitting, publishing, distributing, presenting, exhibiting or advertising any obscene material." K.S.A. 2021 Supp. 21-6401(a)(1). "'[M]aterial'" is defined as "any tangible thing which is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound or other manner." K.S.A. 2021 Supp. 21-6401(f)(2). And material qualifies as "'obscene'" if:

> "(A) The average person applying contemporary community standards would find that the material or performance, taken as a whole, appeals to the prurient interest;
>
> "(B) the average person applying contemporary community standards would find that the material or performance has patently offensive representations or descriptions of:
>
> (i) Ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse or sodomy; or
>
> (ii) masturbation, excretory functions, sadomasochistic abuse or lewd exhibition of the genitals; and
>
> "(C) taken as a whole, a reasonable person would find that the material or performance lacks serious literary, educational, artistic, political or scientific value." K.S.A. 2021 Supp. 21-6401(f)(1).

The State does not dispute that Scheetz' conduct meets the statutory definition of this offense. Even so, since promoting obscenity to minors is not in K.S.A. 2021 Supp. 60-455(g)'s definitional listing of acts and offenses, the State alternatively argues that list is not intended to be exclusive. Reading this list as exemplary, the State claims the offense of promoting obscenity to a minor should generally be considered an act or offense of sexual misconduct. It also alleges that evidence Scheetz offered to buy H.T. alcohol should likewise be considered since it claims this conduct constituted furnishing alcoholic beverages to a minor for illicit purposes under K.S.A. 2021 Supp. 21-5607(b). And it claims Scheetz' request that C.K. send him nude photos of her body and his offer to buy H.T. gas if she would "'come over and watch movies'" should also generally qualify.

Scheetz, on the other hand, contends K.S.A. 2021 Supp. 60-455(g) provides an exclusive definition which must be satisfied

before the evidence is admissible under K.S.A. 2021 Supp. 60-455(d).

Whether K.S.A. 2021 Supp. 60-455(g) should be read as an exemplary list, rather than an exclusive one

Once again, K.S.A. 2021 Supp. 60-455(g) states:

"(g) As used in this section, an 'act or offense of sexual misconduct' includes:

(1) Any conduct proscribed by article 35 of chapter 21 of the Kansas Statutes Annotated, prior to their repeal, or article 55 of chapter 21 of the Kansas Statutes Annotated, or K.S.A. 2021 Supp. 21-6419 through 21-6422, and amendments thereto;

(2) the sexual gratification component of aggravated human trafficking, as described in K.S.A. 21-3447(a)(1)(B) or (a)(2), prior to its repeal, or K.S.A. 2021 Supp. 21-5426(b)(1)(B) or (b)(2), and amendments thereto;

(3) exposing another to a life threatening communicable disease, as described in K.S.A. 21-3435(a)(1), prior to its repeal, or K.S.A. 2021 Supp. 21-5424(a)(1), and amendments thereto;

(4) incest, as described in K.S.A. 21-3602, prior to its repeal, or K.S.A. 2021 Supp. 21-5604(a), and amendments thereto;

(5) aggravated incest, as described in K.S.A. 21-3603, prior to its repeal, or K.S.A. 2021 Supp. 21-5604(b), and amendments thereto;

(6) contact, without consent, between any part of the defendant's body or an object and the genitals, mouth or anus of the victim;

(7) contact, without consent, between the genitals, mouth or anus of the defendant and any part of the victim's body;

(8) deriving sexual pleasure or gratification from the infliction of death, bodily injury or physical pain to the victim;

(9) an attempt, solicitation or conspiracy to engage in conduct described in paragraphs (1) through (8); or

(10) any federal or other state conviction of an offense, or any violation of a city ordinance or county resolution, that would constitute an offense under article 35 of chapter 21 of the Kansas Statutes Annotated, prior to their repeal, or article 55 of chapter 21 of the Kansas Statutes Annotated, or K.S.A. 2021 Supp. 21-6419 through 21-6422, and amendments thereto, the sexual gratification component of aggravated human trafficking, as described in K.S.A. 21-3447(a)(1)(B) or (a)(2), prior to its repeal, or K.S.A. 2021 Supp. 21-5426(b)(1)(B) or (b)(2), and amendments thereto; incest, as described in K.S.A. 21-3602, prior to its repeal, or K.S.A. 2021 Supp. 21-5604(a), and amendments thereto; or aggravated incest, as described in K.S.A. 21-3603, prior to its repeal, or K.S.A. 2021 Supp. 21-5604(b), and amendments thereto, or involved conduct described in paragraphs (6) through (9)."

The State argues the Legislature's use of the word "includes" in the introductory sentence of this subsection signifies that the list

of acts and offenses is meant to be read as exemplary, rather than exclusive. In support, the State relies on the fact that the Kansas Supreme Court has interpreted the use of the word "including" in K.S.A. 60-455(b), which lists material facts for which evidence of prior crimes or civil wrongs can be offered, as exemplary rather than exclusive. *State v. Gunby*, 282 Kan. 39, 56, 144 P.3d 647 (2006). It argues the words "includes" and "including" should be read the same way in the same statute. It also notes that since the Legislature enacted subsection (g) after *Gunby*, it used the word "includes" with full knowledge of and presumably acquiesced to *Gunby*'s interpretation. *State v. Kershaw*, 302 Kan. 772, 782, 359 P.3d 52 (2015); see also *State v. Quested*, 302 Kan. 262, 279, 352 P.3d 553 (2015) (acquiescence to appellate decisions may show legislative intent).

Scheetz argues the list in K.S.A. 2021 Supp. 60-455(g) should be read as exclusive, given the textual differences between the lists in subsections (b) and (g) and the scope of the exceptions to the rule against the use of evidence of prior crimes which subsections (b) and (d) each establish.

While we agree it is sensible to similarly construe the words "including" and "includes," particularly as used in the same statute, the language of K.S.A. 2021 Supp. 60-455 and the distinctions in the enacting backgrounds for the subsections at issue call for different interpretations.

The State's reliance on Gunby is misplaced.

K.S.A. 2021 Supp. 60-455(b) states that evidence that a person committed a crime or civil wrong on a specified occasion "is admissible when relevant to prove *some other material fact including* motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." (Emphasis added.) The State correctly notes our Supreme Court has held the list of material facts provided after the word "including" was meant to be exemplary, not exclusive. *Gunby*, 282 Kan. at 53. But this holding was driven not by a textual analysis of the word "including," as the State's position suggests, but by a reading of the entire phrase "some other material fact including" against the backdrop of the common-law doctrine this statutory language was meant to

codify. 282 Kan. at 53. In fact, the court did not comment on the use of the word "including" at all.

In its wholistic analysis of subsection (b) in *Gunby*, the court relied on the common-law background to the statute by outlining how prior crimes evidence was handled before the enactment of K.S.A. 60-455. The court noted that K.S.A. 60-455(b) did not change the common law substantially and simply codified the historical concept that evidence of other crimes or civil wrongs could be admitted for certain limited purposes. 282 Kan. at 51. At common law, evidence of other crimes or civil wrongs was inadmissible for propensity purposes but could be admitted to prove certain other material facts, so long as a limiting instruction was given. Historically, this included proving relevant material facts other than the eight listed in subsection (b). The court thus found the text of subsection (b)—a statement that prior crimes evidence could be used to prove *some other material fact*, followed by eight examples of material facts—when read against the common-law doctrine codified by the statute, suggested the listed types of material facts were exemplary rather than exclusive. 282 Kan. at 50-53.

While the State is correct that the Legislature adopted subsection (g) after *Gunby* was issued, it was not enacted *because* of *Gunby*. Rather, subsection (d) and its definitional counterpart—subsection (g)—were enacted in response to another Kansas Supreme Court decision: *State v. Prine*, 287 Kan. 713, 200 P.3d 1 (2009) (*Prine I*); see *State v. Spear*, 297 Kan. 780, 787, 304 P.3d 1246 (2013). In *Prine I*, our Supreme Court found the district court erred in allowing the State to introduce evidence of Prine's prior sexual abuse of two young girls other than the victim under K.S.A. 60-455(b). Because it found this evidence prejudicial, it reversed Prine's convictions and remanded the case for a new trial. Soon after this decision, and before Prine's case was retried, the Legislature amended K.S.A. 60-455, adding subsections (d) and (g). *Spear*, 297 Kan. at 787 (citing L. 2009, ch. 103, § 12). On retrial, the propensity evidence was again admitted under K.S.A. 60-455(b) and Prine again appealed its admission. While the Supreme Court once more found the district court erred in admitting the evidence under (b), this time it found the error was not a reversible

one since the evidence was now admissible under the new subsection (d). *State v. Prine*, 297 Kan. 460, 479-80, 303 P.3d 662 (2013) (*Prine II*).

Under these circumstances, it does not make sense to assume the Legislature intended K.S.A. 2021 Supp. 60-455(g) to be interpreted in line with *Gunby* based on the choice of the word "includes." Unlike K.S.A. 2021 Supp. 60-455(b), subsection (d) does not codify an exception to the rule against the use of prior crimes evidence that existed at common law in Kansas. Instead, it created a new class of evidence that was to be completely exempt from the prohibition on propensity evidence—a prohibition that has historically been strictly enforced due to its highly prejudicial nature. *Prine II*, 297 Kan. at 475-76. As a result, we find *Gunby* provides no basis to infer that the Legislature intended to adopt a broader definition of an "act or offense of sexual misconduct" than what is given in the statute.

> *The lengthy and detailed definition of the general phrase "act or offense of sexual misconduct" in K.S.A. 2021 Supp. 60-455(g) suggests the list of acts and offenses is exclusive.*

The most fundamental rule of statutory construction is that courts must follow the Legislature's intent when it can be established. Appellate courts begin that search by looking at the statutory language. If that language is clear and unambiguous, the analysis stops there. Otherwise, the court must determine the Legislature's intent by consulting legislative history and employing traditional canons of statutory construction. *State v. Myers*, 314 Kan. 360, 364, 499 P.3d 1111 (2021). In doing so, courts may look to the historical background of the enactment, the circumstances attending its passage, the purpose to be accomplished, and the effect the statute may have under the various constructions suggested. *Prine II*, 297 Kan. at 475.

The text of K.S.A. 2021 Supp. 60-455(g) painstakingly defines the general phrase "act or offense of sexual misconduct" to include 21 specific criminal offenses and statutory schemes, along with precise descriptions of certain acts. Both the length and spec-

ificity of this list signal it is meant to be all-encompassing. *Premier Health Care Investments, LLC v. UHS of Anchor, L.P.*, 310 Ga. 32, 42-43, 849 S.E.2d 441 (2020) (noting the federal court practice of construing "'include' and its variants as a narrowing term when a variant of 'include' is followed by a list of several items, or when the items that follow 'include' are specific examples as opposed to general categories") (citing, e.g., *Carcieri v. Salazar*, 555 U.S. 379, 391-92, 129 S. Ct. 1058, 172 L. Ed. 2d 791 [2009] ["where Congress 'explicitly and comprehensively defined the term ("Indian") by including only three discrete definitions,' it 'left no gap . . . for the agency to fill'"]); *Dong v. Smithsonian Inst.*, 125 F.3d 877, 879-80 (D.C. Cir. 1997) ("recognizing that "'includes" normally does not introduce an exhaustive list,' but concluding that 'includes' as used in the federal Privacy Act was a limiting term where the Act provided that the term 'agency' 'includes' multiple specified categories without any 'general principle in sight'"). To hold otherwise would render the Legislature's detailed listing superfluous.

While the State does not make this argument, we recognize that typically courts interpret the words "includes" and "including" when used along with a list to signify that the list is exemplary rather than exclusive. See *State v. Jefferson*, 287 Kan. 28, 37, 194 P.3d 557 (2008); see also K.S.A. 2021 Supp. 60-208(c) (list of affirmative defenses "including" not exclusive, although 17 items, each briefly stated). But we also recognize this practice is not universal and context is key. *Schmidt v. Mt. Angel Abbey*, 347 Or. 389, 410, 223 P.3d 399 (2009) (Walters, J., concurring) ("Examples serve no right or wrong purpose, and the legislature may use examples in one statute to establish limits on an ambiguous term, and in another to illustrate or expand."); *Premier Health Care Investments, LLC*, 310 Ga. at 40-41 (recognizing the meaning of the word "includes" can be either exhaustive or illustrative depending on "'the context, the subject matter, and legislative intent'"); *Mitchell v. University of Montana*, 240 Mont. 261, 265, 783 P.2d 1337 (1989) ("includes" construed as exclusive using the *expressio unius est exclusio alterius* maxim of statutory construction and as consistent with the practice of narrowly construing government immunity statutes generally). Therefore, in this context, we interpret the itemization the Legislature set forth in

K.S.A. 2021 Supp. 60-455(g) to be the universe of items which qualify as an "act or offense of sexual misconduct" as that term is used in K.S.A. 2021 Supp. 60-455(d).

We also note the difference in the terms modified by the words "including" and "includes" in the respective subsections. K.S.A. 2021 Supp. 60-455(b) allows admission of the evidence "when relevant to prove *some other material fact including* motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." (Emphasis added.) The term "material fact" has a recognized legal definition independent of the statute. See *Timi v. Prescott State Bank*, 220 Kan. 377, 389, 553 P.2d 315 (1976) (in the context of a fraudulent misrepresentation case, finding "[a] fact is material if it is one to which a reasonable person would attach importance in determining his choice of action in the transaction involved"); *Unified Gov't of Wyandotte County v. Trans World Transp. Svcs.*, 43 Kan. App. 2d 487, 490, 227 P.3d 992 (2010) (noting in the context of summary judgment, "[i]ssues of fact are not material unless they have legal controlling force as to the controlling issue"). Thus, the Legislature could have determined an explicit, exclusive, definition of what qualified as a "material fact" was unnecessary.

K.S.A. 2021 Supp. 60-455(g), on the other hand, does not rely on terms with an existing definition outside the statute. Rather than listing a general term with a widely accepted existing definition followed by eight other terms recognized at common law as examples of the former, subsection (g) provides a specific definition for a statutory term. Subsection (g) states that "[a]s used in this section, an 'act or offense of sexual misconduct' includes"—followed by a list of 21 specific acts and criminal offenses. The term "act or offense of sexual misconduct," unlike the term "material fact," does not have a common legal definition independent of the one given by K.S.A. 2021 Supp. 60-455(g).

Furthermore, as Scheetz notes, K.S.A. 2021 Supp. 60-455(b) and (d) differ in terms of the scope of the exception to the rule against the use of other crimes evidence they establish.

K.S.A. 2021 Supp. 60-455(a) establishes a general prohibition against the use of evidence of other crimes to establish a defendant's propensity to commit the alleged crime at hand. This rule is

based on the long-standing principle that such evidence is irrelevant and unduly prejudicial and has historically been strictly enforced. *Prine II*, 297 Kan. at 475-76.

K.S.A. 2021 Supp. 60-455(b) creates a narrow exception to the rule against the use of evidence of other crimes, allowing the use of such evidence to prove some material fact at issue other than propensity. Additionally, when evidence of other crimes is admitted under this exception, the district court must give a limiting instruction to ensure the jury does not consider the evidence for propensity purposes. *Prine II*, 297 Kan. at 478-79.

On the other hand, the Legislature created a total exception to the rule against the admission of other crimes evidence in K.S.A. 2021 Supp. 60-455(d). Under this exception, evidence of a defendant's other crimes may be admitted for any purpose, including propensity. Accordingly, no limiting instruction is necessary. *Prine II*, 297 Kan. at 478-79. The only limit the Legislature placed on the use of other crimes evidence under subsection (d) is that the criminal conduct must qualify as an "act or offense of sexual misconduct." Given the historical practice of strict enforcement of the rule against the admission of propensity evidence, Scheetz persuasively argues that the Legislature intended this exception to be narrowly construed. And reading the list of acts and offenses in subsection (g)'s definition of that term as nonexclusive would seemingly remove the only limit the Legislature has placed on this exception.

We find that interpreting the list as exclusive gives meaning to the exception carved out by the Legislature to the general prohibition on the use of propensity evidence. And it recognizes the Legislature's authority to craft such an exception. If the Legislature wished this list to be interpreted expansively, it could have so instructed. See, e.g., K.S.A. 2021 Supp. 21-6815(c)(1) (outlining the "nonexclusive list of mitigating factors [which] may be considered in determining whether substantial and compelling reasons for a departure exist"); K.S.A. 2021 Supp. 50-626(b) ("Deceptive acts and practices" under the Kansas Consumer Protection Act "include, but are not limited to," the listed items.). Or it could have specified that "comparable" acts or offenses also qualified. See, e.g., K.S.A. 2021 Supp. 22-4902(b)(9), (c)(17), (e)(3), (f)(2)

(convictions of a "comparable" offense to those listed in the definitions of "'[s]ex offender,'" "'[s]exually violent crime,'" "'[v]iolent offender,'" and "'[d]rug offender'" can require one to register under the Kansas Offender Registration Act). It did not. On the other hand, interpreting this specific list as merely illustrative would usurp the Legislature's exclusive authority by allowing courts, and not the Legislature, to determine what items satisfy the statutory definition of "an act or offense of sexual misconduct" as that term is used in K.S.A. 2021 Supp. 60-455. This term should be legislatively and not judicially defined.

This point is exemplified by the State's failure to provide a working definition if K.S.A. 2021 Supp. 60-455(g)'s list of acts and offenses is to be read as exemplary. Nor does the State provide any suggestion on how to apply its interpretation of the statute. Although the State identifies several offenses not in subsection (g)'s list that it claims qualify as acts or offenses of sexual misconduct if the list is read as nonexclusive, it does not identify what definition of the term it is applying to reach its conclusions. If we adopted the State's proposition, there would be no guidance in determining whether acts or offenses qualified as "sexual misconduct," and such qualification could then turn on subjective opinions and concerns. Such a ruling would undermine jurisprudential values of fairness and predictability within the law. *Franklin v. First Money, Inc.*, 427 F. Supp. 66, 70 (E.D. La. 1976) ("Predictability of judicial interpretation of the laws is desirable because citizens must abide by those laws and should not have to guess their meaning.").

The legislative history of K.S.A. 60-455(g) and a canon of statutory construction both support reading the list of acts and offenses as exclusive.

While we do not find the language to be ambiguous, a review of the legislative history and application of a well-accepted canon of statutory construction supports our interpretation.

First, we agree with Scheetz that the level of detail in subsection (g)'s definition justifies application of the *expressio unius est exclusio alterius* canon of construction. Under this maxim, which

roughly translates as "the inclusion of one thing implies the exclusion of another," when an item is not in a specific list, a court can presume that the Legislature intended to exclude it. *Cole v. Mayans*, 276 Kan. 866, 878, 80 P.3d 384 (2003). And, as Scheetz points out, reading the definition in K.S.A. 2021 Supp. 60-455(g) as exclusive makes sense given the differing level of detail between that subsection and K.S.A. 2021 Supp. 60-455(b). Subsection (g)'s list of 21 acts and offenses is much more comprehensive than subsection (b)'s list of 8 general terms, describing each qualifying act or citing specific sections of the criminal code.

The legislative history of K.S.A. 2021 Supp. 60-455(g) also supports reading its definition as exclusive rather than exemplary. As the enacting legislation made its way through the committee process, it was amended, modifying the list of offenses in the definition of an "act or offense of sexual misconduct."

For example, as part of its review of the bill, the House Judiciary Committee extended the list to include four other criminal offenses: (1) the sexual gratification component of aggravated human trafficking; (2) exposing another to a life threatening communicable disease; (3) incest; and (4) aggravated incest. It also changed the existing acts or offenses in the definition. H.B. 2250 (February 16, 2009), as amended by House Committee on Judiciary, p. 2.

The original version of the bill included "contact, without consent, between any part of the defendant's body or an object and the genitals and anus of another person" and "contact, without consent, between the genitals and anus of the defendant and any part of another person's body" under the definition of an "'act or offense of sexual misconduct.'" H.B. 2250 (February 4, 2009), as amended by House Committee on Judiciary, pp. 1-2. The language of both these categories of conduct was changed to "the genitals, mouth or anus of the victim" and "the genitals, mouth or anus of the defendant." H.B. 2250 (February 16, 2009), as amended by House Committee on Judiciary, p. 2. Furthermore, the final catch-all category in the list, "an attempt or conspiracy to engage in conduct described [above]," was changed to include "an attempt, solicitation or conspiracy to engage." H.B. 2250 (February 4, 2009), as amended by House Committee on Judiciary, p. 2;

H.B. 2250 (February 16, 2009), as amended by House Committee on Judiciary, p. 2.

These amendments show that the Legislature intended the list of acts and offenses in subsection (g) to be exclusive. If the list of offenses was merely exemplary, as the State suggests, the House Judiciary Committee would have had no need to carefully adjust the list of offenses in the definition. In particular, if the provision including unconsented contact between the defendant's body and the victim's genitals and anus was meant as exemplary, there would be no need to amend the language to include unconsented contact with the victim's mouth. That the defendant engaged in unconsented sexual contact with the victim's body would seemingly be enough to construe the contact as already in the definition.

For these reasons, we find the statutory definition provided in K.S.A. 2021 Supp. 60-455(g) is meant to be exclusive. And since we also find none of the propensity evidence admitted by the State falls under this definition, the district court erred in admitting it under K.S.A. 2021 Supp. 60-455(d). This evidence should have been excluded under K.S.A. 2021 Supp. 60-455(a)'s general prohibition on the admission of such evidence.

But we stop short of finding the district court's error in admitting the propensity evidence under K.S.A. 2021 Supp. 60-455(d), standing alone, constituted reversible error entitling Scheetz to a new trial. Instead, we reserve our final ruling on this subject until we address Scheetz' claim that he was denied a fair trial based on cumulative error.

Evidence of Scheetz' internet search history was irrelevant and inadmissible.

The State moved in limine to admit Scheetz' internet search history as propensity evidence under K.S.A. 2021 Supp. 60-455(d), and that is the avenue under which the district court admitted it.

Scheetz challenged this admission below by noting there was no evidence he had watched child pornography and nothing in the search history was illegal. Scheetz correctly notes that K.S.A.

2021 Supp. 60-455(g) does not designate the possession of pornography as an act of sexual misconduct unless the pornographic material is child pornography. And because his search history only shows that he accessed written content and pornographic videos of adult actors, Scheetz argues there was nothing in his search history that qualified as child pornography. See K.S.A. 2021 Supp. 21-5510(a)(2) (criminalizing possession of "visual depiction of a child under 18 years of age shown or heard engaging in sexually explicit conduct").

The State makes no argument that Scheetz' internet search history qualifies as an act or offense of sexual misconduct as defined in K.S.A. 2021 Supp. 60-455(g). Instead, the State claims that Scheetz did not preserve this argument for review with a timely objection. For the reasons laid out previously, the State's arguments about preservation lack merit.

The State argues on appeal that the district court did not err in admitting evidence of Scheetz' internet search history because it was relevant and not unduly prejudicial. Unless prohibited by statute, constitutional provision, or court decision, all relevant evidence is admissible. K.S.A. 60-407(f). Evidence is relevant if it has any tendency in reason to prove any material fact. K.S.A. 60-401(b). To establish relevance, there must be some material or logical connection between the asserted facts and the inference or result they are intended to establish. *Gunby*, 282 Kan. at 47.

The State seemingly urges this panel to adopt the district court's finding that this evidence was relevant to show Scheetz' "sexual attraction to young girls . . . and his sexual attraction for stepfather-stepdaughter or other type[s] of incestuous sexual contact."

As Scheetz notes, however, both the Kansas Supreme Court and our court have repeatedly held that the possession of pornography is irrelevant to show an individual's propensity to engage in the sort of behavior depicted in the pornography. See *State v. Smith*, 299 Kan. 962, 976, 327 P.3d 441 (2014); *State v. Boleyn*, 297 Kan. 610, 624-27, 303 P.3d 680 (2013); *State v. Ewing*, No. 118,343, 2019 WL 1413962, at *23 (Kan. App. 2019) (unpublished opinion).

In *Boleyn*, the court held that evidence that Boleyn possessed homosexual pornography was not probative to rebut or impeach

his claim of not being gay. 297 Kan. 626-27. The court cautioned against assuming a defendant has a propensity to engage in certain conduct based on their possession of certain pornography, noting:

"'[T]he central function of pornography is the creation or enhancement of sexual fantasy and/or arousal. That is, it presents bodies, behaviors, and situations in a way that is intended to sexually inspire or excite the viewer, *regardless of whether such bodies, behaviors, and situations would be available or even desirable for the viewer to experience in real life*.'" *Boleyn*, 297 Kan. at 627 (quoting Weinberg, Williams, Kleiner & Irizarry, *Pornography, Normalization, and Empowerment*, 39 Arch. of Sex. Behav. 1389, 1391 [2012]).

In *Smith*, the court reached the same conclusion in slightly different circumstances. There, the State sought to introduce evidence of the defendant's possession of heterosexual pornography to prove the defendant had lied in testifying he was gay. The court once again held the pornography was irrelevant to show the defendant's sexual practices. 299 Kan. at 976. The court compared the case to *Boleyn*, noting that it had already "cautioned against inferring too much about a person's actual sexual practices from the pornography he or she possesses." *Smith*, 299 Kan. at 976. Explaining its ruling, the court remarked "[i]f possession of homosexual pornography is not relevant to prove a person's sexual practices, then possession of heterosexual pornography is likewise not relevant for that purpose." 299 Kan. at 976.

In *Ewing*, evidence of a defendant's internet search history showing he had accessed violent pornography, along with selected clips of the videos themselves, were admitted as propensity evidence at trial. It was not admitted under K.S.A. 60-455 but as relevant evidence which the district court determined was not unduly prejudicial. Our court found the district court erred in admitting this evidence, noting several problems with its probative value. 2019 WL 1413962, at *24.

First, the internet search history was admitted with no evidence showing that Ewing viewed the video footage depicted, since his search history merely showed that he accessed the videos and provided no indication as to which portions of the videos he watched. "Thus, even if the State's rationale [was] sound—that the viewing of violent pornography is relevant to showing that an individual committed acts like those depicted therein—there simply [was] no evidence that Ewing viewed the portions of the videos

containing acts like those of which he was accused." *Ewing*, 2019 WL 1413962, at *23. This problem was made worse by the lack of expert testimony on the correlation between men who consume violent pornography and men who engage in violent sexual acts with women. "[W]ithout evidence showing that a person viewing violent pornography has an increased likelihood to commit violent sex crimes, [the evidence] had little, if any, probative value about whether Ewing committed the violent sex crimes charged." 2019 WL 1413962, at *23.

The panel in *Ewing* also cited two other bases in concluding the district court had erred in admitting the evidence: (1) one of the pornographic videos was entitled "'Autism Abuse,'" even though there was no evidence that any of the victims in the case were autistic and (2) the district court admitted it never viewed the evidence before allowing the jury to see it, so it could not possibly have weighed the probative value of the evidence against its potential for undue prejudice. *Ewing*, 2019 WL 1413962, at *24.

The State makes a brief attempt to distinguish these cases but avoids addressing their core holding that a defendant's possession or consumption of pornography is not relevant to show that the defendant was more likely to commit the acts portrayed in the pornography. We find the district court erred in determining Scheetz' internet search history was relevant to show his propensity to engage in sexual acts with underage girls.

Both *Smith* and *Boleyn* instructed that a person's pornographic preferences are irrelevant towards determining their real-life sexual preferences. And the problems with search history evidence highlighted in *Ewing* are just as applicable here. While the State presented evidence of Scheetz' search history, this evidence provides no indication as to how long Scheetz accessed these webpages or whether he even watched the videos they contain. Furthermore, as Scheetz points out, many of the searches have no apparent relation to the charges here, including, for example, searches for adult sex toys and searches related to sibling incest. As Scheetz points out, there was no information provided as to what these videos depicted apart from the titles, leaving the jury to speculate about their actual content. Finally, there was no expert testimony to support a correlation between this evidence and

Scheetz' alleged propensity to commit the crimes with which he was charged.

Accordingly, we find the evidence of Scheetz' internet search history was irrelevant to prove his propensity to commit the charged crimes. Because this evidence was irrelevant, there is no need to weigh its probative value against its potential for undue prejudice. But as with the admission of the other propensity evidence under K.S.A. 2021 Supp. 60-455(d), we do not decide whether the admission of Scheetz' internet search history, standing alone, constituted reversible error entitling Scheetz to a new trial. Instead, we also reserve our final ruling on this subject until we address Scheetz' claim that he was denied a fair trial based on cumulative error.

Did the prosecutor's comments during closing arguments constitute prosecutorial error?

Scheetz next argues the prosecutor erred by misstating the evidence and law and by presenting an argument designed to inflame the passions of the jury during closing argument. The State counters that the prosecutor's comments were proper and any error was harmless.

Scheetz concedes that he did not object to the prosecutor's comments at trial and makes these arguments for the first time on appeal. But he correctly argues we may still consider his claim because a contemporaneous objection is not generally required to preserve issues of prosecutorial misconduct during closing argument. *State v. Sean*, 306 Kan. 963, 974, 399 P.3d 168 (2017). A prosecutor's comments made during voir dire, opening statement, or closing argument are reviewable based on prosecutorial error even without a timely objection, although the presence or absence of an objection may figure into the court's analysis of the alleged misconduct. 306 Kan. at 974.

Appellate courts employ a two-step process to evaluate claims of prosecutorial error, examining the existence of error and prejudice. To determine whether prosecutorial error has occurred, the appellate court must decide whether the challenged conduct falls outside the wide latitude afforded prosecutors. If error is found,

the appellate court must next determine whether the error prejudiced the defendant's due process rights to a fair trial. In evaluating prejudice, we adopt the traditional constitutional harmlessness inquiry demanded by *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Under this standard, prosecutorial error is harmless if the State can show beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial considering the entire record—in other words, where there is no reasonable possibility that the error contributed to the verdict. *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016).

A criminal defendant can establish the first prong by showing the prosecutor misstated the law or argued a fact or factual inferences with no evidentiary foundation. *State v. Moore*, 311 Kan. 1019, 1040, 469 P.3d 648 (2020). And a prosecutor may err by misstating the law through implication. See *State v. Jones*, 298 Kan. 324, 336, 311 P.3d 1125 (2013). A defendant can also establish prosecutorial error by showing the prosecutor made an argument intended to inflame the jury's passions or prejudices or made an argument that diverted the jury's attention from its duty to decide the case on the evidence and controlling law. *State v. Adams*, 292 Kan. 60, 67, 253 P.3d 5 (2011).

On the other hand, while a prosecutor may not misstate the facts in evidence, a prosecutor may draw reasonable inferences from the evidence and is given latitude in drawing those inferences. *State v. Stano*, 284 Kan. 126, 151, 159 P.3d 931 (2007).

Scheetz claims the prosecutor: (1) misstated the evidence; (2) misstated the law; and (3) made an argument designed to inflame the jury's passions. Each of these claims is analyzed in turn.

Whether the prosecutor misstated the evidence

Scheetz first argues the prosecutor misstated the evidence, exacerbating the prejudicial impact of the inadmissible propensity evidence. Scheetz claims the prosecutor argued facts with no evidentiary foundation by: (1) stating the photo G.H. received was of Scheetz' *erect* penis and (2) stating that after B.C. spoke with Assistant Chief Enfield about H.T.'s statement, he began to think Scheetz sent the photo to G.H. intentionally.

As to his first claim, Scheetz points out that G.H. did not describe the penis in the picture she received as erect in either her trial testimony or the statement she gave to police. The State counters that while there was no direct evidence that the picture was of an erect penis, this was a reasonable inference based on the accompanying text.

G.H. described the picture as including text that said: "Not much just waiting for you to come over." And Undersheriff Diercks testified that he and B.C. first concluded that Scheetz' transmission of the picture to G.H. was an accident and that Scheetz was possibly trying to send the picture to his girlfriend instead, based on the way Snapchat functions.

While prosecutors enjoy latitude in making closing arguments, their arguments must fit the evidence presented at trial. There was no evidence the penis in the photo sent to G.H. was erect, so the State's characterization of it as such was in error and arguably made to inflame the passions of the jury, which is also error. See *Ewing*, 2019 WL 1413962, at *35-36 (finding closing arguments lacked evidentiary basis and were speculation made to inflame the passions of the jury); see also *State v. Logan*, No. 123,151, 2022 WL 1592702, at *3-4 (Kan. App. 2022) (unpublished opinion) (prosecutor characterization of revolver as single action [requiring cocking separately from pulling trigger] rather than double action [pulling trigger cocks and fires gun] with no evidence on the point was error, albeit harmless).

We also agree with Scheetz that the prosecutor further misstated the evidence during closing argument by stating that after B.C. spoke with Assistant Chief Enfield about H.T.'s statement, he began to think Scheetz sent the photo to G.H. intentionally. None of the witnesses testified that they believed Scheetz intentionally sent the photo to G.H., including her father, B.C.

Undersheriff Diercks testified that he and B.C. both believed Scheetz' transmission of a nude picture to G.H. was an accident. But Diercks stated that after learning from Officer Enfield that Scheetz was possibly exchanging inappropriate Snapchat messages with a 16-year-old girl, they decided to contact the KBI. He testified the reason they decided to do this was that they became

suspicious the picture Scheetz sent to G.H. may have been intended for this 16-year-old girl and they knew he was working as a school resource officer in a high school. On cross-examination, Diercks confirmed that neither he, B.C., nor G.H. believed that Scheetz intended to send the picture to G.H.

The State offers a vague description of the above testimony, notably omitting any reference to Diercks' statement that he and B.C. decided to contact the KBI because they became suspicious the picture Scheetz sent to G.H. may have been intended for the 16-year-old girl who was the focus of Officer Enfield's investigation. Rather than confront this evidence, the State claims that it "could argue" the prosecutor's statement that Scheetz sent the photo to G.H. on purpose was a reasonable inference. We disagree and find Scheetz has established error on this claim as well.

Whether the prosecutor misstated the law

Scheetz next claims the prosecutor misstated the law by describing H.T. and C.K. as "underage," as this implied they were under the age of consent set by Kansas' statutory rape law. Scheetz points out the age of consent in Kansas is 16 and both H.T. and C.K. were 16 when he allegedly sent the nude pictures.

The State counters that the prosecutor never mentioned the term "statutory rape" in closing argument. And, the State claims, commenting on C.K.'s age was proper as Scheetz was charged with sexual exploitation of a child (M.C.) and one of the required elements of that offense is that the victim be less than 18 years old.

The State's argument that commenting on C.K.'s age was proper because Scheetz was charged with sexual exploitation of a child is not persuasive. While the State is correct that sexual exploitation of a child requires the victim to be under 18 years old, Scheetz was not charged with sexual exploitation of C.K., but of M.C. There was thus no need for the prosecutor to mention C.K.'s age to prove that Scheetz had committed this offense. Additionally, this argument, even if we accepted it, does not explain why the prosecutor needed to comment on H.T.'s age.

The State also does not explain how the fact that the prosecutor did not use the words "statutory rape" impacts whether the description of C.K. and H.T. as underage was a misstatement of law.

But we find its argument that the prosecutor was not referring to the age of consent and was instead referring to some other age requirement under Kansas law persuasive. While C.K. and H.T. were not underage as it pertains to the age of consent in Kansas, they were underage as it pertains to Scheetz' alleged transmission of nude pictures. Although the age of consent is 16, K.S.A. 2021 Supp. 21-6401(b) criminalizes promoting obscenity to anyone under the age of 18 years. Given that the prosecutor was discussing Scheetz' alleged transmission of nude photos to C.K. and H.T. when she mentioned the girls were underage, it seems more likely that this is what the prosecutor was referring to.

Since C.K. and H.T. were "underage" as it pertains to the legality of Scheetz' alleged transmission of nude pictures to them, we find the prosecutor did not misstate the law by describing them as such.

Whether the prosecutor made an argument designed to inflame the passions of the jury

Last, Scheetz claims the prosecutor made an argument designed to inflame the passions of the jury by arguing to the jury that nobody in M.C.'s life cared about her. Scheetz argues that M.C.'s difficult upbringing bears no relevance to the crimes he was charged with, and the prosecutor's statement sought to have sympathy play an undue role in the verdict. The State argues that the prosecutor's comments accurately reflected the evidence and were within the wide latitude afforded to prosecutors in describing the evidence.

Scheetz has failed to show error on this point. In making this statement, the prosecutor was describing why M.C. waited so long to divulge Scheetz' actions. According to the prosecutor, M.C. had not reported the abuse earlier because, until then, no one in her environment had tried to help her, despite the plain evidence of her mother's abuse. Given the context of the statement, we find it was within the wide latitude granted to prosecutors in describing the facts.

Reversibility

We find the prosecutor erred in describing Scheetz' penis as erect in the picture sent to G.H. and in stating that the witnesses concluded Scheetz sent the picture to G.H. intentionally. But the errors amounted to isolated and comparatively minor misstatements that were insufficiently prejudicial to compromise Scheetz'

fundamental right to a fair trial given the admissible evidence pointing to his guilt. Defense counsel's failure to object to these statements also supports this conclusion. See, e.g., *State v. Lowery*, 308 Kan. 1183, 1211-12, 427 P.3d 865 (2018) (strength of the evidence and the lack of objection justified finding that isolated errors in closing statements did not deprive defendant of fair trial). Nonetheless, they factor into Scheetz' claim of cumulative error, and we consider them for that purpose.

Do the trial errors cumulatively support reversal?

Finally, Scheetz claims that the totality of errors here cumulatively prejudiced him and denied him his right to a fair trial. We agree.

This court uses a de novo standard when determining whether the totality of circumstances substantially prejudiced a defendant and denied the defendant a fair trial based on cumulative error. *State v. Brown*, 298 Kan. 1040, 1056, 318 P.3d 1005 (2014). Yet "'if any of the errors being aggregated are constitutional in nature, the cumulative error must be harmless beyond a reasonable doubt.'" *Ewing*, 2019 WL 1413962, at *39 (quoting *State v. Robinson*, 306 Kan. 1012, 1034, 399 P.3d 194 [2017]). Here, some errors Scheetz asks us to accumulate are constitutional, so we must apply the constitutional harmless error standard. This means the State must prove there is "no 'reasonable possibility'" the errors contributed to the verdict. *State v. Berkstresser*, 316 Kan. 597, 606, 520 P.3d 718 (2022) (distinguishing constitutional and nonconstitutional harmless error tests).

Several relevant factors help show "'whether errors were cumulatively harmful, including the effectiveness of any remedial efforts by the district court at the time the error arose; the nature and number of errors committed and their interrelationship, if any; and the strength of the evidence.'" *Ewing*, 2019 WL 1413962, at *39 (quoting *Lowery*, 308 Kan. at 1243).

Here, as in *Ewing*, we identified several serious errors committed by the district court in admitting the propensity evidence at trial. We also identified two less significant errors by the prosecutor in closing arguments. And, as Scheetz notes, these errors compounded upon themselves. The State relied heavily on inadmissible propensity evidence (which was highly prejudicial) in building

its case. It then misstated portions of this evidence in its closing arguments, exaggerating its prejudicial effect. Given the quantity of the propensity evidence admitted and the emphasis placed upon it by the State, both throughout the trial and during opening statements and closing arguments, we cannot say there is no reasonable possibility the errors contributed to the outcome.

The sheer volume of the propensity evidence admitted by the district court reveals the significant role this evidence played in the State's case. This evidence included the testimony of nine witnesses (including the alleged victims and some of their parents), records of G.H.'s text messages with her father, G.H.'s written statement to investigators, Facebook messages between Scheetz and C.K., and over 30 pages, printed in small font, of Snapchat messages between Scheetz, G.H., C.K., and H.T. And rather than including one or two representative examples of the pornography, the State introduced close to 60 pages of mostly graphic and inflammatory search terms. In fact, the amount of propensity evidence was vastly disproportionate to the amount of evidence directly related to the crimes Scheetz was charged with.

The importance of the propensity evidence to the State's theory at trial is plain by the way it was used in the State's opening and closing arguments. The State bookended its case by referencing the propensity evidence, starting its case with a description of Scheetz' alleged conduct with G.H., H.T., and C.K. and ended its case by telling the jury they could tell what type of person he was and infer his guilt based on this evidence. The State sought to support M.C.'s credibility by casting her revelation of Scheetz' abuse as the endpoint of a widespread investigation into Scheetz' improper conduct with other young women. And the State directly tied its theory for the case to the propensity evidence admitted at trial, instructing the jury at the end of the trial that it could tell what type of person Scheetz was and could dismiss any question about his guilt based on his internet search history and his past conduct with G.H., H.T., and C.K.

Finally, the State amplified the prejudicial effect of the search history evidence, highlighting a list of the entries most likely to offend the jury as part of its closing arguments. And it reinforced

this prejudice by misdescribing other propensity evidence in those arguments.

While the evidence against Scheetz was substantial, the district court took no efforts to mitigate the prejudicial effect of these errors. Although there was physical evidence supporting the convictions on counts 5 and 6, there was no direct physical evidence on counts 1 through 4. The jury was largely asked to weigh the competing testimony of M.C. and Scheetz, and the State relied heavily on the propensity evidence to attack Scheetz' credibility.

The inherent dangers of admitting propensity evidence include a jury's desire to punish the defendant for that wrongdoing regardless of the evidence bearing on the charged crimes and a diminution of the defendant's credibility as a chronic wrongdoer. Another danger is convicting a defendant to punish him or her for a propensity to violate the law or giving the propensity evidence too much weight. See *State v. Boggs*, 287 Kan. 298, 305, 197 P.3d 441 (2008). All these dangers would be in play here, which supports recognizing the impact this evidence likely had on the verdict.

Accordingly, we cannot say beyond a reasonable doubt that the impermissible evidence and improper comments did not cumulatively impact the verdict. As we explained in *Ewing*, this is not a decision we make lightly, especially given the seriousness of the charges. And this finding is in no way a comment on the credibility of the alleged victims, either M.C. or any of the other girls. But the Constitution guarantees Scheetz the right to a fair trial, and we find the cumulative effect of the errors committed by the district court and prosecutor denied Scheetz this constitutional right. Thus, we are compelled to reverse Scheetz' convictions and remand this case to the district court to conduct a new trial.

Reversed and remanded with directions.

(524 P.3d 68)

No. 124,920

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

Petition for review filed February 10, 2023

SYLLABUS BY THE COURT

MOTOR VEHICLES—*Statutory Definition of Operating Vehicle.* A driver who is in actual physical control of the machinery of a vehicle, causing such machinery to move by engaging the transmission and pressing the gas pedal, is operating the vehicle within the meaning of K.S.A. 2020 Supp. 8-1002(a)(2)(A).

Appeal from Sumner District Court; GATEN WOOD, judge. Opinion filed January 13, 2023. Affirmed.

C. Ryan Gering, of Hulnick, Stang, Gering & Leavitt, P.A., of Wichita, for appellant.

Charles P. Bradley, of Legal Services Bureau, Kansas Department of Revenue, for appellee.

Before ARNOLD-BURGER, C.J., GARDNER and CLINE, JJ.

CLINE, J.: Shana L. Jarmer was notified her driving privileges would be suspended after she failed a breath alcohol test. She challenges the district court's decision to uphold the suspension by claiming she did not "operate" the vehicle because it was stuck in the mud and did not move. We disagree. Jarmer was actively controlling the movement of the vehicle by pressing the gas pedal, spinning the tires with the transmission engaged, and holding the steering wheel. We find such actions sufficient to constitute "operation" of the vehicle under K.S.A. 2020 Supp. 8-1002(a)(2)(A) and affirm the district court.

The underlying proceedings

On January 24, 2021, law enforcement was called to the scene of a vehicle accident. Jarmer's husband had apparently driven their vehicle into a house before landing in a muddy ditch. Law enforcement arrived to find the couple trying to maneuver the vehicle out of the ditch. Jarmer was in the driver's seat, pressing the

gas pedal with her hands on the steering wheel. The vehicle's tires were spinning, and her husband was pushing it from the rear. The vehicle itself was not moving, however, because of the muddy conditions.

Jarmer submitted to a breath alcohol test and the result was 0.156. The legal limit in Kansas is 0.08. See K.S.A. 2021 Supp. 8-1567(a). She was arrested for driving under the influence (DUI), and she was notified her driving privileges would be suspended by the Kansas Department of Revenue (KDR) under K.S.A. 2020 Supp. 8-1014.

Jarmer requested an administrative hearing to challenge the suspension of her driving privileges. The KDR upheld the suspension, finding Jarmer "operated [the] vehicle while [her] husband pushed [the] car." Jarmer then sought judicial review of this decision in Sumner County District Court. She argued that because the vehicle was not moving from one point to another, she was not "operating" or "driving" the vehicle. Instead, she claimed she was merely attempting to operate the vehicle, so the administrative suspension of her driver's license was improper. The relevant statute, K.S.A. 2020 Supp. 8-1002(a)(2)(A), requires the operation of a vehicle, rather than attempted operation, if the driver fails a breath alcohol test. In contrast, K.S.A. 2020 Supp. 8-1002(a)(1)(A) requires *either* operation or attempted operation if the driver refuses a breath alcohol test.

The district court denied Jarmer's petition after finding Jarmer was operating the vehicle since the engine was running, she was behind the wheel, and the tires were spinning. It emphasized that, but for the muddy conditions, the vehicle would have been in motion.

Jarmer timely appeals.

Did the district court err in finding that Jarmer operated the vehicle?

Jarmer challenges the district court's decision for the same reason she disputed the suspension below—she claims she was merely attempting to operate the vehicle, but not actually operating it.

Appeals of the administrative suspension of driver's licenses are subject to review under the Kansas Judicial Review Act.

Rosendahl v. Kansas Dept. of Revenue, 310 Kan. 474, 480, 447 P.3d 347 (2019); see K.S.A. 2021 Supp. 8-259(a). Our review is unlimited here since there is no factual dispute and we are interpreting statutory language. This means we owe no deference to either KDR or the district court's interpretation of K.S.A. 2020 Supp. 8-1002(a)(2)(A). See *Hanson v. Kansas Corp. Comm'n*, 313 Kan. 752, 762-63, 490 P.3d 1216 (2021).

Jarmer argues the term "operate" in K.S.A. 2020 Supp. 8-1002(a)(2) should be interpreted the same way our Supreme Court has interpreted that term in the DUI statute—K.S.A. 8-1567. While this proposition makes sense, it does not further Jarmer's position because she overstates the holdings in the cases on which she relies.

Our Supreme Court has interpreted the term "operate" in the DUI statute to mean "drive." See, e.g., *State v. Zeiner*, 316 Kan. 346, Syl. ¶ 2, 515 P.3d 736 (2022); *State v. Darrow*, 304 Kan. 710, Syl. ¶ 1, 374 P.3d 673 (2016); *State v. Kendall*, 274 Kan. 1003, 1009, 58 P.3d 660 (2002); *State v. Fish*, 228 Kan. 204, 207, 612 P.2d 180 (1980).

And, in *Darrow*, it held this means some movement of the vehicle is required. 304 Kan. 710, Syl. ¶ 1. But none of these cases hold, as Jarmer claims, that "the vehicle itself must be moving from one place to another" to find Jarmer was "driving" or "operating" it.

The district court found Jarmer was driving and causing movement of the vehicle by engaging the transmission and spinning the tires. And it properly distinguished the cases cited by Jarmer since none involved drivers as actively engaged as Jarmer. In fact, none of the vehicles involved in those cases were even in gear, and none of the drivers were awake when discovered by law enforcement:

- The defendant in *Fish* was found in his vehicle, parked off the highway at a community trash receptacle. The motor was running, the vehicle was in park, and Fish appeared to be asleep in the front seat. 228 Kan. at 205. Jarmer's vehicle was not in park, nor was she asleep.
- The defendant in *Kendall* was found slumped over the steering wheel of his truck, which was resting in the middle of a public street in a residential neighborhood. The truck's motor was running, Kendall was wearing his seat belt, the truck's headlights and brake lights were on, and Kendall had one foot on the

brake. The truck was in neutral, and Kendall appeared to be asleep. 274 Kan. at 1004-05. Again, Jarmer was not passively sitting in the driver's seat of a running vehicle. Her transmission was not in neutral but was actively engaged as she pressed the gas pedal and spun the wheels.

- The defendant in *Darrow* was also found asleep in the driver's seat of a parked but running vehicle. After law enforcement approached and asked Darrow to turn off the vehicle, she "'started to reach down and fumble[] with the gear shift, but the car stayed in park.'" 304 Kan. at 712. On appeal, both this court and the Kansas Supreme Court agreed that Darrow's actions in fumbling with the gear shift while in the driver's seat with the engine running could support the district court's finding that Darrow had "attempted to operate," i.e., attempted to move the vehicle, and thus was guilty of violating the DUI statute. 304 Kan. at 718. Jarmer's vehicle was not in neutral, and she did more than simply "fumble with the gear shift." She was engaging the transmission, which the court described in *Darrow* as "the last act needed to legally 'drive' the vehicle." 304 Kan. at 719.
- The defendant in *Zeiner* was also found asleep in the driver's seat of his SUV, parked alongside a gravel road. The motor had been turned off, but the radio and headlights were still on. At trial, the State argued Zeiner "was 'operating' his vehicle by running the heater, radio, and lights of his SUV while parked." 316 Kan. at 352. Relying on *Darrow*, 304 Kan. 710, Syl. ¶ 1, our Supreme Court found this was not a correct statement of the law, since when interpreting the DUI statute in *Darrow* it found the "'term "operate" is synonymous with "drive," which requires some movement of the vehicle.'" *Zeiner*, 316 Kan. at 353. The court noted that although Zeiner was in the driver's seat when law enforcement arrived, he "was wearing no seatbelt, made no attempt to move, stop, or shift the vehicle, or take any other action that indicated he was attempting to control the movement or future movement of the SUV." *Zeiner*, 316 Kan. at 347. Unlike *Zeiner*, Jarmer was actively controlling the movement of the vehicle by pressing the gas pedal with her hands on the wheel, spinning the tires, and trying to move the vehicle out of the ditch it was stuck in.

The facts here are almost identical to those in *Hines v. Director of Revenue*, 916 S.W.2d 884 (Mo. Ct. App. 1996). In that case, the defendant's husband had driven the couple's vehicle into a muddy ditch where it became stuck. Defendant Deana Hines then unsuccessfully tried to get it unstuck. Like Jarmer, Hines was in the driver's seat, the motor was running, the transmission was in gear, and the rear wheels were spinning. And, like Jarmer, Hines failed a breath test, and her driving privileges were suspended. Hines made the same claim Jarmer does—that is, she argued she was not driving or operating the vehicle. However, the Missouri Court of Appeals found "in attempting to move the vehicle from the ditch, Mrs. Hines was the person in a position to regulate its

movement," and thus was operating the vehicle. 916 S.W.2d at 886.

We agree with the court's statement in *Hines* that "[t]he fact that the vehicle could not be driven from the ditch did not preclude its being operated." 916 S.W.2d at 886 (quoting *Chinnery v. Director of Revenue,* 885 S.W.2d 50, 52 [Mo. Ct. App. 1994]) ("[D]riving or operating a vehicle occurs 'even when the vehicle is motionless as long as the person is keeping the vehicle in restraint or is in a position to regulate its movements.'").

Jarmer's case is also like *Commonwealth of Pennsylvania v. Kallus*, 243 A.2d 483, 485 (Pa. Super. 1968). Like Jarmer, the defendant in *Kallus* was seated in the driver's seat behind the steering wheel, with the engine running, tires spinning, and vehicle in gear. While Jarmer was trying to dislodge her vehicle from mud, Kallus was trying the dislodge his from a snowbank. The Pennsylvania Superior Court found Kallus' actions met the meaning of the term "operate" under 75 Pa. Stat. § 1037. In upholding Kallus' conviction, it noted:

> "We agree with the reasoning of the court below that it is not necessary that the vehicle itself must be in motion but that it is sufficient if the operator is in actual physical control of the movements of either the machinery of the motor vehicle or of the management of the movement of the vehicle itself.
>
> "There is no doubt, in the present case, that the engine was running and that the car was in gear and thus the defendant was in actual physical control of the machinery of the vehicle. It was through no fault of his that the vehicle itself was not also in motion and had he succeeded in his efforts, the public safety, which the [statute] was intended to protect, could have been seriously jeopardized." 242 A.2d at 507-08.

Jarmer was in actual physical control of the movements of the machinery of the vehicle and, like the court pointed out in *Kallus*, had she succeeded in her efforts, she could have seriously jeopardized the public safety that K.S.A. 2020 Supp. 8-1002(a)(2) was intended to protect. See K.S.A. 2021 Supp. 8-1001(u) (implied consent law "is remedial law and shall be liberally construed to promote public health, safety and welfare"); see also *Huelsman v. Kansas Dept. of Revenue*, 267 Kan. 456, 462, 980 P.2d 1022 (1999) (distinguishing driver's license suspensions from DUI actions).

Recently, in *State v. Moler*, 316 Kan. 565, 519 P.3d 794 (2022), our Supreme Court interpreted the word "operate" in the context of the Kansas Offender Registration Act. It looked to the "common meaning" of the word as defined by Merriam-Webster's Collegiate Dictionary 869 (11th ed. 2019) ("defining the transitive verb form of 'operate' to mean to 'bring about, effect'; 'to cause to function, work'; 'to put or keep in operation'; or 'to perform an operation on'"). *Moler*, 316 Kan. at 572. Using this definition, we agree with the district court's finding that Jarmer operated the vehicle because she caused it to function or work when she engaged the transmission and pressed the gas pedal.

Affirmed.

(525 P.3d 1)

No. 124,168

In the Matter of the Estate of ROSA LEE RANEY.

SYLLABUS BY THE COURT

1. JURISDICTION—*Kansas District Courts have General Original Jurisdiction over All Civil and Criminal Matters*. Kansas district courts have general original jurisdiction over all matters, both civil and criminal, unless otherwise provided by law. This means that a district court has jurisdiction to hear all subject matters unless the legislature provides that it does not or that jurisdiction lies elsewhere.

2. SAME—*Subject Matter Jurisdiction—Court's Power to Hear and Decide Particular Type of Action*. Subject-matter jurisdiction is the power of a court to hear and decide a particular type of action. Kansas district courts' general original jurisdiction includes the authority to hear probate proceedings.

3. CIVIL PROCEDURE—*Venue Is Procedural Matter— Considerations of Venue*. Venue describes the proper or possible place for a lawsuit to proceed. Venue is not a jurisdictional matter, but a procedural one. Considerations of venue involve practical and logistical aspects of litigation—the convenience of the parties and witnesses and the interests of justice.

4. PROBATE CODE—*Venue under K.S.A. 59-2203 in Probate Cases*. K.S.A. 59-2203 governs venue in probate cases; it does not confer or otherwise affect district courts' subject-matter jurisdiction over probate cases.

Appeal from Trego District Court; GLENN R. BRAUN, judge. Opinion filed January 20, 2023. Affirmed.

Jonathan M. Snyder, of Snyder Law, LLC, of Topeka, for appellant Carl Raney.

Donald F. Hoffman, of Dreiling, Bieker & Hoffman LLP, of Hays, for appellee Wayne Raney.

Before WARNER, P.J., HURST, J., and TIMOTHY G. LAHEY, S.J.

WARNER, J.: This case is the latest in a series of legal disputes between Carl Raney and his siblings as to how their mother's estate should be administered. The most recent dispute involves a motion Carl filed in 2020—about four years after the estate had been opened and over a year after the district court entered judgment against him. In his motion, Carl claimed that the venue for

the four-year-old probate case was improper, as it should have been filed in a different Kansas county. Carl asserted that because Trego County was not the correct venue for the lawsuit, the district court never had subject-matter jurisdiction to open and administer the estate, and the judgment against Carl was void. The district court disagreed and denied Carl's motion, leading to this appeal.

The parties have now submitted briefs discussing various complicated procedural mechanisms, as well as obscure and largely ambiguous references from Kansas Supreme Court decisions that predate court unification. But these discussions miss the larger point: Venue and subject-matter jurisdiction are different concepts. As a court of general jurisdiction, the district court had subject-matter jurisdiction to administer Rosa Lee Raney's estate. And Carl waived his venue concerns early in the probate litigation, years before he filed his current challenge. Given these realities, the district court did not err when it denied Carl's motion. We affirm the court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Rosa died in 2016 and was survived by her three adult children: Carl, Virginia Cauthorn, and Wayne Raney. Carl, Virginia, and Wayne have been parties to several Kansas appellate cases over the last four decades. See *In re Estate of Raney*, 247 Kan. 359, 799 P.2d 986 (1990) (Carl, Virginia, and Wayne challenging their father's testamentary capacity in executing a will that effectively disinherited them); *In re Guardianship and Conservatorship of Raney*, No. 110,841, 2015 WL 5927053 (Kan. App. 2015) (unpublished opinion) (Carl challenging Wayne's actions managing their mother's conservatorship before her death), *rev. denied* 304 Kan. 1017 (2016); *In re Estate of Raney*, No. 122,421, 2021 WL 3439210 (Kan. App. 2021) (unpublished opinion) (Carl appealing the district court's decision that he had challenged the distribution in Rosa's will and thus was disinherited under the will's *in terrorem* provision). This court described the events leading up to the current legal dispute in our two previous decisions involving Rosa, but we provide an abbreviated description here for context.

The Conservatorship Case

Rosa suffered a stroke in March 2010. A year later, she filed a voluntary petition with the district court in Trego County, asking that Wayne be appointed as her conservator. At the time, Rosa was living at an assisted-living center in Trego County. Though Carl objected to Wayne's appointment, the district court granted Rosa's petition and appointed Wayne as conservator.

Rosa suffered a second stroke in September 2011. Sometime around March 2012, she was moved from the Trego County assisted-living center to a retirement home in Meade County. Carl continued to challenge Wayne's conduct as conservator, but the district court ultimately ruled in 2013 that Carl's claims were without merit. This court affirmed the district court's decision. *In re Guardianship and Conservatorship of Raney*, 2015 WL 5927053, at *4-5.

Rosa executed her will in October 2011. The will divided Rosa's estate—which included real property in Stanton and Ford Counties and over 4,000 acres of land and underlying mineral rights in Belize—between Carl, Virginia, and Wayne. The record also shows that at some point, Rosa owned real property in Trego County in a joint tenancy with Wayne, but this property was not discussed in her will.

In July 2013—as the parties litigated Carl's claims in the conservatorship case—Rosa executed a codicil to her will. The new provision added an *in terrorem* provision, stating that any heir who contested her will would be disinherited.

In the codicil, she stated she was a resident of Meade County. Rosa passed away in Meade County in April 2016.

The Probate Case

A month later, Wayne filed a verified petition for probate of the will and codicil with the district court in Trego County. The petition did not state Rosa's county of residence—only that "at the time of death said decedent was a resident of Kansas." Though Virginia had been named as a co-executor in the will, she lived out of state and resigned her position, indicating that Wayne lived nearby and would be better able to handle the task. Wayne mailed copies of the petition to Virginia and to Carl.

The probate petition Wayne filed was set for hearing in June 2016. Before the hearing, Carl filed a pro se request for a continuance, stating he contested the will and believed that Trego County was "not the proper county to decide the provisions of the estate." He also requested an order to show cause, questioning the court's jurisdiction given what he believed to be irregularities in the petition and stating that Rosa's properties were in Ford County and Stanton County, not Trego County. Carl alleged that Wayne had filed the petition in Trego County to influence how the assets would be distributed. The court continued the June hearing to allow the parties time to address these concerns.

Wayne later petitioned for appointment of a special administrator, and this request was set for a hearing in July 2016. He mailed notice to Carl, but Carl did not appear at the hearing. The district court commented that Carl had filed a challenge to venue being in Trego County and that an inventory of Rosa's property had yet to be filed. The court asked Wayne's counsel if Rosa owned any real estate in Trego County when she died. Wayne's counsel responded that she did. The court commented, "I am more comfortable then moving forward here knowing that." The court appointed Wayne as special administrator. Later that month, Wayne filed a notice of trial. The notice stated that "the challenge to the will of Rosa Lee Raney filed by Carl Raney will be heard, Wednesday, October 5, 2016." Wayne mailed the notice to Carl via email and sent it to his last known address.

In September 2016, Carl filed a motion for change of venue, as well as a demand for payment against the estate for $2,200,000, which he claimed was due to him for managing the Belize property. Carl also filed a wrongful-death action against Wayne and Virginia in Stanton County and sought to postpone the October 5 hearing until after it was resolved.

The day before the October hearing, Carl emailed the district court and counsel "withdrawing any challenge to the admissibility" of the will and advising that attorney Mark Ayesh would be representing him. Ayesh emailed the district court and counsel, stating: "Any challenge to the admissibility of the Will or Codicil should be withdrawn. All issues pertaining to the impact and/or

interpretation of any provisions of the Will or Codicil are reserved." Thus, all of Carl's previous procedural challenges—including his venue challenges—were withdrawn, and the case went forward.

The district court admitted the will and codicil to probate later that month. The court found that Rosa was a resident of Trego County when she died and issued letters testamentary to Wayne as executor of Rosa's estate. On the same day, Wayne petitioned in Rosa's guardianship case for approval of his final accounting, which only listed her properties in Stanton County, Ford County, and Belize. Wayne's final inventory of Rosa's real property did not mention any property in Trego County.

Ayesh represented Carl in the probate case until July 2017 but then withdrew. Carl continued to assert that he was owed $2,200,000 for his work as the farm manager for the Belize property (though a Belize court found this contention to be unfounded). He also asserted that Wayne was mishandling the estate and that, despite Rosa's declarations in her will, the property should be divided equally among the three children. The district court later denied Carl's claim for $2,200,000 based on the ruling of the Belize court. Carl retained new counsel, but that attorney also withdrew as the case progressed.

In 2019, when the probate matter had been pending for over three years, Wayne filed a motion to enforce the *in terrorem* clause in the codicil to Rosa's will. Wayne asserted that Carl had repeatedly violated that provision during the probate case. The district court ultimately granted Wayne's request, effectively disinheriting Carl from Rosa's will. This court affirmed the district court's decision in 2021. *In re Estate of Raney*, 2021 WL 3439210, at *9, 11.

Carl represented himself in his appeal of the decision regarding the *in terrorem* clause. But while his appeal was pending, he retained new counsel and in 2020 filed a new motion in the district court—the motion giving rise to this appeal.

The Subject of this Appeal: Carl's 2020 Motion to Transfer Venue

Carl titled his 2020 motion a Petition to Transfer Venue. In his motion, Carl again argued that Trego County was not the appropriate venue for administering Rosa's estate under K.S.A. 59-2203. In Carl's view, the only counties where the venue statute contemplated that the estate could be opened were the counties

where Rosa resided (which Carl asserted was Meade County) or owned real property (which he claimed were Ford and Stanton Counties). The district court denied his motion, noting it was filed more than three years after the estate was opened.

Carl then filed a motion for relief from judgment under K.S.A. 60-260(b) on the same basis. He claimed that because Trego County was not the appropriate *venue* under K.S.A. 59-2203, the district court never had *subject-matter jurisdiction* to open or administer the estate under Kansas law. Wayne also filed a petition to amend the inventory of Rosa's estate to include a piece of real estate located in Trego County which he did not include in his earlier final inventory (the land Rosa had owned with Wayne in joint tenancy that was not part of the probate estate).

The district court heard arguments on these requests over the course of two hearings. Wayne's attorney explained that Wayne had been concerned about having to probate his mother's estate too far from his home and preferred to do it near his home in Hoxie. He also stated that Wayne and Rosa jointly owned property in Trego County, and the attorney who prepared the deed told Wayne's attorney that Rosa owned real estate in Trego County. Wayne's attorney was unaware that the deed prepared by the other attorney was in joint tenancy and thus that the property would not be part of Rosa's estate. At the hearing, Wayne's attorney conceded that when the petition to probate the will was filed, Rosa owned no real estate in Trego County, as that property had passed by operation of law to Wayne upon Rosa's death.

Carl argued that the court erred when it found Rosa was a resident of Trego County, as no one claimed she lived in that county at the time of her death. Carl conceded that the 2016 order admitting the will to probate was a final order he had not appealed. But Carl asserted that it did not matter whether he had appealed the decision because the court lacked jurisdiction to make the order. Carl asserted that the probate petition lacked the essential jurisdictional fact of Rosa's county of residence at the time of her death. Carl also argued he received deficient notice of the October 2016 hearing, as he believed the hearing would only involve Carl's motions, not the petition to admit the will.

After hearing these arguments, the district court denied all the pending motions. The court noted that the estate inventory should

not be amended to include non-probate assets (such as the property Rosa had previously owned in joint tenancy in Trego County). And relevant to our discussion in this appeal, the court found it had jurisdiction to hear the case. It distinguished jurisdiction from venue, and stated it had jurisdiction over probate cases for any Kansas resident. It also found that Carl's assertions regarding notice of the October 2016 hearing were unfounded, as the notice of hearing clearly showed that the hearing would be on whether to admit the will. The court noted that Carl had actual notice of the hearing because he and his attorney contacted the court and withdrew his challenges to the will. Finally, the court again denied Carl's request to transfer venue, noting that such an action would be unjust. At the time the district court issued its ruling, the probate case had been pending for almost five years. Carl appeals.

DISCUSSION

The statute at the center of the parties' appellate briefing is the Kansas probate code's venue provision, K.S.A. 59-2203. Generally speaking, the statute indicates that proceedings to probate a Kansas resident's will should be conducted in the decedent's county of residence or in a county where the decedent owned an interest in real property:

> "Proceedings for the probate of a will or for administration shall be had in the county of the residence of the decedent at the time of such decedent's death if the decedent owned an interest in real property in such county, or, if the decedent did not own an interest in real property in the decedent's county of residence at the time of such decedent's death, in such county of the residence of the decedent at the time of such decedent's death or in any county where the decedent owned an interest in real property." K.S.A. 2021 Supp. 59-2203.

The statute also contains venue directions for cases involving the estates of people who are not Kansas residents, stating that those cases may be conducted "in any county where [the] decedent left any estate to be administered under K.S.A. 59-805." K.S.A. 2021 Supp. 59-2203. K.S.A 59-805 defines the parameters of Kansas courts' jurisdiction over nonresidents' tangible and intangible property. The law has not included a similar statement of Kansas courts' jurisdiction over Kansas residents' estates since the unification of the Kansas court system in 1977.

At first blush, the parties seem to indicate that their dispute is an evidentiary one. Carl argues that K.S.A. 59-2203 required the district court in Trego County to transfer venue of Rosa's probate case to another county because Rosa did not live or own property in Trego County at the time of her death. Wayne argues that there was evidence to support the district court's finding that venue was proper in Trego County because Rosa had declared Trego County as her residence when she filed her petition in the conservatorship case. He also asserts that Carl should have challenged this finding during his earlier appeal in the probate case.

But while Carl's motion is framed as a petition to transfer venue to a different Kansas county, he asserts that the effect of his request is much more wide-reaching than a prospective transfer: He claims that because the case was, in his view, filed in the wrong county under K.S.A. 59-2203's *venue* provision, the district court in Trego County never had *subject-matter jurisdiction* over Rosa's will. On this basis, he claims that all orders the district court entered in the years that this probate case has been pending—including and most importantly its ruling that Carl's challenges disinherited him under the *in terrorem* clause—were void.

Thus, Carl's motion assumes that a district court only has jurisdiction to hear a probate case if it is filed in a venue listed in K.S.A. 59-2203. Put another way, Carl's argument presupposes that the concepts of subject-matter jurisdiction and venue are equivalent in the probate context. They are not.

1. *The district court had general subject-matter jurisdiction to preside over the probate case and administer Rosa's estate.*

Subject-matter jurisdiction is "the power of [a] court to hear and decide a particular type of action." *Chalmers v. Burrough*, 314 Kan. 1, 7, 494 P.3d 128 (2021). In Kansas, the contours of the courts' judicial power are defined by "the Kansas Constitution and Kansas statutes." *In re Marriage of Williams*, 307 Kan. 960, 967, 417 P.3d 1033 (2018). Article 3 of the Kansas Constitution states that district courts have "such jurisdiction in their respective districts as may be provided by law." Kan. Const. art. 3, § 6(b). Thus, parties cannot agree to confer subject-matter jurisdiction where it does not otherwise exist. And because subject-matter jurisdiction

establishes the "power of [a] court to hear a case," courts are required to investigate an apparent lack of this jurisdiction even if the parties have not raised the issue. *Kingsley v. Kansas Dept. of Revenue*, 288 Kan. 390, 395, 204 P.3d 562 (2009).

In contrast, venue describes the "'proper or a possible place for a lawsuit to proceed, usu[ally] because the place has some connection either with the events that gave rise to the lawsuit or with the plaintiff or defendant.'" *Akesogenx Corp. v. Zavala*, 55 Kan. App. 2d 22, 36, 407 P.3d 246 (2017) (quoting Black's Law Dictionary 1790 [10th ed. 2014]), *rev. denied* 308 Kan. 1593 (2018). Venue is "not a jurisdictional matter, but a procedural one." *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 546, 567 P.2d 1292 (1977). Unlike subject-matter jurisdiction, the judicial district or county where a case is filed rarely affects a district court's authority to hear a case. Instead, considerations of venue involve more practical and logistical aspects of litigation—"the convenience of the parties and witnesses and the interests of justice." K.S.A. 60-609(a). Unlike subject-matter jurisdiction, parties may agree upon a particular venue where a case may be brought. And parties who fail to raise a venue question in their answer or in a motion under K.S.A. 60-212 waive their ability to contest venue later in the case. See K.S.A. 60-610; *Kansas Bd. of Regents v. Skinner*, 267 Kan. 808, Syl. ¶ 2, 814-15, 987 P.2d 1096 (1999); *Akesogenx Corp.*, 55 Kan. App. 2d at 37.

Since the unification of the Kansas court system in 1977, K.S.A. 20-301 has provided that district courts have "general original jurisdiction of all matters, both civil and criminal, unless otherwise provided by law." Kansas courts have long interpreted this statute to indicate that a district court has jurisdiction to hear all subject matters "unless the legislature provides that it does not or that jurisdiction lies elsewhere." *City of Overland Park v. Niewald*, 20 Kan. App. 2d 909, 910-11, 893 P.2d 848, *aff'd as modified* 258 Kan. 679, 907 P.2d 885 (1995).

Kansas district courts' general original jurisdiction includes the authority to hear probate proceedings. See *In re Estate of Heiman*, 44 Kan. App. 2d 764, 766, 241 P.3d 161 (2010); *Quinlan v. Leech*, 5 Kan. App. 2d 706, 710, 623 P.2d 1365 (1981). Thus, the central question we must answer in this appeal is whether the

legislature specifically restricted the exercise of district courts' jurisdiction in probate cases to only those cases that comply with K.S.A. 59-2203's venue provisions. Accord *Chalmers*, 314 Kan. at 7 (applying a similar analysis in interpreting the Uniform Interstate Family Support Act). We conclude it has not.

Our analysis begins with the language of K.S.A. 59-2203. See 314 Kan. at 7-8. That statute defines where "[p]roceedings for the probate of a will or for administration shall be had" entirely in terms of "venue." K.S.A. 2021 Supp. 59-2203. It does not mention jurisdiction at all and contains "no language . . . that explicitly deprives a district court of general subject matter jurisdiction over" probate issues. 314 Kan. at 8; accord *State v. Spencer Gifts*, 304 Kan. 755, Syl. ¶ 3, 374 P.3d 680 (2016) (courts do not add statutory requirements not included in the text). Rather, the statute *presumes* that the district court has jurisdiction to hear a probate case and merely provides direction about where the case should be filed. And the statute includes a procedure by which a district court may transfer a case to a more appropriate venue—not dismiss the case entirely, which would be the appropriate action for a court with no authority to hear it. There is nothing in the text of K.S.A. 59-2203 to indicate it was intended to restrict district courts' general subject-matter jurisdiction over probate matters.

Carl does not argue that the text of K.S.A. 59-2203 requires such a result. Instead, he asserts that several older decisions of the Kansas Supreme Court—decided before court unification in the 1970s—can be read to equate courts' jurisdiction in probate matters with the appropriate venue under K.S.A. 59-2203. For example, Carl argues that the Kansas Supreme Court equated venue under that statute with jurisdiction in *In re Estate of Barnes*, 212 Kan. 502, 506, 512 P.2d 387 (1973), when it noted that the "primary jurisdictional facts empowering a probate court to order probate of a decedent's will are either that the decedent was a resident of the particular county at the time of his death or that he left an estate within the county to be administered." See also *In re Estate of Johnson*, 180 Kan. 740, 747, 308 P.2d 100 (1957) ("It was necessary for the probate court to determine the jurisdictional fact of the decedent's residence at the hearing on November 3, 1953.").

The fundamental flaw with Carl's reliance on these decisions, however, is that these cases predated court unification, which

"dramatically reconfigured the judicial system"—and the way we think about subject-matter jurisdiction—in Kansas. *In re Estate of Heiman*, 44 Kan. App. 2d at 767. We explained some of these changes with regard to probate courts in the *In re Estate of Heiman* case:

> "Before unification, Kansas used a variety of specialized courts, including probate courts, county courts, juvenile courts, and courts of common pleas. They operated separately from the district courts. Those specialized courts had defined—and limited—jurisdictional spheres. For example, the probate courts had exclusive jurisdiction to hear probate matters. No other courts could entertain or decide probate issues or disputes. In legal terminology, the other courts, including the district courts, lacked subject matter jurisdiction over probate matters. Conversely, a probate court had no jurisdiction to decide a criminal case or a juvenile matter. To further confound lawyers and other participants in the process, the configuration of the specialized courts varied from county to county. See generally Report of the Kansas Judicial Study Advisory Committee, pp. 24-26 (May 1974).
>
> "One of the primary goals of court unification was the elimination of 'jurisdictional fragmentation.' Advisory Committee Report, p. 24. As enacted by the legislature, the court unification plan accomplished that purpose by consolidating subject matter jurisdiction in the district courts. Thus, following unification, the district courts began hearing probate matters, juvenile proceedings, and other actions previously entrusted to the specialized courts. Those specialized courts were gone, along with the rigid jurisdiction boundaries that marked their judicial territories." 44 Kan. App. 2d at 767.

Before unification, probate courts' authority to consider and hear cases was limited to the instances identified in K.S.A. 59-301 (Corrick 1964), repealed effective January 10, 1977. For example, probate courts were established in each county and had extraordinarily limited authority to direct actions outside the county's geographical boundaries. There were also a host of other procedural matters that were considered "jurisdictional defect[s]" in pre-unification probate proceedings. See *In re Estate of Kempkes*, 4 Kan. App. 2d 154, 156, 603 P.2d 642 (1979); see also *In re Estate of Zahradnik*, 6 Kan. App. 2d 84, 88-89, 626 P.2d 1211 (1981) (noting that some matters previously considered jurisdictional defects were no longer jurisdictional after unification).

But the legislature abolished probate courts and repealed those restrictions when it unified the court system in 1977. K.S.A. 20-335; L. 1976, ch. 242, § 99. At the same time, it updated the probate code to indicate that "district" courts—not the previous

probate courts—presided over those matters. See L. 1976, ch. 242, § 29 (amending K.S.A. 59-2203). And it indicated that district courts "shall have general original jurisdiction" to hear all matters unless otherwise provided. L. 1976, ch. 146, § 9 (amending K.S.A. 20-301).

For these reasons, Kansas courts have repeatedly cautioned that language regarding the scope of the authority of probate and other specialty courts in decisions that predate unification are of limited assistance. Most importantly for purposes of our discussion, these decisions' "discussion of subject matter jurisdiction and limitations on the authority of trial courts to decide particular types of cases has no precedential weight or value in examining those issues under the State's current judicial system." *In re Estate of Heiman*, 44 Kan. App. 2d at 768; see also *Ram Co. v. Estate of Kobbeman*, 236 Kan. 751, 764, 696 P.2d 936 (1985) (distinguishing and declining to follow pre-unification caselaw).

This is not to say that the legislature could not retain jurisdictional rules that existed before court unification if it decided to do so. K.S.A. 59-2203 provides one such example with its treatment of estates of non-Kansas residents. The statute indicates that probate proceedings for nonresidents may be administered "as provided in K.S.A. 59-805"—a pre-unification statute that defines jurisdiction over estates of nonresident decedents. K.S.A. 2021 Supp. 59-2203. But K.S.A. 59-2203 references no such jurisdictional limitations to restrict district courts' power to administer the estates of Kansas residents. And the jurisdictional restrictions relating to nonresidents do not apply here, as the district court found and the parties agree that Rosa was a Kansas resident.

The modern approach "in considering whether legislation restricted a court's subject matter jurisdiction" is to look for "explicit [statutory] language limiting the court's general jurisdiction." *Chalmers*, 314 Kan. at 11. K.S.A. 59-2203 does not include such a limitation.

"Jurisdiction and venue are not interchangeable." *In re Marriage of Yount and Hulse*, 34 Kan. App. 2d 660, 664, 122 P.3d 1175 (2005). K.S.A. 59-2203 governs venue; it does not confer or otherwise affect district courts' subject-matter jurisdiction to hear probate cases. The district court correctly found that Carl's chal-

lenge to the court's venue in 2020 had no effect on its general authority to issue orders in the probate case or otherwise administer Rosa's estate.

2. *Carl's procedural claims—based on venue and notice—are without merit.*

Because the venue provisions in K.S.A. 59-2203 are not jurisdictional, we need only consider whether the district court abused its discretion when it denied Carl's 2020 motion to transfer venue to a different Kansas county. See *Hernandez v. Pistotnik*, 58 Kan. App. 2d 501, 517, 472 P.3d 110 (district courts have broad discretion to grant or deny a party's request for a change of venue), *rev. denied* 312 Kan. 891 (2020). We find no error in the court's decision.

Though Carl originally raised the question of whether Trego County was the appropriate venue at the outset of the probate matter, he specifically abandoned that challenge—along with his other pending motions—in October 2016. The court then proceeded to administer the estate and issue rulings in the case for over three years, eventually ruling against Carl based on the *in terrorem* clause. It was only after the court issued this ruling that Carl again sought to transfer the case to a different venue.

This court considered a similar tactic in our decision in *Akesogenx Corp.* To borrow that decision's language, "because [Carl] waited to challenge venue until after the district court had entered . . . judgment against him, he waived all complaints about venue he may have had." 55 Kan. App. 2d at 38. The district court did not abuse its discretion when it denied Carl's motion to transfer venue.

In his final argument on appeal, Carl challenges the district court's authority to administer Rosa's estate on a somewhat different ground. He asserts that he did not have adequate notice that the district court's October 2016 hearing was to involve the admission of Rosa's will (in addition to Carl's many procedural challenges). But as the district court noted, the record belies this assertion. Both Carl and his attorney contacted the court on the eve of the October 2016 hearing date and indicated that Carl was withdrawing any challenge to "admissibility" of the will. In other words, the record reflects—consistent with the district court's ruling—that Carl had actual notice of the intended scope of the October 2016 proceeding.

We further note that Carl chose not to contest those proceedings in 2016. And even if Carl believed that the October 2016 proceeding had been conducted without adequate notice, he could have raised that issue in his earlier appeal. He did not. In short, there are ample reasons to support the district court's denial of Carl's present challenge to his notice of the October 2016 hearing.

The district court correctly found that it had subject-matter jurisdiction over Rosa's estate as part of its general jurisdiction under Kansas law. Carl's efforts to undermine that jurisdiction years after the fact—through the venue provisions in K.S.A. 59-2203 and his untimely challenges to notice—are without merit. We thus affirm the district court's judgment.

3. *We deny Wayne's request that Carl pay his attorney fees in this appeal.*

As a final matter, Wayne asks this court to order that Carl pay his attorney fees and expenses incurred during this appeal. Wayne argues that attorney fees are warranted, as Carl's appeal raises only frivolous claims "for the sole purpose of harassment and delay."

This court may award attorney fees for services rendered in an appeal if the district court could award attorney fees. Supreme Court Rule 7.07(b)(1) (2022 Kan. S. Ct. R. at 52). If we find that "an appeal has been taken frivolously, or only for the purpose of harassment or delay," we may assess "a reasonable attorney fee for the appellee's counsel." Rule 7.07(c) (2022 Kan. S. Ct. R. at 52).

This is a close case, particularly given the nature of Carl's appeals in his previous cases involving his mother's estate and conservatorship. But on the whole, although Carl's appeal has not succeeded on its merits, we do not agree that Carl's claims were entirely frivolous or that his appeal was taken solely for the purpose of harassment and delay. Carl's jurisdictional claim raised an important legal question that—based on the briefing of both parties—required some discussion. The fact that we did not resolve that claim in Carl's favor does not undermine his right to seek review of the district court's judgment. We therefore deny Wayne's request for appellate attorney fees.

Affirmed.

(525 P.3d 10)

No. 124,357

RAYMOND L. MILLER, as Guardian and Conservator of REGINA KAY MILLER, *Appellant*, v. HUTCHINSON REGIONAL MEDICAL CENTER, *Defendant*, and ESTATE OF JAMES A. ISAAC, M.D., By and Through its Special Administrator, GREGORY JAMES ISAAC, *Appellee*.

Petition for review filed February 14, 2023

SYLLABUS BY THE COURT

1. PHYSICIANS AND SURGEONS—*Medical Malpractice Action—Requirements for Proof under Kansas Law.* Under Kansas law, a patient bringing a medical malpractice action against a physician must prove: (1) the physician owed the patient a duty of care; (2) the physician's actions in caring for the patient fell below professionally recognized standards; (3) the patient suffered injury or harm; and (4) the injury or harm was proximately caused by the physician's deviation from the standard of care.

2. SAME—*Medical Negligence Action—No Duty of Care if No Legal Physician-Patient Relationship.* Without a legally recognized physician-patient relationship, there is no duty of care for purposes of establishing medical negligence.

3. SAME—*Medical Negligence Action—Existence of Physician-Patient Relationship—Question of Fact for Jury.* In a medical negligence action, the existence of a physician-patient relationship typically presents a question of fact for the jury to answer.

4. SAME—*Medical Negligence Action—If No Physician-Patient Relationship Established—Grant of Summary Judgment for Defendant.* If a plaintiff is given the benefit of every dispute in the relevant evidence, the district court may grant summary judgment for the defendant in a medical negligence action so long as no reasonable jury could conclude a physician-patient relationship had been established.

5. SAME—*Medical Negligence Action—Under These Facts District Court Erred.* On the particular facts presented, the district court erred in finding no physician-patient relationship existed and granting summary judgment on that basis.

Appeal from Sedgwick District Court; DEBORAH HERNANDEZ MITCHELL, judge. Opinion filed January 20, 2023. Reversed and remanded with directions.

J. Darin Hayes and *Kaylea D. Knappenberger*, of Hutton & Hutton Law firm, LLC, of Wichita, for appellant.

Brian L. White and *Mark R. Maloney*, of Hinkle Law Firm LLC, of Wichita, for appellees.

Before ARNOLD-BURGER, CJ, ATCHESON, and WARNER, JJ.

ATCHESON, J.: This appeal turns on whether a neurologist formed a doctor-patient relationship with a woman who sought treatment at the Hutchinson Regional Medical Center when an emergency room physician there called him to consult on a tentative diagnosis and the need for further diagnostic testing. Dr. James A. Isaac, the neurologist, had agreed to serve as an on-call consultant to maintain admitting privileges at the medical center. This narrow issue has come up in a medical malpractice action brought on behalf of Regina Kay Miller, the woman, against the medical center and the two physicians on the grounds they misdiagnosed her and, as a result, she suffered a debilitating stroke.

The Sedgwick County District Court found no doctor-patient relationship existed and for that reason granted summary judgment to Dr. Isaac's estate, which has been substituted as the named defendant because the doctor died during this litigation. Without such a relationship, there is no duty of care, and there can be no medical negligence absent a legally recognized duty. Miller, acting through her husband as the nominal plaintiff, has appealed the ruling.

A trilogy of Kansas Supreme Court cases sets out legal principles governing when a consulting physician enters into a doctor-patient relationship. But the standards are ragged and outline something short of a conclusive test. We must consider the summary judgment evidence in the best light for Miller. Given the evidence and the governing law, we conclude the district court erred in entering summary judgment—reasonable jurors might find a doctor-patient relationship between Dr. Isaac and Miller. We, therefore, reverse the judgment and remand to the district court for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Because the appeal challenges a summary judgment, the standards of review in both the district court and here dictate how we look at the relevant facts. So we set out the standards before

reciting the governing facts. See *Bouton v. Byers*, 50 Kan. App. 2d 34, 36-37, 321 P.3d 780 (2014). The standard, of course, has been often stated and is, therefore, well known.

When considering summary judgment, the district court must view the evidence properly submitted in support of and in opposition to the motion most favorably to the party opposing the motion and give that party the benefit of every reasonable inference that might be drawn from that record. *Trear v. Chamberlain*, 308 Kan. 932, 935-36, 425 P.3d 297 (2018); *Shamberg, Johnson & Bergman, Chtd. v. Oliver*, 289 Kan. 891, 900, 220 P.3d 333 (2009). The party seeking summary judgment has to show that even taking the evidence in that light, there are no genuine disputes over any material facts and it is entitled to judgment as a matter of law. *Trear*, 308 Kan. at 935; *Shamberg, Johnson & Bergman, Chtd.*, 289 Kan. 900. Basically, the moving party submits no reasonable construction of the evidence would permit a jury to return a verdict for the opposing party.

An appellate court applies the same standards in reviewing a challenge to the district court's entry of summary judgment. We, therefore, owe no particular deference to the district court's ruling, since it effectively applies a set of undisputed facts viewed favorably to the plaintiff to the controlling legal principles. Summary judgment, then, presents a question of law an appellate court can assess just as well as the district court. See *Adams v. Board of Sedgwick County Comm'rs*, 289 Kan. 577, 584, 214 P.3d 1173 (2009). Given those principles, we render an account of the facts favoring the plaintiff, recognizing some of the key circumstances actually are disputed.

About 10 p.m. on a weekday evening in late January 2018, Raymond L. Miller took his wife Regina to the emergency room at the Hutchinson Regional Medical Center. They saw Dr. Li Jia, an emergency room physician, and reported that Regina had stroke-like symptoms for about a minute earlier in the evening. (We refer to Regina as Miller in the remainder of this opinion and refer to Raymond by his first name.) Miller was in her early 40s and apparently had a history of migraines. Dr. Jia concluded Miller likely had a "complex migraine" that can have symptoms mimicking a stroke. He recommended against a CT scan that would

help differentiate between a migraine and a stroke as the cause of what Miller experienced.

That evening Dr. Isaac was on call for emergency room physicians at the medical center. Under the arrangement with the medical center, Dr. Isaac and his medical partner, another neurologist, each agreed to be available to consult with the emergency room physicians 10 days a month. Providing on-call consultations was a condition for the two neurologists being allowed to admit patients to the medical center. The agreement was unwritten and could be characterized as a general understanding without much detail.

In a deposition, Dr. Jia testified he called Dr. Isaac around 11 p.m. to secure his opinion about Miller's condition. The telephone call lasted several minutes, although the precise duration is uncertain. According to Dr. Jia, he described Miller's clinical history and symptoms to Dr. Isaac, outlined his diagnosis of complex migraine, and offered his assessment that discharging Miller would be appropriate. Again, according to Dr. Jia, Dr. Isaac agreed with the diagnosis and assessment, and the hospital record suggests Dr. Isaac concluded there was no need for a CT scan.

The Millers twice asked Dr. Jia to contact the on-call neurologist. Dr. Jia, however, also testified that he felt he needed to consult with Dr. Isaac about the diagnosis before releasing Miller and to make sure Dr. Isaac would be available to see her the next day. Dr. Isaac neither reviewed any clinical records nor spoke directly to either of the Millers. He had not previously seen Miller as a patient.

In his deposition, Dr. Isaac offered a substantially different account of the telephone call: Dr. Jia called simply to determine if he would see Miller as a patient the next day, so he offered no medical opinion or advice. Consistent with the standards governing summary judgment, both we and the district court have properly declined to consider Dr. Isaac's testimony about the call with Dr. Jia. Resolving the obvious inconsistency in those versions of the same event is a task entrusted to a jury or a district court judge acting as the fact-finder during a trial. (Although Dr. Isaac's estate is now the named party, we refer to Dr. Isaac in the balance of the opinion as if he were still the defendant.)

After speaking with Dr. Isaac, Dr. Jia discharged Miller without ordering a CT scan or other further testing and without treating her for a stroke. After returning home with Raymond, Miller suffered a stroke leaving her with sufficiently severe and permanent disabilities she can no longer manage her personal affairs. Raymond has been appointed Miller's guardian and custodian. In that capacity, Raymond filed this action on behalf of Miller against Dr. Jia, Dr. Isaac, and the Hutchinson Regional Medical Center. To oversimplify an aspect of the case not directly relevant to this appeal, the theory of liability is that Dr. Jia and Dr. Isaac deviated from appropriate medical standards by not having Miller undergo a computed tomography angiography—a CT scan with a contrast medium—that would have indicated the physical condition that caused the severe stroke the next morning, prompting immediate treatment that would have averted the stroke.

We mention several markers in the procedural progression of the case. First, the parties do not dispute venue properly lies in Sedgwick County. Second, Dr. Jia has settled the claim against him, and he is no longer a defendant in the case. After granting summary judgment to Dr. Isaac, the district court directed that the ruling be treated as a final judgment under K.S.A. 2020 Supp. 60-254(b), permitting an immediate appeal. The parties have not questioned the ruling, so we decline to do so on our own. See *Ball v. Credit Bureau Services, Inc.*, No. 111,144, 2015 WL 4366440, at *13-14 (Kan. App. 2015) (unpublished opinion). The claims against Hutchinson Regional Medical Center remain unresolved in the district court.

Raymond Miller, as the formal plaintiff, has appealed the district court's decision granting summary judgment to Dr. Isaac's estate. That is the sole issue before us.

LEGAL ANALYSIS

We have already set out the summary judgment standards applicable in the district court and for appellate review.

Under Kansas law, a patient bringing a medical malpractice action against a physician must prove: (1) the physician owed the patient a duty of care; (2) the physician's actions in caring for the

patient fell below professionally recognized standards; (3) the patient suffered injury or harm; and (4) the injury or harm was proximately caused by the physician's deviation from the standard of care. *Burnette v. Eubanks*, 308 Kan. 838, 842, 425 P.3d 343 (2018); *Russell v. May*, 306 Kan. 1058, 1067-68, 400 P.3d 647 (2017). Those elements, however, essentially presuppose the existence of a legally recognized physician-patient relationship. And without that relationship, there is no duty of care. *Russell*, 306 Kan. at 1069 ("[A] legal duty arises with the formation of a physician-patient relationship."); *Irvin v. Smith*, 272 Kan. 112, 122, 31 P.3d 934 (2001) ("Absent the existence of a physician-patient relationship, there can be no liability for medical malpractice.").

The Kansas Supreme Court has characterized the existence of a doctor-patient relationship as a question of fact typically reserved for the jury to answer. *Russell*, 306 Kan. 1058, Syl. ¶ 5; *Irvin*, 272 Kan. at 119. Nonetheless, if a plaintiff is given the benefit of every dispute in the relevant evidence, the district court may grant summary judgment for the defendant so long as no reasonable jury could conclude a doctor-patient relationship had been established. See *Russell*, 306 Kan. at 1069; cf. *Estate of Belden v. Brown County*, 46 Kan. App. 2d 247, 276, 261 P.3d 943 (2011) ("Should the evidence taken in the best light for a plaintiff nonetheless fail to establish a basis for a jury to return a verdict for that plaintiff, the court may enter a summary judgment for the defendant" on what would be a question of fact.). In granting Dr. Isaac's motion, the district court mistakenly construed the summary judgment record as legally and factually incompatible with any reasonable determination that Miller may have had a doctor-patient relationship with Dr. Isaac.

To reiterate, the only issue before us is whether Miller has presented evidence from which a jury might reasonably conclude she formed a physician-patient relationship with Dr. Isaac. As we have indicated, three Kansas Supreme Court cases address the formation of the relationship. Dr. Isaac, not surprisingly, zeroes in on *Irvin*. In that case, the court held that a physician engaging in what it characterized as an "informal" or "curbside" consultation with a colleague does not form a physician-patient relationship with the colleague's patient. In turn, the patient could not sue the consulted

physician for medical malpractice, since there would be no relationship between them giving rise to an actionable legal duty. 272 Kan. at 121-23.

In *Irvin*, a child living in western Kansas had a shunt or tube that drained excess fluid that chronically accumulated around her brain. When the child began having seizures and other symptoms possibly indicating a shunt malfunction, her local doctor had her transferred to a Wichita hospital, where a pediatric specialist admitted her as a patient. The admitting physician called a highly respected pediatric neurologist in Wichita the same day for a consultation. The physician chose to contact the neurologist because of his reputation. The neurologist was "'not on call'" at the hospital and had "no contractual obligation . . . requir[ing] him to attend any patients at [the hospital]." 272 Kan. at 122.

The admitting physician and the neurologist had a lengthy telephone conference and decided they should perform a mildly invasive diagnostic test the next day to evaluate the shunt's capacity. The child appeared to be in no immediate danger. The neurologist had not seen the child, offered no diagnosis for the cause of the seizures, and suggested no treatment plan. The next morning, before the test could be done, the child's condition rapidly deteriorated, and she suffered severe brain damage apparently because the shunt failed. The child's parents filed a medical malpractice action against a host of defendants including the neurologist. Pertinent here, the district court granted summary judgment to the neurologist, finding he had no physician-patient relationship with the child.

In reviewing the summary judgment ruling, the *Irvin* court noted the dearth of Kansas decisions exploring when a consulting physician may enter into a doctor-patient relationship creating an actionable legal duty. The court affirmed the judgment for the neurologist and drew a distinction between informal or "curbside" consultations, on the one hand, and "formal" consultations, on the other. The court found the neurologist provided only an informal consultation and, as a matter of public policy, those sorts of discussions should be insulated from legal liability in medical malpractice actions. 272 Kan. at 123. Two dissenting justices doubted the majority's division of informal and formal consultations as a

policy matter and would have found a jury question on the facts as to the existence of a doctor-patient relationship. 272 Kan. at 135, 139 (Lockett, J., joined by Allegrucci, J., dissenting).

The *Irvin* court mostly sets out what it considers hallmarks of formal consultations that establish physician-patient relationships and a concomitant duty of care. So, "generally" the physician has to "personally examine" the patient. 272 Kan. at 120. But that is not essential; "indirect contact" may be sufficient in some circumstances. 272 Kan. at 120. A physician must expressly or impliedly agree to advise or treat the patient. The patient, then, customarily seeks out the physician. 272 Kan. at 121. Yet, "an implied physician-patient relationship may be found where the physician gives advice to a patient by communicating the advice through another health care professional." 272 Kan. at 120. The court described a "formal consultation" as entailing "a full bedside review" with a "physical examination" of the patient and a review of clinical records. 272 Kan. at 123. A doctor-patient relationship—and potential liability for malpractice—exists when the doctor "assumes the role of treating the patient." 272 Kan. at 120.

But the court did not attempt to forge those observations into a set of factors or a predictive legal test. They seem ill-suited to defining some overarching principle, and they poorly fit certain medical specialties—most obviously, perhaps, radiology and pathology in which the practitioners have little or no direct contact with the patient. The *Irvin* dissenters noted as much in passing. 272 Kan. at 136 (citing and quoting *Bovara v. St. Francis Hospital,* 298 Ill. App. 3d 1025, 1030-31, 700 N.E.2d 143 [1998]). Ultimately, the court affirmed the summary judgment because of how the neurologist was drawn into the consultation and the limited role he took ahead of the patient's precipitous decline.

Although *Irvin* remains the leading Kansas appellate decision on when a consulting physician may enter a doctor-patient relationship, it is bookended by two other cases that looked at the formation of the relationship. *Russell*, 306 Kan. 1058; *Adams v. Via Christi Regional Medical Center*, 270 Kan. 824, 19 P.3d 132 (2001). We discuss them briefly as generally informing the issue.

In *Adams*, a family physician cross-appealed a jury determination he had a doctor-patient relationship with a young woman who died from complications of an ectopic pregnancy. The doctor

was the family physician for the 22-year-old woman's parents and her siblings but had not seen the woman as a patient for about four years. The woman's mother called the doctor's service at about 9 p.m. and received an immediate return call from the doctor. She reported that her daughter was 5 to 8 weeks pregnant and was experiencing significant abdominal pain. The doctor, who had discontinued his obstetrical practice, advised mother that abdominal pain was not unusual with pregnancy and to take her daughter to the emergency room if she got worse and to have her see a physician the next day. About three hours later, mother took the woman to the hospital. The woman had a ruptured ectopic pregnancy that led to cardiac arrest and, in turn, to brain death. The doctor later testified that he knew ectopic pregnancies pose serious risks beginning at about 8 weeks, but he did not consider that possibility during the telephone call with the woman's mother. A jury later found the hospital and the doctor liable in a medical malpractice action. In an appeal, the doctor argued he did not have a physician-patient relationship with the woman and, therefore, did not have any legal liability.

The court rejected the doctor's argument and found sufficient evidence to support the jury's conclusion there was a physician-patient relationship with the woman principally because the doctor took "some action to give medical assistance" rather than deflecting mother's inquiry by saying he no longer provided obstetrical care or simply referring her to another practitioner. *Adams*, 270 Kan. at 836-37. The court also recognized that if the professional relationship between the doctor and the woman had lapsed, the substantive medical advice transmitted during the telephone call with mother "renewed" the relationship. 270 Kan. at 837. The doctor functionally treated the woman by "express[ing] his medical opinion about her condition" and suggesting she "was experiencing nothing unusual" in what turned out to be a life-threatening emergency. 270 Kan. at 837. And that was true even though the doctor did not see or speak to the woman and provided his medical assessment to a proxy.

In *Russell*, the Kansas Supreme Court returned to the issue of when a doctor-patient relationship exists, although the relevant point there turned on whether the relationship had ended. 306 Kan.

at 1070-71. In getting to that question, the court relied on *Adams* for the proposition that "'the physician's express or implied consent to advise or treat the patient is required for the relationship to come in to being.'" 306 Kan. at 1069 (quoting *Adams*, 270 Kan. at 835). The *Adams* court immediately went on to say that consent would be inferred when a physician "take[s] some affirmative action with regard to treatment of a patient." 270 Kan. at 835. The facts in *Russell* don't shed much light on formation of the professional relationship for our purposes. There, a woman saw a primary care physician who took a history, examined her, and made a referral to a specialist for sophisticated diagnostic testing. The specialist then reviewed the test results and met with the woman. The woman later saw a gynecologist for a routine checkup. The physicians failed to diagnose the woman's breast cancer, and she sued all three for medical malpractice. The court reversed the district court's ruling granting judgment as a matter of law to the primary care physician the woman first saw because there was sufficient evidence of a continuing duty of care (and, hence, a doctor-patient relationship) to send the claim to the jury. 306 Kan. at 1070-71. The court also found sufficient evidence on the other elements of the malpractice claim against the primary care physician, determinations that are legally beside the point for our purposes.[1]

[1] Although this court's decision in *Seeber v. Ebeling*, 36 Kan. App. 2d 501, 141 P.3d 1180 (2006), involved a medical malpractice action against an on-call physician, it is wholly uninformative given the facts. Seeber arrived at a Topeka hospital after suffering serious injuries in a motor vehicle mishap. An emergency room physician contacted Ebeling as the hospital's designated on-call neurosurgeon. After listening to the ER physician's recitation of Seeber's condition, Ebeling refused to come to the hospital to examine Seeber and offered no medical opinion about possible treatment. Ebeling told the ER physician to contact an orthopedic surgeon affiliated with the hospital or to transfer Seeber to another hospital. Seeber was eventually transferred. We affirmed the district court's grant of summary judgment to Ebeling on the grounds he never established a doctor-patient relationship with Seeber, since he refused to provide any medical opinion on

the injuries or a course of care. In turn, Ebeling could not be liable for medical malpractice absent such a relationship. 36 Kan. App. 2d at 518. In discussing the formation of doctor-patient relationships in Kansas, *Seeber* drew briefly from *Irvin* and *Adams* without much elaboration. 36 Kan. App. 2d at 514-15.

As we have indicated, the Kansas appellate caselaw does not yield an especially clear or harmonious structure for our task here. We can say the *Irvin* court treated the pediatric neurologist as an "informal or curbside" consultant—a role that does not create a doctor-patient relationship imposing a duty of care. The court, however, did not lay out indicia of curbside consultations. Moreover, consistent with *Adams*, the neurologist in *Irvin* withheld any assessment of the patient's condition and any recommendation for treatment—deferring a professional opinion until the planned diagnostic test had been completed. So for that reason, as well, there may have been no doctor-patient relationship.

Likewise, so-called "curbside consultations" do not seem to have particularly well-formed contours within the medical profession or in legal proceedings. Indeed, these collaborations are known by different names among physicians: back door, hallway, lunchroom, or coffee room consultations. Perley, *Physician use of the curbside consultation to address information needs: report on a collective case study*, 94 J. Med. Libr. Assoc. No. 2, 137, 138 (April 2006). As the terms suggest, the interactions tend to "take place opportunistically," and the consulted physician is not compensated. The consulted physician typically relies on information conveyed by the consulting physician. And the consulting physician generally does not tell the patient about the consultation. See Zacharias et al., *Curbside Consults in Clinical Medicine: Empirical and Liability Challenges*, 49 J. L. Med. & Ethics 599, 599 (2021); Suri, *Action, Affiliation, and a Duty of Care: Physicians' Liability in Nontraditional Settings*, 89 Fordham L. Rev. 301, 315-16 (2020); *Curbside Consultations*, 7 Psychiatry (Edgmont) No. 5, 51-52 (May 2010); 94 J. Med. Libr. Assoc. No. 2, at 138; Berlin, *Malpractice Issues in Radiology: Curbstone Consultations*, 178 Am. J. Roentgenology 1353, 1354 (June 2002). A survey of medical practitioners indicated there were no settled rules for partici-

pating in curbside consultations, although their use was an expected and commonplace part of the profession. 94 J. Med. Libr. Assoc. No. 2, at 141.

A recent examination of the law across jurisdictions on curbside consultations, on-call physicians, and the imposition of malpractice liability suggests myriad lines of judicial analyses, often coupled with fact-intensive inquiries, leading to varied outcomes. 89 Fordham L. Rev. at 304 (recognizing "divergent approaches courts use" in cases involving curbside consultants and on-call physicians); see also Zuckett and Ryckman, *No Physician-Patient Relationship Means No Duty, Right? Warning: Get a Second Opinion*, 56 DRI For the Defense No. 8, 12 (August 2014) (noting varied and changing judicial views on establishment of physician-patient relationships). This division is nothing new, as the authority compiled in *Kelley v. Middle Tennessee Emergency Physicians, P.C.*, 133 S.W.3d 587, 593-96 (Tenn. 2004), and the dueling citations in the *Irvin* majority opinion and dissent illustrate. Succinctly, the law around the country is a hodgepodge.

But with the expanded use of on-call physicians and the rise of telemedicine in the 20 years since *Irvin* was decided, see 89 Fordham L. Rev. at 303, appellate courts in a number of jurisdictions have examined anew how the duty of care for medical practitioners should be defined and have endeavored to outline more cohesive tests than what Kansas common law now provides. For example, in *Kelley*, the Tennessee Supreme Court recognized that a consulting physician may create an actionable, though implied, doctor-patient relationship with an individual he or she never meets by "affirmatively undertak[ing] to diagnose and/or treat a person, or affirmatively participat[ing] in such diagnosis and/or treatment." 133 S.W.3d at 596. More recently, the Oregon Supreme Court similarly found that an on-call physician who does not see a patient may, nonetheless, form an implied doctor-patient relationship if "the physician either knew or reasonably should have known that he or she was diagnosing the patient's condition or providing treatment to the patient." *Mead v. Legacy Health System*, 352 Or. 267, 279, 283 P.3d 904 (2012). The determination will be informed by the specific circumstances, including "the customary practice within the relevant medical community, the de-

gree and the level of formality with which one physician has assumed (or the other physician has ceded) responsibility for the diagnosis or treatment, the relative expertise of the two physicians, and the reasonable expectations, if any, of the patient." 352 Or. at 278-79.

Those courts rely heavily on an element of foreseeability—whether the consulted or on-call physician knew or should have known the consulting physician would rely on the opinions as substantive diagnoses or treatment recommendations—in fashioning a test for doctor-patient relationships creating a duty of care. In 2019, the Minnesota Supreme Court went a step further and recognized a duty of care essentially based on foreseeability alone without requiring a traditional or implied physician-patient relationship. *Warren v. Dinter*, 926 N.W.2d 370, 375 (Minn. 2019). The court held: "[A] duty arises between a physician and an identified third party when the physician provides medical advice and it is foreseeable that the third party will rely on that advice" and that professionally substandard advice may cause harm. 926 N.W.2d at 376. Acknowledging its treatment of medical negligence to be uncommon, the *Warren* court found support in earlier Minnesota cases and what it characterized as analogous authority in four other states. 926 N.W.2d at 377 & n.6.

We neither presume to endorse nor apply any of those decisions and confine ourselves to the precepts that may be derived from Kansas authority, primarily as stated in *Adams*, *Irvin*, and *Russell*. The somewhat fragmentary state of the law complicates the tasks facing practitioners and district courts, including presenting and resolving dispositive motions and, likely, instructing juries. Although that law may be less than analytically comprehensive, we conclude there are sufficient points of distinction between the circumstances here and those in *Irvin* to require a different result at this stage in the litigation. As we explain, there are adequate facts, taking the evidence in the best light for Miller, to preclude summary judgment.

On summary judgment, Dr. Isaac endeavored to draw his consultation with Dr. Jia into the realm of a curbside exchange that created no physician-patient relationship with Miller. To successfully resist the effort, Miller simply must point to evidence that

would permit a reasonable jury to find there was such a relationship. We do not have to be persuaded a given jury *would* come to that conclusion—only that it fairly might. *Estate of Belden*, 46 Kan. App. 2d. at 276 (In reviewing summary judgment granted a defendant, the appellate court asks whether "a reasonable jury *might* render a verdict for" plaintiff and "do[es] not consider the probability of such a verdict, only its possibility."); see *Fusaro v. First Family Mortg. Corp.*, 17 Kan. App. 2d 730, 735, 843 P.2d 737 (1992) (defendant's summary judgment motion should be denied if submissions contain sufficient evidence so that "a jury might reasonably find for the plaintiff"); *Cullison v. City of Salina*, No. 114,571, 2016 WL 3031283, at *6 (Kan. App. 2016) (unpublished opinion). Miller crosses that comparatively low threshold.

• The communication between Dr. Jia and Dr. Isaac took place in an established framework unlike a customary curbside consult and bore earmarks of formality. First, Dr. Jia contacted Dr. Isaac because he was the hospital's designated on-call neurologist. Although being "on-call" does not itself create some sort of physician-patient relationship, being called could depending on the exchange of information that follows. Conversely, in a prototypical curbside consultation, the consulting physician buttonholes a colleague (sometimes a specialist, sometimes not) to "run something by" the consulted physician. The consulted physician has no reason to expect the inquiry and may be chosen because of a collegial relationship with the consulting physician, a sound reputation in the professional community (as was true in *Irvin*), or mere happenstance, e.g., being present in the lounge. Viewed benignly, those informal exchanges provide some check that the consulting physician hasn't overlooked a fair possibility in making a differential diagnosis or in assessing a patient's treatment options.

Here, as the on-call neurologist, Dr. Isaac expected the type of call he received from Dr. Jia. He had an agreement with the medical center to provide that service. Dr. Isaac knew Dr. Jia was in the midst of treating a patient. Dr. Jia outlined the patient's symptoms, relevant clinical history, and a possible diagnosis and course of care—discharge with no immediate treatment and a referral for Miller to see Dr. Isaac the next day. The exchange was

not a casual one occurring at a time and place removed from the consulting physician's interaction with the patient.[2]

[2] In this respect, the *Irvin* decision creates an unhelpful labeling that draws a legal distinction between "formal" and "informal" medical opinions. A formal opinion flows from a meeting between the doctor and the patient; a review of a chart, test results, and medical history; and a physical examination—all leading to a diagnosis and treatment or a referral to another physician. Rendering a formal opinion creates a doctor-patient relationship. Conversely, an informal opinion is something less than a formal opinion typified by a curbside consultation and does not create a doctor-patient relationship. That binary differentiation, even as a first cut rather than a legally determinative one, seems almost obtusely indifferent to the varied factual circumstances attendant to medical consultations. Although broad labeling may be a risky endeavor, a better starting place may be dividing "professional" opinions from "casual" opinions of the sort recognized as curbside consultations. A professional opinion, rendered through a formalized process commonly with some documentation, would be a necessary condition for a doctor-patient relationship. Returning an after-hours call from a patient acting as a proxy for an immediate family member in distress, as in *Adams*, may be sufficiently formal when the physician then offers a medical opinion.

• Participating in ad hoc curbside consults, either as the consulting physician or the consulted physician, is an accepted, if unregimented, aspect of medical practice. So the consulted physicians offer their off-the-cuff views without compensation and in the loose expectation of a reciprocal professional courtesy should they seek out a curbside consultation. Nothing more.

Dr. Isaac's involvement here was markedly different. He had a set arrangement with the medical center requiring him to be available on call 10 days a month, and his practice partner had to cover an additional 10 days a month. The neurologists provided the on-call coverage as a condition for admitting their patients to the medical center—a thing of value. The neurologists and the medical center exchanged on-call services for admitting privileges in a mutually beneficial agreement. Their arrangement may not

have been reduced to writing with a slew of provisos and conditions, but it was formalized through the unbroken performance of the interlocking obligations over time.

Dr. Isaac, therefore, consulted with Dr. Jia because of his established and specific obligation to the medical center rather than as a part of a convention of the medical profession encouraging informal discussion between practitioners. At the summary judgment stage, we may infer the arrangement required and the medical center expected Dr. Isaac to provide thorough and carefully reasoned assessments in his capacity as an on-call physician. See *Crabb v. Swindler, Administratrix*, 184 Kan. 501, Syl. ¶ 2, 337 P.2d 986 (1959); see also *David v. Hett*, 293 Kan. 679, 696-97, 270 P.3d 1102 (2011). And that requirement would inure to the practical, if not the legal, benefit of the patients.

• An informal opinion of the sort provided in a curbside consultation typically is neither documented nor conveyed to the patient. It functions mostly as a hedge against a gross oversight on the part of the consulting physician. Here, the facts as we must take them, are quite different and portray a much more formal and professional exchange between Dr. Jia and Dr. Isaac.

As we have already explained, Dr. Jia contacted Dr. Isaac precisely because he was the on-call neurologist and in that capacity had years of experience and specialized medical training and practice Dr. Jia did not as a much younger emergency room physician. Dr. Jia was looking for guidance beyond a typical curbside consultation. As we have said, he described Miller's salient symptoms and history to Dr. Isaac and outlined his diagnosis of a complex migraine and possibly his recommendation to forego a CT scan. Dr. Isaac then lent *his* professional expertise to confirm Dr. Jia's conclusion about the cause of Miller's symptoms and apparently endorsed dispensing with additional diagnostic testing.

Even the time of the call—about 11 p.m.—suggests a purpose of more substance and urgency than the classic casual curbside consultation. Dr. Jia sought a specialist's studied assessment of a patient who might be experiencing symptoms of a relatively benign, if uncomfortable, headache or of a potentially life-threatening stroke. He wanted something more than an informal opinion. And while an on-call physician would anticipate fielding inquiries

outside of usual business hours, he or she presumably ought to consider a late-night inquiry from the emergency room to be of immediate importance to the doctor making the call and the patient.

Again, we may (and really must on summary judgment review) infer that Dr. Isaac knew Miller and her husband remained in the emergency room, so he could have spoken to either of them directly or solicited additional information from them through Dr. Jia. He also would have understood that because Miller had not been released, Dr. Jia's clinical assessment had not been implemented and easily could have been changed without, for example, requiring Miller to return to the medical center. In some strict literal sense, Dr. Isaac did not offer a diagnosis of or treatment plan for Miller but only because he concurred with Dr. Jia. His agreement entailed a professional opinion not unlike the physician's conclusion in *Adams* that the young woman's abdominal cramping likely was a normal side effect of her pregnancy rather than a medical emergency and, thus, required no further diagnosis or immediate treatment.

Two other factual circumstances tend to separate this case from the sort of informal opinions the court discussed in *Irvin*. First, the Millers explicitly asked Dr. Jia to get a second opinion from the on-call neurologist. The summary judgment record is silent on whether Dr. Jia conveyed their request to Dr. Isaac in so many words. But, as we have said, Dr. Isaac knew they remained at the medical center and were waiting on his discussion with Dr. Jia. Second, Dr. Jia documented the substance of his consultation with Dr. Isaac in Miller's medical chart and orally informed the Millers of Dr. Isaac's medical opinion. The documentation and dissemination of Dr. Isaac's conclusion lends the consultation a formality absent from curbside consults and similar informal discussions among medical peers. Those characteristics also would be consistent with a doctor-patient relationship between Dr. Isaac and the Millers, albeit one established through Dr. Jia.

Viewed in its entirety and favorably to Miller, the summary judgment record would permit a jury to conclude Dr. Isaac formed at least an implied physician-patient relationship with Miller arising from his consultation with Dr. Jia. See *Adams*, 270 Kan. at

835. The professional exchange had indicia of formality missing from curbside consultations that do not implicate such a relationship between a patient and the consulted physician. Prominent among those indicators are the Millers' request for the consultation, their remaining at the emergency room while Dr. Jia consulted with Dr. Isaac, and the formal documentation of the consultation in the patient chart and its oral communication to the patient.

We, therefore, reverse the district court's summary judgment for Dr. Isaac's estate and remand for further proceedings consistent with this opinion. In doing so, we say no more than the available evidence was sufficient, first, to create a jury question and, second, to permit the finding of a doctor-patient relationship as a reasonable implication drawn from that evidence. We should not be understood to be ruling that's the only implication. We, likewise, express no view on any other issue in this litigation.

Reversed and remanded for further proceedings.

(524 P.3d 448)

No. 123,797

STATE OF KANSAS, *Appellee*, V. TYLER BRANDON MCDONALD, *Appellant*.

Petition for review filed March 6, 2023

SYLLABUS BY THE COURT

1. CONSTITUTIONAL LAW—*Objective Facts to Support Public-safety Stop Required to Comport with Fourth Amendment*. To comport with the Fourth Amendment to the United States Constitution, public-safety encounters must be supported by objective, specific, and articulable facts which suggest the stop is necessary to serve a caretaking function.

2. SEARCH AND SEIZURE—*No Reasonable Suspicion of Criminal Activity Required before Public-Safety Stop*. A law enforcement officer is not required to possess reasonable suspicion of criminal activity prior to performing a public-safety stop.

3. SAME—*Legality of Public-Safety Stop—Three-Part Test to Assess Legality*. A three-part test is utilized to assess the legality of a public-safety stop: (1) If there are objective, specific, and articulable facts from which an officer would suspect that a person is in need of assistance then the officer may stop and investigate; (2) if an individual requires assistance the officer may take appropriate action to render assistance; and (3) once an officer is assured the individual is no longer in need of assistance or that the peril has been mitigated, any actions beyond that constitute a seizure triggering the protections provided by the Fourth Amendment.

Appeal from Geary District Court; CHARLES A. ZIMMERMAN, magistrate judge. Opinion filed February 3, 2023. Affirmed.

Kristen B. Patty, of Wichita, for appellant.

Tony Cruz, assistant county attorney, and *Derek Schmidt*, attorney general, for appellee.

Before CLINE, P.J., ISHERWOOD and HURST, JJ.

ISHERWOOD, J.: The State charged Tyler Brandon McDonald with possession of marijuana, possession of paraphernalia, and criminal use of weapons after Geary County Sheriff's Deputy James Regalado discovered the contraband in McDonald's vehicle. Prior to trial, McDonald sought to suppress the evidence as the product of an unlawful detention. Regalado noticed McDon-

ald's car in a lot in the park after dark and became concerned because of incidents involving self-harm that occurred in that area. Regalado stopped, activated his rear lights, and approached the vehicle. When the deputy knocked on McDonald's window and McDonald rolled it down, Regalado smelled marijuana, which led to a search and recovery of the evidence sought to be suppressed. The district court held Regalado's actions did not violate the Fourth Amendment to the United States Constitution because the interaction fell within the deputy's community caretaking function. On appeal, McDonald argues the district court erred when it denied his motion to suppress because Regalado did not have objective, articulable facts to suspect McDonald needed help. Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On September 16, 2019, Geary County Sheriff's Deputy James Regalado was on routine patrol just after 9 p.m. inside a park near Milford Lake when he noticed a car in one of the park's secluded lots. The park was still open but, given the later hour and time of year, it was already dark outside. As the deputy drove past, he noticed that the instrument panel slightly illuminated the interior of the vehicle but only to the extent that he could determine there was a single occupant in the front seat. Regalado immediately became concerned given incidents of self-harm that occurred around the lake. He personally observed at least one critical episode of that nature in the area.

Regalado parked his patrol vehicle on the street around 20 feet from the rear of the other vehicle, but not in a way that it compromised the other vehicle's ability to exit. Given the time of day and the secluded nature of the area, Regalado activated the rear emergency lights in his patrol vehicle to distinguish his car from that of a member of the public, as well as for his own safety if any other officers needed to locate him quickly.

As Regalado approached, he saw McDonald sitting in the driver's seat and heard him talking on a phone. The deputy knocked on the passenger side window to get McDonald's attention. When McDonald rolled it down, Regalado identified himself as a Geary County Sheriff's Deputy and asked whether McDonald

was all right. As the two spoke Regalado detected the odor of marijuana emanating from the vehicle. Based on that stench, Regalado requested McDonald's identification and called another deputy for backup. After Deputy Cory Shoemake arrived on the scene, Regalado searched the vehicle and discovered marijuana, drug paraphernalia, and a firearm.

The State charged McDonald with one count each of possession of marijuana, possession of drug paraphernalia, and criminal use of weapons. Prior to trial, McDonald moved to suppress the evidence found during the search of his vehicle and argued that Regalado violated his rights under the Fourth Amendment to the United States Constitution when he contacted McDonald in the parking lot. The State countered that Regalado executed a lawful public-safety stop/welfare check that ultimately led to the recovery of the evidence.

The district court held an evidentiary hearing on McDonald's motion but ultimately declined to grant the relief requested. In support of its conclusion the court found Regalado's testimony was credible, and that he did not detain McDonald as McDonald could have freely left at any point during the encounter before detection of the marijuana odor. It further determined the stop was justified as a lawful public-safety stop/welfare check and that, in fact, had Regalado decided not to stop and McDonald ultimately harmed himself, the Sheriff's Department may be exposed to liability for a failure to act.

The case proceeded to a bench trial and the district court found McDonald guilty of the marijuana and paraphernalia charges. It then sentenced him to a six-month suspended jail sentence and six months of mail-in probation.

McDonald now brings this appeal to determine whether the district court erred in denying his motion to suppress.

LEGAL ANALYSIS

The district court properly denied McDonald's motion to suppress.

The single issue McDonald presents for our review is whether the district court properly classified his encounter with Deputy Regalado as a legitimate public-safety stop. According to McDonald,

despite the circumstances the deputy confronted that evening, and his awareness that an increasing number of individuals engaged in acts of self-harm at the park, he nevertheless lacked a reasonable basis to suspect McDonald might be in need of assistance and, therefore, the court erred in denying his motion to suppress on the grounds that the officer's investigation was justified as a lawful welfare check.

The standard of review for a district court's decision to deny a motion to suppress has two parts. First, the appellate court reviews the district court's factual underpinnings to determine whether they are supported by substantial competent evidence, and next it reviews the district court's legal conclusion de novo. *State v. Hanke*, 307 Kan. 823, 827, 415 P.3d 966 (2018). We do not reweigh the evidence or reassess the credibility of witnesses. *State v. Reiss*, 299 Kan. 291, 296, 326 P.3d 367 (2014). The State bears the burden to prove that a challenged search or seizure was lawful. *State v. McGinnis*, 290 Kan. 547, 551, 233 P.3d 246 (2010).

The Fourth Amendment to the United States Constitution preserves "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The Kansas Supreme Court has found it reasonable to seize an individual to protect public safety. See *State v. Vistuba*, 251 Kan. 821, 825, 840 P.2d 511 (1992), *disapproved of in part on other grounds by State v. Field*, 252 Kan. 657, 847 P.2d 1280 (1993). As long as there are objective, specific, and articulable facts from which an experienced law enforcement officer would suspect that a citizen needs help or is in peril, then the officer has the right to stop and investigate. *State v. Ellis*, 311 Kan. 925, 929-30, 469 P.3d 65 (2020).

Kansas courts have recognized four types of police-citizen encounters: (1) voluntary encounters, (2) investigatory detentions, (3) public-safety stops, and (4) arrests. *State v. Phillips*, 49 Kan. App. 2d 775, 783, 315 P.3d 887 (2013). The encounter we are tasked with analyzing is the public safety-stop, or welfare check. The district court denied McDonald's motion to suppress on the grounds that Deputy Regalado's encounter with McDonald was properly classified as a valid public-safety stop.

The public-safety or welfare check rationale was first discussed and analyzed by the United States Supreme Court in *Cady*

v. Dombrowski, 413 U.S. 433, 441, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973). It was then recognized by the Kansas Supreme Court nearly two decades later in *Vistuba*, 251 Kan. at 824-25. The doctrine is based on the notion that the role of law enforcement officers is not limited to the detection, investigation, and prevention of criminal activity. Rather, they are also called upon to serve a community caretaking function to ensure that the safety and well-being of the public is somewhat insulated from harm. The requirement for reasonable suspicion of criminal activity is suspended in these contexts because to require the same could potentially undermine law enforcement's ability to timely render aid and protect the public. *State v. Messner*, 55 Kan. App. 2d 630, Syl. ¶ 1, 419 P.3d 642 (2018).

In applying the public-safety rationale to justify a police-citizen encounter, courts meticulously scrutinize the facts "so the protections of the Fourth Amendment are not emasculated." *Gonzales*, 36 Kan. App. 2d at 455. This court has adopted a three-part test to determine the legality of a public-safety stop. First, as long as there are objective, specific, and articulable facts from which a law enforcement officer would suspect that a citizen needs help or is in peril, the officer has the right to stop and investigate. Second, if the citizen needs aid, the officer may take appropriate action to render assistance. Third, once the officer is assured that the citizen is not in peril or is no longer in need of assistance, any actions taken beyond that point constitute a seizure, and the protections provided by the Fourth Amendment are triggered. 36 Kan. App. 2d at 456. Our analysis is largely confined to the first step in the inquiry.

The facts that the parties request us to scrutinize are rather straightforward and largely uncontroverted. It is the import of those facts and what they signify where the parties go their separate ways.

As set forth above, Deputy Regalado was on patrol in a park near Milford Lake when he happened upon McDonald's vehicle. The deputy immediately experienced a measure of concern because it was dark, the car was parked in a rather secluded area of the park with only a single occupant inside, and Regalado was keenly aware that individuals were known to seek refuge in the

park to carry out acts of self-harm. Accordingly, he stopped his patrol vehicle in the street adjacent to the lot in which McDonald was parked and approached to make contact with the driver. As he neared the vehicle, he heard the occupant engaged in a phone call. Deputy Regalado knocked on the passenger side window to obtain the occupant's attention and when the individual rolled down the window, Regalado inquired into his well-being. It was during that exchange that the deputy detected the odor of marijuana.

The foundation for McDonald's claim is that Deputy Regalado had no reason to believe that McDonald was in peril. But that peace of mind settles in post-investigation. As a means of buttressing his contention, McDonald directs our attention to *State v. McKenna*, 57 Kan. App. 2d 731, 459 P.3d 1274 (2020), where an officer found a vehicle's occupant slumped over the steering wheel; *State v. Tilson*, No. 108,253, 2013 WL 2920147 (Kan. App. 2013) (unpublished opinion), where law enforcement officers were notified that Tilson threatened self-harm and they later located him, injured, following a single vehicle accident; and *State v. Dionne*, No. 116,009, 2017 WL 1826284 (Kan. App. 2017) (unpublished opinion), where officers made contact with Dionne as he walked down the street, yet had no reasonable factual basis for doing so.

The cases relied upon by McDonald simply illustrate the reality that scenarios which arise under the umbrella of the Fourth Amendment are varied, fact sensitive, and span a considerable spectrum. While *McKenna* unquestionably presents a circumstance when the community caretaking function is triggered, it does not stand for the proposition that an officer is only permitted to investigate when the individual at issue is incapacitated. Again, the doctrine recognizes that law enforcement officers carry the additional responsibility of shielding the public from harm. That necessarily contemplates the latitude to intervene when objective and articulable facts highlight cause for concern. To adopt McDonald's interpretation of the concept would be to disallow law enforcement officers from investigating a matter until after a harmful, or even lethal, act comes to fruition. Such an interpretation runs contrary to longstanding caselaw.

Since *Vistuba*, Kansas courts have often examined the justifications for public-safety stops that transform into criminal investigations and arrests. In *Nickelson v. Kansas Dept. of Revenue*, 33 Kan. App. 2d 359, 102 P.3d 490 (2004), a highway patrolman observed Nickelson pull into a driveway in a rural area, stop, and turn his lights off. The officer situated his vehicle in a way that blocked Nickelson's path of travel back onto the roadway, activated the spotlight on his patrol car, and approached the vehicle to find out whether he needed assistance. Nickelson rolled down his window and the patrolman smelled alcohol, which eventually led to Nickelson's arrest and conviction for driving under the influence.

On appeal, this court referenced several factors that supported the patrolman's concern for Nickelson's welfare. Notably, Nickelson pulled off the highway in the middle of a cold night into an area where no buildings were located and following Nickelson complied with the agency's policy to check the welfare of any occupants in a vehicle that pulled off the roadway. To that end, the court found the patrolman's reasons for approaching Nickelson's vehicle justified the public-safety stop. 33 Kan. App. 2d at 365.

Similarly, in *State v. Schuff*, 41 Kan. App. 2d 469, 202 P.3d 743 (2009), officers received a report at 1 a.m. that a car drove through a dead end and stopped at the edge of a field. An officer responded, parked roughly 20 yards from the car, and approached the vehicle to verify the well-being of its occupants. When the driver rolled down the window, the officer smelled marijuana which then led to Schuff's prosecution and conviction for possession of marijuana. On review, this court determined the circumstances justified the officer's welfare check of the vehicle's occupants. 41 Kan. App. 2d at 476.

A bit of additional research further buttresses the district court's conclusion that the encounter between McDonald and Deputy Regalado fell within the ambit of a lawful public-safety stop. First, this court has found that when a person is reported to allegedly be suicidal, a law enforcement officer's conservative effort to verify their safety does not skirt the Fourth Amendment. See *City of Salina v. Ragnoni*, 42 Kan. App. 2d 405, 411, 213 P.3d 441 (2009); *Tilson*, 2013 WL 2920147, at *2-3. Also, returning to

McKenna, this court acknowledged that the particular characteristics of a given area may contribute to the validity of a safety stop. In that case, the circumstances which gave rise to a police officer's need to make contact with McKenna occurred in an area known for significant drug trafficking activity. 57 Kan. App. 2d at 735.

This case shares similarities with *Nickelson* and *Schuff* in that Deputy Regalado encountered an occupied vehicle under somewhat unusual circumstances. His apprehension was then heightened by the fact that he had firsthand knowledge that it was a location of choice as of late for those wishing to inflict self-harm. In that respect, Regalado's concern has, as its foundation, the same disquiet expressed in *Ragnoni*, *Tilson*, and even *McKenna*. All five prior cases, discussed here, joined now by McDonald's, provide objective, specific, and articulable foundations for their respective public-safety inquiries. The district court properly denied McDonald's motion to suppress.

Affirmed.

* * *

HURST, J., dissenting: This appeal stems from McDonald's motion to suppress evidence obtained during his encounter with the deputy at Milford State Park as explained in the majority opinion. In denying McDonald's motion to suppress, the district court appears to have found both that the deputy did not seize McDonald during the encounter, and that the deputy's nonseizure was permitted by the public-safety exception to the Fourth Amendment's prohibition against unreasonable searches and seizures. However, a valid public-safety stop necessarily requires a finding that the deputy seized McDonald. To be clear, I find that the deputy did seize McDonald during the encounter at issue here, and further that the deputy lacked a specific, objective, and articulable reason to do so. Therefore, the deputy's seizure of McDonald was not a valid public-safety stop under the Fourth Amendment, and the district court erred in denying McDonald's motion to suppress.

1. *District Court's Determinations*

This court reviews the district court's denial of McDonald's motion to suppress using a bifurcated standard, first determining

if substantial competent evidence supports the district court's factual findings and then conducting a de novo review of the district court's legal conclusions based upon those factual findings. *State v. Chapman*, 305 Kan. 365, 369-70, 381 P.3d 458 (2016). Here, the district court did not specifically enumerate the factual findings upon which it based its legal conclusions. Even assuming, however, that the district court agreed with all of the State's factual contentions made through the deputy's testimony, the district court's legal conclusions are not supported by those facts.

The district court made two seemingly contradictory legal conclusions, finding both that the deputy conducted a valid public-safety stop (which necessarily entails a seizure) but also that he never seized McDonald. The court found that the officer's "actions amounted to a public welfare stop" and reasoned that if the officer "had stopped when he could see the dome light on, and then ten minutes later the person—maybe not you, but some other person—blew their brains out, he—the sheriff's department would be sued for why he didn't take further action." McDonald's attorney sought clarification and asked, "Is the court finding that [McDonald] was detained?" The district court responded, "No . . . he was not detained."

2. *The Deputy Seized McDonald*

The Fourth Amendment to the United States Constitution preserves "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. On appeal, this court is asked only to address whether the district court properly invoked the public-safety exception to the Fourth Amendment's prohibition against unreasonable searches and seizures to deny McDonald's motion to suppress the evidence found during his encounter with the deputy. Thus, the parties seem to concede that the deputy seized McDonald during the encounter. Determining whether a law enforcement encounter constitutes a seizure of a person triggering Fourth Amendment protections depends on whether, "under the totality of the circumstances, the law enforcement officer's conduct conveys to a reasonable person that he or she was free to refuse the requests or otherwise end the encounter." *State v. Thompson*, 284

Kan. 763, 775, 166 P.3d 1015 (2007); see *State v. Thomas*, 291 Kan. 676, 682, 246 P.3d 678 (2011); *State v. McGinnis*, 290 Kan. 547, 552, 233 P.3d 246 (2010); *State v. Pollman*, 286 Kan. 881, 887, 190 P.3d 234 (2008).

Here, the deputy testified that he intended to seize McDonald, and McDonald was not free to leave until after the deputy checked his welfare and identity. Under the circumstances, it was reasonable for McDonald to believe he was not free to leave when the deputy pulled perpendicularly behind McDonald's vehicle, activated his rear emergency lights, exited his vehicle, approached McDonald's passenger window, and asked McDonald to roll his window down. Because the parties apparently do not dispute that the deputy seized McDonald, there is no need to analyze this issue, but it is important to note that the district court's reliance on the public-safety exception to the Fourth Amendment's prohibition on unreasonable searches and seizures is only necessary if McDonald was, in fact, seized during the encounter.

3. *The Seizure Was Not a Lawful Public-Safety Stop*

Because a reasonable person in McDonald's position would not have felt free to leave, the deputy's encounter with McDonald was not voluntary, and the court's next step is to determine whether the deputy was permitted to seize McDonald for public-safety reasons. See *State v. Williams*, 297 Kan. 370, 376, 300 P.3d 1072 (2013) (voluntary police encounters do not trigger Fourth Amendment protections). Police officers are often placed in a position to assess and ensure public safety, and this court does not discourage those public-safety actions. To that end, police officers may seize individuals solely for public-safety reasons when the officer believes such a stop is necessary to protect the public based on the objective, specific, and articulable facts of the situation. *State v. Ellis*, 311 Kan. 925, 929-30, 469 P.3d 65 (2020); *State v. Vistuba*, 251 Kan. 821, 824, 840 P.2d 511 (1992); *State v. Gonzales*, 36 Kan. App. 2d 446, 456, 141 P.3d 501 (2006).

These public-safety stops must be "'totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.'" *City of Topeka v. Grabauskas*, 33 Kan. App. 2d 210, 214-15, 99 P.3d 1125 (2004) (quoting *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S. Ct. 2523, 37 L. Ed. 2d 706

[1973]). Additionally, the scope of a public-safety stop may not exceed the safety-related justification for the stop. *Ellis*, 311 Kan. at 932-33. This court's "[c]ases recognizing the public safety or community caretaking exception have consistently acknowledged that such actions should be scrutinized carefully so the protections of the Fourth Amendment are not emasculated." *Gonzales*, 36 Kan. App. 2d at 455.

a. *The Deputy Lacked Specific, Objective, and Articulable Facts to Justify a Public-Safety Stop*

The majority asserts that the deputy's decision to seize McDonald for public-safety reasons was supported by the deputy's assertion that there had been recent incidents of self-harm in the area. First, there is not substantial competent evidence establishing Milford State Park as an area known for self-harm, and the district court made no such factual finding. The deputy testified that Milford Lake was an area where there were "a lot of issues . . . that people go out there to either self-harm or to conduct other illegal activities." In the deputy's five years of working for the Geary County Sheriff's Department, he testified to his involvement with one incident of self-harm at Milford State Park which was "an incident of murder/suicide." That was the total evidence submitted regarding the propensity for activities of self-harm at Milford State Park. While the district court did not make a factual finding that Milford State Park was an area commonly known for self-harm, the court did explain that the stop "was for welfare" and that the deputy "had reason to do it," and "had to make sure that everything was all right." Given the court's legal conclusion, it is reasonable to believe that the court believed the deputy's testimony that the area was known for self-harm. However, the deputy's testimony concerning one incident of murder/suicide in five years was not substantial competent evidence supporting such a factual finding. This court is not required to accept the district court's erroneous or unsubstantiated factual findings. See, e.g., *State v. White*, 289 Kan. 279, 288-89, 211 P.3d 805 (2009) (finding the district court's factual findings not supported by substantial competent evidence).

However, even assuming that the deputy's testimony was enough to support a factual finding that Milford State Park was an area known for self-harm, the State failed to identify a single objective, specific, and articulable fact about McDonald that caused the deputy to become concerned about McDonald's safety. It is imperative that the narrow public-safety exception to Fourth Amendment protections not be mutated to the point where it "emasculate[s] the constitutional protection afforded" to individuals. *State v. Ludes*, 27 Kan. App. 2d 1030, 1035, 11 P.3d 72 (2000).

The deputy testified that he encountered McDonald at about 9 p.m. in an area he described as "secluded" and "near the entrance of Outlet Park at the gathering ponds near Milford Lake" which was in a "parking area . . . next to some information posters for the gathering ponds and lakes." The district court did not make a factual finding regarding whether this public parking area near the entrance to the gathering ponds was "secluded." Other than the assumption of Milford State Park being an area prone to self-harm activities, the deputy cited no specific, objective, and articulable facts about McDonald's conduct—being parked in the public parking area near the entrance and information posters during the park's operating hours—that supported a finding that McDonald could be in some type of peril. To find a valid public-safety seizure here undermines the Fourth Amendment's promise of freedom from unreasonable seizures.

If the State is permitted to seize every individual parked in a public parking area of an open public park after dark where one "incident of murder/suicide" had occurred in the past five years, and one police officer described it as an area where there are "a lot of issues . . . that people go out there to either self-harm or to conduct other illegal activities," then the State can effectively carve out entire zones in a community where occupants are not afforded Fourth Amendment protections. Even assuming the deputy's statements constitute substantial competent evidence supporting a factual finding that Milford State Park is, in fact, an area known for self-harm, the district court erred in its legal conclusion that the deputy had objective, specific, and articulable facts supporting McDonald's seizure. There is no evidence that the time of

day the deputy encountered McDonald, 9 p.m., related to the likelihood that McDonald may be engaged in self-harm. Nor was there evidence that the people who go to the park to "either self-harm or to conduct other illegal activities" occurred in the public parking lot where McDonald was parked. Moreover, McDonald was alone—which is unlike the only specific incident of self-harm, a murder/suicide, cited by the deputy as his reason for being concerned about McDonald's safety. Simply, nothing about McDonald's specific conduct—even assuming Milford State Park is an area known for self-harm—provides objective, specific, and articulable facts supporting the deputy's authority to properly seize McDonald for a public-safety reason. A proper public-safety stop requires more.

None of the cases relied upon by the majority support its decision to create an entire area of a community where the Fourth Amendment simply does not apply. In all five of the cases, the police officer(s) identified at least some specific, articulable facts—far beyond what the deputy offered here—to justify the public-safety seizure of the individual. See *State v. McKenna*, 57 Kan. App. 2d 731, 735, 459 P.3d 1274 (2020); *City of Salina v. Ragnoni*, 42 Kan. App. 2d 405, 406, 411, 213 P.3d 441 (2009); *State v. Schuff*, 41 Kan. App. 2d 469, 470, 476, 202 P.3d 743 (2009); *Nickelson v. Kansas Dept. of Revenue*, 33 Kan. App. 2d 359, 365, 102 P.3d 490 (2004); *State v. Tilson*, No. 108,253, 2013 WL 2920147, at *1-3 (Kan. App. 2013) (unpublished opinion).

In *Nickelson*, the seized individual had pulled his vehicle off the highway at 1 a.m. on a cold night in a remote area where "no farm buildings, outbuildings, businesses, or residences" were around. 33 Kan. App. 2d at 365. Moreover, the Kansas Highway Patrol had a policy of performing a welfare check on any vehicle pulled off the side of the road. Similarly, in *Schuff*, the seized individual had driven off the paved road and parked in a remote area next to a field around 1 a.m. Moreover, a concerned citizen had called the police to alert them to the possibly endangered occupants of the vehicle that had driven off the paved road in a remote area. 41 Kan. App. 2d at 470, 476. Unlike the specific, objective facts in *Nickelson* and *Schuff*, which made officers concerned that someone needed help or was in peril, McDonald was

lawfully parked in the parking lot of a public park while it was still open and could be seen moving around inside his vehicle. In other words, none of the factors validating the public-safety stops in *Nickelson* or *Schuff*—such as the lateness of the hour (1 a.m.), the car being parked off the roadway (not in a parking lot), the remoteness of the area, the lack of public or private amenities nearby, or a report from a concerned citizen requesting an officer to investigate—were present in this case. The majority describes where McDonald parked as "secluded," but the testimony is clear that he was legally parked in a parking lot at a public park during operating hours—not in a field after driving off the road or the shoulder of a highway (which is not a legal parking spot). And although it was dark, it was only about 9 p.m. at the time of the encounter and the park was still open. Nothing here, other than the park itself, which the officer personally associated with one incident of murder/suicide, demonstrated McDonald was in some type of peril.

Additionally, the deputy had no specific, articulable reason to believe McDonald was in danger of self-harm. In *Ragnoni*, the seized individual's ex-wife reported to the police that he was suicidal. 42 Kan. App. 2d at 406. Similarly, in *Tilson*, the seized individual had been reported to the police as suicidal by his friend and was found wandering near an intersection after crashing his car. 2013 WL 2920147, at *1-3. Here, on the other hand, no one reported to the deputy—or anyone else—that McDonald was suicidal. Nor was McDonald wandering about the streets after having wrecked his car. Again, the factors upon which this court upheld the public-safety stops in *Ragnoni* and *Tilson* are absent from this case. I do not concede that the State established that the Milford State Park itself is a place where people routinely engage in self-harm—but even assuming it had—that alone is not enough to seize all of its occupants without some fact specific to the occupant that leads an officer to believe they are in danger of self-harm.

Finally, in *McKenna*, the seized individual was found parked at 2 a.m. in a residential neighborhood purported to be a high drug-trafficking area with her window down, dome light on, slumped over, and unresponsive when an officer shined a spotlight on her. Here, McDonald was in the parking lot of a public park during operating hours, and the deputy did not observe McDonald to be unresponsive or slumped over indicating a possible need for medical care. In fact, as the majority notes, the deputy heard McDonald speaking on the phone and saw him

moving before he reached McDonald's window and detected the odor of marijuana. Far from believing McDonald was unresponsive or in peril like the individual in *McKenna*, the deputy was aware that McDonald was awake and speaking on the phone. To permit McDonald's seizure here would be to authorize the seizure of anyone in a dangerous or high drug-trafficking area—even those not slumped over and unresponsive in their cars at 2 a.m.—because the alleged dangerous nature of the public park (as an area where people engaged in self-harm) is the only fact McDonald's seizure shares in common with the seizure in *McKenna*.

b. *The Deputy's Stop Exceeded Any Purported Public-Safety Reasons*

Even assuming the deputy had an objective, specific, and articulable reason to believe McDonald was in danger of self-harm or other peril, the scope of a public-safety stop may not exceed the safety-related justification for the stop. *Ellis*, 311 Kan. at 932-33; see *Gonzales*, 36 Kan. App. 2d at 455. The deputy's hunch that McDonald may be in peril was extinguished when he heard McDonald speaking on the phone—which occurred well before the deputy detected the odor of marijuana. Accordingly, once the deputy became aware that McDonald was not in peril, his further detention and questioning of McDonald (during which he detected the odor of marijuana) was beyond the scope of the alleged safety-related justification for the stop. See *State v. Morales*, 52 Kan. App. 2d 179, 186, 363 P.3d 1133 (2015) (rejecting a public-safety justification for a seizure because the officer's alleged safety-related reason for conducting the stop had "evaporated"). The deputy's suspicion was insufficient "to override [McDonald's] right to be left alone," and, in any event, that elusive hunch had evaporated before the deputy detected the odor of marijuana. See *Ludes*, 27 Kan. App. 2d at 1035.

c. *The Deputy's Stop of McDonald Was Not Divorced from Detection or Investigation*

Public-safety stops cannot be used for investigation purposes. See, e.g., *Morales*, 52 Kan. App. 2d at 183 ("[P]ermitting the public safety rationale to serve as a pretext for an investigative detention runs the risk of emasculating our Fourth Amendment protection."); see also *State v.*

Marx, 289 Kan. 657, 663, 215 P.3d 601 (2009). The deputy acknowledged at the suppression hearing that as he walked up to McDonald's vehicle—before checking on McDonald's safety—he radioed in McDonald's license plate number. He further testified that if McDonald had declined to speak to him, the deputy would have "check[ed] who he was" by "running a license plate" to "make sure I didn't have a BOLO at that time." The deputy's public-safety stop was not totally divorced from investigation or detection when he ran McDonald's tags before checking on McDonald's welfare. See, e.g., *Morales*, 52 Kan. App. 2d at 186-87 (running a license plate immediately upon pulling behind someone was inconsistent with conducting a public-safety stop); see also *State v. Messner*, 55 Kan. App. 2d 630, 635-38, 419 P.3d 642 (2018) (obtaining the defendant's driver's license during a public-safety stop to check for warrants exceeded public-safety stop).

CONCLUSION

Even assuming that the deputy could or did establish that Milford State Park was an area known for self-harm, the State failed to present objective, specific, and articulable facts regarding McDonald's conduct at the park to support seizing him for public-safety reasons. I cannot join the majority's declaration that Milford State Park is a Fourth Amendment-free zone after dark. McDonald's motion to suppress should have been granted. There is no denying the benefits afforded by a police officer's properly performed community caretaking function, but it is imperative that the right to be free from unreasonable searches and seizures not be swallowed by those efforts. I respectfully dissent.

(525 P.3d 767)

No. 122,782

STATE OF KANSAS, *Appellee*, v. DZUNG N. NINH, *Appellant*.

Petition for review filed March 13, 2023

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Statutory Definition of Rape When Victim Is Overcome by Force or Fear—Not Unconstitutionally Vague*. K.S.A. 2021 Supp. 21-5503(a)(1)(A), the statute defining rape when the victim is overcome by force or fear, is not rendered unconstitutionally vague by inclusion of language prohibiting a defendant from asserting that they "did not know or have reason to know that the victim did not consent to the sexual intercourse, that the victim was overcome by force or fear, or that the victim was unconscious or physically powerless." K.S.A. 2021 Supp. 21-5503(e). The statute gives fair warning of what is prohibited conduct and avoids arbitrary and unreasonable enforcement by leaving intact the State's burden to prove a victim was overcome by force or fear.

2. SAME—*Statutory Definition of Aggravated Criminal Sodomy When Victim Is Overcome by Force or Fear—Not Unconstitutionally Vague*. K.S.A. 2021 Supp. 21-5503(b)(3)(A), the statute defining aggravated criminal sodomy when the victim is overcome by force or fear, is not rendered unconstitutionally vague by inclusion of language prohibiting a defendant from asserting that they "did not know or have reason to know that the victim did not consent to the sexual intercourse, that the victim was overcome by force or fear, or that the victim was unconscious or physically powerless." K.S.A. 2021 Supp. 21-5504(f). The statute gives fair warning of what is prohibited conduct and avoids arbitrary and unreasonable enforcement by leaving intact the State's burden to prove a victim was overcome by force or fear.

3. SAME—*Victim's Fear Family Would Be Harmed Is Sufficient to Find Victim Was Overcome by Force or Fear—Sustained Conviction for Rape or Aggravated Criminal Sodomy.* A victim's expressed fear that their family stability or structure would be harmed if they did not submit to being raped or sodomized is sufficient for a rational fact-finder to find the victim was overcome by force or fear to sustain a defendant's conviction for rape or aggravated criminal sodomy.

4. SAME—*No Requirement of Explicit Threats to Prove Victim Was Overcome by Force or Fear*. The State is not required to prove the defendant made explicit threats of physical force or violence in order to prove the victim of rape or aggravated criminal sodomy was overcome by force or fear.

5. SAME—*Conviction for Rape and Aggravated Criminal Sodomy—No Evidence Required to Be Presented Defendant Made Verbal Threat of Specific Harm*. In convicting a defendant for rape and aggravated criminal sodomy,

a rational fact-finder may find that a victim was sufficiently overcome by an expressed fear of specific harm even when no evidence is presented that the defendant ever made verbal threats of that same specific harm.

6. SAME—*Prosecutorial Error—Misstating Law if Characterize Grooming as Force Sufficient to Sustain Conviction for Rape or Aggravated Criminal Sodomy*. It is error for a prosecutor to misstate the law by characterizing "grooming" as a form of force sufficient to sustain a defendant's conviction for rape or aggravated criminal sodomy in violation of K.S.A. 2021 Supp. 21-5503(a)(1)(A) and K.S.A. 2021 Supp. 21-5504(b)(3)(A).

7. SAME—*Trial—Prosecutor's Reference to Defendant as Rapist Not Error.* The prosecutor's reference to the defendant as a rapist during closing argument was not error when arguing that the evidence presented demonstrates the defendant committed rape.

8. SAME—*Sixth Amendment Right to Jury Trial—Incorporated to State Criminal Prosecutions—Right to Unanimous Verdict in Federal as well as State Court Defendants*. The Sixth Amendment right to a jury trial in federal criminal cases is incorporated, via the Fourteenth Amendment, to state criminal prosecutions thus extending the Sixth Amendment right to a unanimous verdict in federal criminal proceedings to state court criminal defendants.

9. SAME—*Claim of Multiple Acts Issue—Challenge to Sufficiency of Evidence*. The defendant's claim that the State both submitted evidence of multiple acts but failed to present sufficient evidence from which a jury could unanimously agree on the underlying act supporting each conviction, and that the unanimity instruction did not cure the multiple acts issue, is essentially a challenge to the sufficiency of the evidence and not a constitutional challenge to the unanimity of the verdict.

Appeal from Sedgwick District Court; JEFFREY SYRIOS, judge. Opinion filed February 10, 2023. Affirmed.

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

Matt J. Maloney, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before HURST, P.J., GARDNER, J., and PATRICK D. MCANANY, S.J.

HURST, J.: Dzung N. Ninh appeals what amounts to a life sentence in prison resulting from his multiple convictions including rape, indecent liberties with a child, and aggravated criminal sodomy related to allegations that over the course of more than four years he sexually assaulted, raped, and sodomized his victim.

Ninh challenges his convictions on multiple grounds and claims specifically:

(1) the Kansas rape and aggravated criminal sodomy statutes are unconstitutional;
(2) the State presented insufficient evidence to sustain his convictions for rape and aggravated criminal sodomy;
(3) the State committed reversible error in the opening and closing statements; and
(4) the State violated his right to a unanimous verdict.

While this court does agree that the prosecutor misstated the law in closing arguments, such misstatement did not prejudice Ninh considering the totality and abundance of the State's evidence and Ninh's asserted defense. This court finds none of Ninh's claims availing. Ninh's asserted ambiguity does not make the Kansas rape and aggravated criminal sodomy statutes unconstitutional; the State presented sufficient evidence to support Ninh's convictions; Ninh's asserted prosecutorial errors do not constitute reversible error; and the State did not violate Ninh's right to a unanimous verdict. The jury's verdict is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

The underlying facts of this case are important to this court's analysis and as such, are included in some detail. In October 2017 the State charged Ninh with numerous sex crimes against the victim that allegedly occurred between August 15, 2013, and September 7, 2017. The facts supporting Ninh's charges are reviewed herein chronologically to assist with this court's analysis.

1. *The Victim's Trial Testimony About Incidents in 2013*

The victim turned 13 years old shortly after moving to the United States in the summer of 2013 and she started spending more time with Ninh. She said their relationship began to make her feel uncomfortable because Ninh started touching her and grabbing parts of her body "to the point where [she] didn't like it." She said the touching escalated into Ninh grabbing her breasts. The victim explained that she would sit on Ninh's lap while he showed her things on his computer, and he would grab her breasts

over her clothing. Later that summer, before school had started, Ninh started putting his hands under her bra or removing her bra and touching, playing with, and grabbing her bare breasts.

After school started in 2013, the victim testified that she would be home alone with Ninh for two to three hours in the evening, and he continued to touch her breasts during that time. Over the course of the 2013-2014 school year, she estimated Ninh touched her breasts 15 or 20 times. There were times where she pushed Ninh's hand off her breast or told him to stop; sometimes Ninh would stop and other times he would try to put his hand back on her breast.

The victim testified that during this same time, Ninh also began touching her vagina on the outside of her clothes while they were sitting in the computer area. The victim said that type of touching occurred five or six times during that school year. She explained that she would try to move Ninh's hand by grabbing it and pulling it away and asking Ninh to please stop. During that same school year, Ninh also began touching her vaginal area underneath her clothing, and she estimated that occurred five or six times during that school year.

At some point during that school year, Ninh made the victim promise not to tell anybody about how he touched her. At that time, the only person she had told about the touching was her younger sister because she believed her sister would not tell anyone. During this time, the victim felt like Ninh was monitoring her behavior and who she was talking to in order to make sure she did not tell anyone, and that monitoring made her fearful or concerned that Ninh would find out if she told anyone.

2. *The Victim's Trial Testimony About Incidents from 2014 to 2015*

The victim testified that Ninh's molesting touches continued into the next school year, and that he began coming to her bedroom at night. The victim explained that Ninh would come into her room around 12:30 or 1 a.m. and come to her bed, lift the comforter and grab her breast, and would pull down her pants and touch her vagina—running his finger "in between" her vagina and massaging it.

The victim confirmed that during this time, when she was about 14 years old, she never asked Ninh to touch her, she did not consent to the touching, and she did not want it to continue. The victim said she did not know how many times Ninh touched her in this way during that school year—there were two- to three-day gaps of Ninh not touching her, "[a]nd then there are times where it would be two weeks, maybe three, and then it happened again." The victim considered telling her mother about what Ninh was doing but decided not to because she was worried it would hurt her family. "It was just constantly me thinking, well, should I tell my mom and entirely break up my family or should I let this happen so that my siblings actually grew up with a father."

3. *The Victim's Trial Testimony About Incidents from 2015 to 2016*

The victim testified that Ninh continued touching her like he had the prior year—by putting his hand under her comforter, grabbing her breasts, pulling her pants down to put his finger "inside those flaps" of her vagina, and to massage her vagina. She said she started wearing a bra to bed at night to try to deter Ninh from touching her breasts and signal that she "didn't want this anymore."

The victim testified that Ninh's molestation progressed and that around January 2016, Ninh began using his mouth on her breasts. She explained that she would keep her comforter over her head to avoid seeing what Ninh was doing to her. She described her shared bedroom as having enough space for a person to sit on the floor or rest on their knees over her bed without disturbing her sister's bed and she believed that is how Ninh positioned himself while she hid. She testified that Ninh would lift her shirt to her armpits, move or remove her bra, and he "sucked on [her] breast" while he would also touch her vagina. When asked how many times Ninh sucked her breasts during this time, the victim testified, "It's like once he gets access to this he starts doing it more often." She also testified that Ninh began using his mouth on her vagina at some point between 2015 and 2016.

4. *The Victim's Trial Testimony About Incidents from 2016 to 2017*

The victim testified that Ninh continued touching her breasts and vagina and using his mouth on her breasts and vagina during 2016 and

2017. She testified specifically about how Ninh would enter her bedroom when she was already in bed and, leaning over her bed, he would use his mouth on her breasts and then pull her pants down to her knees and move her legs open. He would use his mouth on her breasts and begin "licking" and using his mouth on her vagina. She testified that Ninh used his mouth on her vagina "once or twice" during 2016 and 2017, but he stopped coming into her room when she began dating someone. The victim was 16 when Ninh stopped coming into her room at night to sexually assault her. She testified that she "constantly" thought about telling her mom, but when Ninh stopped, she decided not to tell her mom to avoid something "big" happening to harm her family.

5. *The Victim's Trial Testimony About Incidents from 2017 to 2018*

In 2017, the victim was still dating the person that she dated in 2016. During the course of their relationship, she testified that her boyfriend "somehow knew that there was stuff happening," and asked her about it. The victim eventually told her boyfriend generally about how Ninh had been touching her and had "used his mouth on" her. Her boyfriend said that she needed to tell her mother about the abuse, but she did not want to "destroy [her] family." Her boyfriend eventually convinced her, and she wrote her mother a letter stating that Ninh had been touching her, that she understood she should have told her mother sooner, but that she was scared. She testified that she was "afraid that this would do something to our family." She talked to her mother about the note the next day on the drive to school but did not discuss all the details of how Ninh had been touching her. She testified that she wanted to talk to her mom about the note on another occasion, but her mother seemed tired, and she did not want to bother her mother.

On September 7, 2017, the last incident occurred between Ninh and the victim. She testified that at approximately 11 p.m. she was doing her homework in the computer area while simultaneously on a video call with her boyfriend. Ninh came up to her and "grabbed [her] hand" and "pulled [her] over to [another] room." She said Ninh started doing "his routine"—the types of

touching he had done with her before—except this time he penetrated her vagina with his penis. She testified that she left her laptop open while on the video chat with her boyfriend, which allowed him to see and hear most of the encounter. The next day, her boyfriend told the victim's mother that he witnessed the sexual encounter between the victim and Ninh the prior evening. Her mother then called the police.

6. *The Police Investigation*

On September 8, 2017, in response to the victim's mother's report, local police officer D.K. went to the family's home to investigate. Officer D.K. took various photos of the rooms and items inside the home and talked to the victim in her front yard. Officer D.K.'s Axon body camera recorded the conversation with her, and that footage was played for the jury. The body camera footage showed the victim briefly recount the escalating series of touching she said she experienced between 2013 and 2017. She said that "[Ninh] has violated [her] body." She explained that the abuse "started when [she] was 13. . . . That was when [she] first came over here" from another country. She stated that she had never had a father figure before Ninh, and when he started touching her, she "did not" have any knowledge of whatever that is. "Like I don't know much because before I came over here the teachers in my country they don't teach that stuff." She explained that she did not understand that Ninh was doing something wrong until he made her promise she would not tell anyone what he was doing.

The victim told Officer D.K. that she "was freaked out" and that she "didn't know what to do" but she could not bring herself to tell her mom. While explaining the incidents to Officer D.K., she said, "[I]t was getting so bad to the point where I was scared to go to sleep, like I stayed up until 1 or 2 in the morning." When Officer D.K. asked her why she had not told her mom about the incidents, she said she was "scared, [she] felt ashamed," and she also "wanted to do anything [she] could to protect the family."

Later that evening, local Detective C.Z. with the Exploited and Missing Children's Unit (EMCU) interviewed the victim, and that interview was recorded and played for the jury. During that interview, she again recounted the various ways Ninh had touched

her from 2013 to 2017. The allegations she made to Detective C.Z. tracked the allegations she made in her trial testimony, though the amount of touching and the timeline she told Detective C.Z. varied slightly from her trial testimony.

The victim told Detective C.Z. that Ninh began grabbing her breasts in July 2013. She told Detective C.Z. that she knew she needed to tell her mother about the touching, but she was scared because she had not lived with her mother for so long. Early in the abuse, Ninh was touching her and asked her to promise not to tell anyone what he was doing. She stated she did not know what to do after that request, so she promised him that she would not tell anyone about the abuse. As she got older, Ninh was busier and "wasn't touching [her] that much" but he was still doing it occasionally, and she believed he touched her breasts and vagina "100 or more" times during 2013.

She told Detective C.Z. that from 2014 to 2015, Ninh started coming into her room at night and would touch her breasts under her shirt and he "started trying to put his finger inside my vagina," but it would hurt and she would pull away. She said Ninh came into her room to touch her breasts and vagina "50 or so" times from 2014 to 2015. She said from 2015 to 2016, Ninh continued touching her breasts and vagina with his hands, but also started using his mouth on her breasts and vagina. She estimated Ninh did this 30 or 40 times during this timeframe. She said Ninh continued coming into her bedroom around the time she started school in 2016 and would touch her breasts and vagina with his hands and mouth. When she started talking to her boyfriend in October 2016, Ninh stopped coming into her bedroom.

During that interview, she told Detective C.Z. that Ninh did not touch her again until September 7, 2017, when Ninh penetrated her vagina with his penis. She did not tell Detective C.Z. that she and her boyfriend had planned for him to see the encounter on their video call but did say that her boyfriend was on a video call during the encounter and likely saw or heard what happened. She said that day after school, her boyfriend told her mother what happened, and her mother called the police.

A sexual assault nurse examiner conducted an examination on the victim late in the evening on September 8, 2017, to note any injuries and collect swabs for potential DNA testing. The nurse

said the victim recounted what happened with Ninh the previous night, and then told her about the history between her and Ninh. The swabs were sent to the County Regional Forensic Science Center and were tested for DNA evidence. A forensic scientist with the County Regional Forensic Science Center testified that the DNA profile obtained from a swab of the victim's right breast was consistent with Ninh's DNA profile, meaning Ninh could not be excluded as the source of that DNA.

7. *Jury Trial and Sentencing*

The State charged Ninh with the following seven counts:

(1) Aggravated indecent liberties with a child in violation of K.S.A. 2013 Supp. 21-5506(b)(3)(A), (c)(2)(C), (c)(3), for actions that occurred between August 15, 2013, and May 30, 2014;

(2) Rape in violation of K.S.A. 2014 Supp. 21-5503(a)(1)(A), for actions that occurred between August 15, 2014, and May 30, 2015;

(3) Rape in violation of K.S.A. 2014 Supp. 21-5503(a)(1)(A), for actions that occurred between August 15, 2014, and May 30, 2015;

(4) Rape in violation of K.S.A. 2015 Supp. 21-5503(a)(1)(A), for actions that occurred between August 15, 2015, and May 30, 2016;

(5) Aggravated criminal sodomy in violation of K.S.A. 2015 Supp. 21-5504(b)(3)(A), for actions that occurred between August 15, 2015, and May 30, 2016;

(6) Aggravated criminal sodomy in violation of K.S.A. 2016 Supp. 21-5504(b)(3)(A), (c)(2)(A), for actions that occurred between August 15, 2016, and May 30, 2017; and

(7) Rape in violation of K.S.A. 2017 Supp. 21-5503(a)(1)(A), (b)(1)(A), for actions that occurred on September 7, 2017.

After a five-day trial in January 2020, a jury found Ninh guilty of Counts 1-6 but acquitted Ninh on Count 7. The district court sentenced Ninh to a hard 25 life sentence, running consecutive to five concurrent 165-month prison sentences. Ninh appeals.

DISCUSSION

Ninh appeals his convictions on four separate grounds, alleging: (1) the Kansas rape and aggravated criminal sodomy statutes are unconstitutional; (2) there was insufficient evidence to support his convictions for rape and criminal sodomy; (3) the State committed reversible prosecutorial error in its opening and closing statements; and (4) the State violated his right to a unanimous verdict.

I. THE KANSAS RAPE AND AGGRAVATED CRIMINAL SODOMY STATUTES AT K.S.A. 21-5503(a)(1)(A) AND K.S.A. 21-5504(b)(3)(A) ARE NOT UNCONSTITUTIONALLY VAGUE

Ninh argues that the Kansas rape and aggravated criminal sodomy statutes are unconstitutionally vague, and thus his convictions for those crimes must be reversed. The jury convicted Ninh of three counts of rape, which is defined as "(1) Knowingly engaging in sexual intercourse with a victim who does not consent to the sexual intercourse under any of the following circumstances: (A) When the victim is overcome by force or fear." K.S.A. 2021 Supp. 21-5503(a)(1)(A).

The jury also convicted Ninh of two counts of aggravated criminal sodomy, which is defined as "(3) sodomy with a victim who does not consent to the sodomy or causing a victim, without the victim's consent, to engage in sodomy with any person or an animal under any of the following circumstances: (A) When the victim is overcome by force or fear." K.S.A. 2021 Supp. 21-5504(b)(3)(A).

The rape and aggravated criminal sodomy statutes under which the jury convicted Ninh contain substantially similar subsections limiting the defendant's ability to use a lack of knowledge as a defense. Those subsections provide that:

"[I]t shall not be a defense that the offender did not know or have reason to know that the victim did not consent to the sexual intercourse, that the victim was overcome by force or fear, or that the victim was unconscious or physically powerless." K.S.A. 2021 Supp. 21-5503(e).

"[I]t shall not be a defense that the offender did not know or have reason to know that the victim did not consent to the sodomy, that the victim was overcome by force or fear, or that the victim was unconscious or physically powerless." K.S.A. 2021 Supp. 21-5504(f).

Ninh argues that these subsections render both the rape and aggravated criminal sodomy statutes unconstitutional. Specifically, he claims that these subsections deny him, and any accused, notice that their actions could be criminal, and fail to provide explicit standards for statutory enforcement. See K.S.A. 2021 Supp. 21-5503(e); K.S.A. 2021 Supp. 21-5504(f).

Ninh preserved this issue for appeal by objecting to the inclusion of the "it is not a defense" language in the jury instructions, arguing it was unconstitutionally vague. He also raised this vagueness argument in his motion for a new trial and at the sentencing hearing. In any event, Ninh's constitutional challenge satisfies exceptions to the general prohibition against raising constitutional challenges for the first time on appeal because it involves only a question of law and will be determinative of the case, and review of the claim is necessary to preserve Ninh's fundamental rights. See *State v. Johnson*, 309 Kan. 992, 995, 441 P.3d 1036 (2019) (outlining the exceptions permitting appellate review of constitutional challenges brought for the first time on appeal).

1. *Standard of Review*

This court exercises unlimited review to interpret a statute in response to a challenge that the statute is unconstitutionally vague. *State v. Jenkins*, 311 Kan. 39, 52, 455 P.3d 779 (2020). Appellate courts use a two-prong test to determine whether a statute is unconstitutionally vague, first asking whether the statute gives fair warning to those potentially subject to it, and second, whether the statute sufficiently guards against arbitrary and unreasonable enforcement. In doing so, this court must determine whether a person of ordinary intelligence can understand what conduct is prohibited by the challenged statutory language. 311 Kan. at 53. Kan-

sas courts have long held that a statute will not be declared unconstitutionally vague where "it employs words commonly used, previously judicially defined or having a settled meaning in law." *In re Brooks*, 228 Kan. 541, 544, 618 P.2d 814 (1980). Moreover, this court presumes statutes are constitutional and resolves all doubts in favor of the statute's validity. Ninh, as the party challenging these statutes' constitutionality, bears the burden to overcome this presumption. *Jenkins*, 311 Kan. at 53.

It appears that Ninh's specific argument has not yet been addressed by the Kansas Supreme Court, and whether the challenged language makes the statute vague presents a question of first impression.

2. *Vagueness Analysis*

Ninh couches his argument as one alleging statutory vagueness—but in reality, he objects to these criminal statutes creating strict liability offenses. He also does not argue that the statutory language defining the criminal, prohibited conduct uses uncommon, vague, or unclear words such that a person of ordinary intelligence would not understand the prohibited conduct. Instead, he appears to argue the statutes permit arbitrary or unreasonable enforcement because an accused is not permitted to claim lack of notice of "what was in [the victim's] mind" as a defense. Ninh asserts that because the Kansas Supreme Court assumes the rape statute creates a strict liability crime that does not require mens rea, the Legislature's inclusion of the "it shall not be a defense" subsection makes the entire rape and aggravated criminal sodomy statutes unconstitutionally vague. See *State v. Thomas*, 313 Kan. 660, 663-64, 488, P.3d 517 (2021) (finding that the statute criminalizing rape was not required to have a mens rea component, and the Legislature is not prohibited from creating strict liability criminal offenses with lengthy or harsh sentences). This court sees no difference in Ninh's argument than the one made by the defendant in *Thomas*, which the Kansas Supreme Court rejected.

In *Thomas*, a defendant convicted of rape argued that the "it is not a defense" subsection of the Kansas rape statute effectively made rape a strict liability crime, eliminating the crime's mens rea element and thus violating his due process right to notice. The

court rejected Thomas' argument, finding that it was not unconstitutional for the Legislature to adopt strict liability criminal offenses, even when the statute carried a lengthy potential sentence, and the statutes did not violate the defendant's constitutional due process rights. 313 Kan. at 663-64. This court is bound by the precedent in *Thomas*. See *Snider v. American Family Mut. Ins. Co*., 297 Kan. 157, 168, 298 P.3d 1120 (2013) ("Court of Appeals is duty bound to follow Kansas Supreme Court precedent, absent some indication this court is departing from its previous position").

While Ninh's constitutional objection is not exactly the same as that in *Thomas*, he objects to the same subsections of the rape and aggravated criminal sodomy statutes, claiming they unconstitutionally permit arbitrary and unreasonable enforcement of the crimes. Ninh contends the subsections permit charging someone with rape or aggravated criminal sodomy even if the accused was unaware their sexual partner was overcome by force or fear, thus prosecutors can charge defendants "knowing they do not have to prove the accused knowingly did anything other than have sex or sodomy." This argument holds no merit.

The police may only arrest, and the prosecutors may only charge, a defendant when evidence exists demonstrating the defendant committed the charged crime. The statutes require the State to prove more than the accused merely engaged in sexual intercourse or sodomy with the victim. That is, when the victim did "not consent to the" sexual intercourse or sodomy, and when that "victim is overcome by force or fear." K.S.A. 2021 Supp. 21-5503(a)(1)(A); K.S.A. 2021 Supp. 21-5504(b)(3)(A). While the prosecutor is not required to prove the accused *knew* the victim did not consent and *knew* the victim was overcome by force or fear, the statute still requires proof that the victim in fact did not consent and was overcome by force or fear. The accused's inability to claim ignorance of the victim's nonconsent or being overcome by force or fear does not relieve the State from having to prove every material element of the crime, including that the victim did not consent and was overcome by force or fear.

The Kansas rape and aggravated criminal sodomy statutes use words commonly known and understood by persons of ordinary

intelligence to provide fair warning to those subject to its provisions, and Ninh does not argue otherwise. Rather, he seems to argue that by not permitting a defendant to claim ignorance as to the victim's nonconsent or being overcome by force or fear, permits arbitrary or unreasonable enforcement—but that is a fallacy. To take Ninh's argument to its logical conclusion would prohibit the Legislature from creating strict liability offenses. The statutory language prohibiting the defendant from using ignorance of whether the victim consented or was overcome by force or fear does not negate any of the State's obligations to prove the essential elements of the crime—which Ninh does not object to as being vague—and thus does not permit arbitrary or unreasonable enforcement. This court presumes statutory validity, and Ninh has failed to overcome that presumption.

II. SUFFICIENT EVIDENCE EXISTED FOR A RATIONAL FACT-FINDER TO CONVICT NINH OF RAPE AND AGGRAVATED SODOMY

Ninh's second claim is that the State presented insufficient evidence that the victim was "overcome" by force or fear because her only expressed fears related to consequences to her family or losing privileges—but not for her own safety. Ninh also argues that none of her alleged fears were reasonable because she never suffered any of the feared harm.

In reviewing the sufficiency of the evidence, this court must review the evidence available to the fact-finder in the light most favorable to the State "to determine whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt." *State v. Aguirre*, 313 Kan. 189, 209, 485 P.3d 576 (2021). In performing this review, the court does not reweigh the evidence or make witness credibility determinations. 313 Kan. at 209.

In a rape case, the court looks to the record as a whole and considers the individual circumstances of each case in determining whether a rational fact-finder could have found beyond a reasonable doubt that an alleged victim was overcome by force or fear. *State v. Borthwick*, 255 Kan. 899, 911, 880 P.2d 1261 (1994). The Kansas Supreme Court has "refused to define in absolute

terms the degree of fear required to sustain a rape conviction" because "'fear is inherently subjective.'" *State v. Brooks*, 298 Kan. 672, 685, 317 P.3d 54 (2014) (quoting *Borthwick*, 255 Kan. at 913). A rape victim is not required to demonstrate a particularly high likelihood that the feared outcome would or could result. In other words, the reasonableness of the rape victim's fear is a credibility determination for the fact-finder—not a question of law for this court. See *Borthwick*, 255 Kan. at 904-05.

1. *The Victim's Fear of Physical Harm*

First, the record demonstrates that a rational fact-finder could find that the victim experienced fear, rendering Ninh's argument factually and legally inaccurate. The victim testified that she experienced fear for her safety, or that she would be hurt or injured if she refused Ninh's sexual contact. She testified that she was not more forceful in fighting back because "what usually would go through my head if I were to tell him off or something" is that "something might happen to me or my siblings." She also testified that if she told him to stop, she thought he was "going to try to do other things, like force me to do certain things or he'll just—I guess forcefully just do the things that he does to me." She also agreed that if Ninh did become more forceful, she was concerned she might get hurt or injured. While her physical safety was not her expressed primary or main concern, the law does not require a rape victim to prove they were in constant fear of physical harm, or to demonstrate fear of a particular gravity of physical harm. See *Borthwick*, 255 Kan. at 911 (finding no requirement that a rape victim endure a certain degree of physical violence or "endure a beating or be threatened with a deadly weapon" to show they were overcome by force or fear). Her testimony, although minimal, that she feared if she more aggressively tried to stop Ninh from touching her he would just "forcefully" do it anyway or she would be hurt or injured, was sufficient for a rational fact-finder to determine she was overcome by fear.

2. *The Victim's Fear of Harm to Her Family Stability*

Not only did the State present evidence that the victim experienced fear for her physical safety, she testified extensively that

she feared potential consequences to her social and family stability if she stopped Ninh from abusing her. Specifically, during August 2014 to May 2015, she testified that "[i]t was just constantly me thinking, well, should I tell my mom and entirely break up my family or should I let this happen so that my siblings actually grew up with a father." When she was 16, she explained that the abuse subsided and she thought, "I'm not going to tell mom and nothing big is going to have to happen to my family in that sense at all."

When asked the consequences she feared if she "demanded that those sexual contacts stop happening," she explained:

"You know, in my mind, if I don't do these things, I was scared or afraid that he was gonna either—like, I would just lose my Internet access completely. It was the only thing that was honestly the problem. Like, I guess I wanted to be able to, you know, not just sit in the house and read a book because, you know, I wanted to go on the Internet and watch movies or YouTube or whatnot. And so that's—I guess it's what I feared that would happen. Like, I would lose my phone, lose my Internet, lose, like, just access to going out to friends or just doing, like, extracurricular activity at school or something like that."

And when asked why she did not fight back, she said, "[I]f I do . . . fight back or say something about it, something might happen to me or my siblings or that was, like, what would—what usually would go through my head if I were to tell him off or something like that."

The victim first moved to the United States when she was almost 13 years old and could not yet speak English. Less than six months after her arrival Ninh began sexually assaulting her. She and her sister reunited with their mother after living in another country with their aunt for the preceding seven years. The victim testified that she previously did not have a father figure and moving in with her mom and Ninh was "a different change" and she "wasn't used to having somebody, like, a father figure in my life just to tell me, you know, this is what you're supposed to do or whatnot." She explained that moving to the United States "there's just entirely different traditions" and "what my family actually do here is different from what we do in [my birth country] and all that stuff, and so it was just odd, I guess." Because fear is subjective, it was not unreasonable under the circumstances, which included the victim's age, length of time she had lived without her mother in her birth country, the amount of time she had been part of her

new family structure, the family dynamics, her lack of fluency in English, her lack of experience having a father figure, and her inexperience in the United States, for the jury to find that she feared consequences to her family structure for herself, her siblings, and her social life if she did not permit Ninh to sexually assault, sodomize, and rape her.

3. *The State's Evidence that the Victim Was Overcome by Fear*

Having found that the State presented sufficient evidence that the victim experienced fear while being raped and sodomized, the State must also demonstrate she was "overcome" by those fears. Ninh argues there was insufficient evidence the victim was "overcome" because she did not testify that Ninh "held [her] down," "blocked her from leaving," or threatened her with consequences for noncompliance. Ninh also claims that there was no evidence she was "emotionally distraught before, during, or after the incidents," and thus there is no evidence she was "overcome." Ninh claims that even if the victim felt fear, the evidence did not establish she was "overcome" by fear but rather that she "acquiesc[ed]."

Ninh's argument that the victim acquiesced to his sexual acts—rather than being overcome by fear—is unavailing. As a panel of this court noted in *State v. Bishop*, No. 118,896, 2019 WL 2398044 (Kan. App. 2019) (unpublished opinion), to acquiesce is different than being overcome by fear and means "'to agree or consent quietly without protest, but without enthusiasm.'" 2019 WL 2398044, at *8 (quoting Webster's New World College Dictionary 12 [5th ed. 2014]). Acquiescing to a sexual encounter necessarily requires the acquiescing party to consent—and that consent cannot occur or result from fear or coercion. The victim testified that when Ninh started sexually assaulting her at age 13—within months of moving to the United States to live with her mother and new family after 7 years apart—she feared the familial and social consequences if she stopped or prevented Ninh's acts.

The victim's testimony was sufficient for a rational fact-finder to determine that she was overcome by fear for her safety, family stability, and social interactions because her fear "'[got] the better of'" her or her fear "'overpower[ed],' 'conquer[ed],' and 'subdue[d]'" her.

See *Brooks*, 298 Kan. at 691-92 (defining "overcome" in the context of rape charges citing Webster's Third New International Dictionary definition of "overcome"). Where the victim's testimony that they were overcome by fear is not "'so incredible as to defy belief,'" sufficient evidence exists to present the ultimate determination to the jury. *Borthwick*, 255 Kan. at 913-14.

The jury is permitted to make reasonable inferences from the evidence, and it is important to consider the victim's testimony in the context of the evidence presented to the jury. See *Borthwick*, 255 Kan. at 913-14 (fear is subjective and the reasonableness of that fear may impact the jury's assessment of the victim's credibility). The jury had ample evidence to examine the reasonableness of the victim's fear. It watched multiple video-taped investigatory interviews where her responses were consistent with her trial testimony. Moreover, the police interviews showed a very quiet, young girl who did not speak English as a first language, and who repeatedly expressed fear that if she stopped or prevented Ninh's sexual assaults her family would be broken up, hurt, or destroyed. The jury could reasonably infer from her youth, inexperience having a father figure, inexperience living in the United States, lack of English fluency, recent move into her mother's and Ninh's home after seven years of being away from her mother, and introduction into a new family structure could have made her fear the consequences to her family if she stopped or prevented Ninh from raping and sodomizing her.

Explicit threats of physical harm are unnecessary for a rational fact-finder to determine that a victim was overcome by force or fear sufficient to convict a defendant of rape or aggravated criminal sodomy. In *Brooks*, a jury convicted the defendant of raping J.P., his ex-wife. Brooks went to J.P.'s house that evening and demanded sex. Brooks threatened J.P. that if she did not have sex with him, he would disclose e-mails to her work that she was having an affair with a married coworker. J.P. did not comply at first but eventually let Brooks have sex with her while she hid her face behind her hands and closed her eyes. The Kansas Supreme Court held that this was sufficient evidence J.P. was overcome by force or fear, stating that a "rational factfinder could infer from the facts presented at trial that J.P. clearly feared Brooks would publicize

the e-mails if she did not submit to having sex with him. And because of this fear, she ultimately submitted to having nonconsensual sex with Brooks." 298 Kan. at 690.

A rational fact-finder could determine under the facts of this case that the victim feared for her family, social stability, or physical safety if she refused to submit to nonconsensual sexual contact from Ninh, even without evidence that he made explicit threats to reinforce those fears.

In *Bishop*, the defendant was convicted of four counts of sex crimes against his girlfriend's 16-year-old child, H.C. Bishop argued there was insufficient evidence H.C. was overcome by force or fear because H.C. merely testified that she feared Bishop would leave the family if she did not comply. Similar to Ninh's argument, Bishop claimed this could not constitute reasonable fear because he had never actually physically harmed H.C. or threatened her safety or family stability. 2019 WL 2398044, at *7-8. But a victim does not need to be threatened to be overcome by fear. Moreover, reasonableness of a victim's fear is not a question for this court but rather a consideration for the jury when making credibility determinations. See *Borthwick*, 255 Kan. at 914. Thus, here, the victim's testimony and statements about her family and her fear provides a sufficient basis upon which the jury could find that she was overcome by fear under the circumstances.

Sufficient evidence existed for a rational fact-finder to find that the victim was overcome by fear while Ninh raped and sodomized her. Because the rape and aggravated criminal sodomy statutes requiring the victim to be "overcome by force or fear" do not create alternative means of the crimes, that finding is sufficient to sustain Ninh's convictions for rape and aggravated criminal sodomy. Therefore, even assuming without deciding that the State failed to show the victim was overcome by force, sufficient evidence still exists to sustain his convictions for rape and aggravated criminal sodomy.

III. THE STATE COMMITTED ERROR DURING CLOSING ARGUMENTS BUT THE ERROR IS HARMLESS

Ninh claims the State committed reversible prosecutorial error in its opening statement and closing argument by misstating the

law, misstating the evidence, stating facts not in evidence, and making inflammatory and distracting statements to the jury.

1. *Preservation and Standard of Review for Prosecutorial Error*

Ninh was not required to object at the district court to preserve his claim for reversible prosecutorial error resulting from statements made during opening statements and closing arguments. However, this court may consider the absence of an objection in its analysis of the alleged error. See *State v. Bodine*, 313 Kan. 378, 406, 486 P.3d 551 (2021).

Appellate courts use a two-step process to evaluate claims of prosecutorial error, first determining whether an error has occurred, and second, weighing any prejudice to the defendant resulting from the error. Prosecutors commit an error when their comments during opening statements or closing arguments fall outside the wide latitude afforded to prosecutors in discussing the evidence and the law. *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016). Prosecutors' comments fall outside this wide latitude if they misstate the applicable law, misstate the facts in evidence, inflame the prejudices of the jury, or improperly divert the jury's attention. See *State v. Lowery*, 308 Kan. 1183, 1208-09, 427 P.3d 865 (2018) ("'A prosecutor should not make statements intended to inflame the passions or prejudices of the jury or to divert the jury from its duty to decide the case based on the evidence and the controlling law.'"); *State v. Davis*, 306 Kan. 400, 413-14, 394 P.3d 817 (2017) ("A prosecutor 'cross[es] the line by misstating the law,'" and "'a prosecutor's arguments must remain consistent with the evidence.'").

If an error is found, this court must determine whether the error prejudiced the defendant's due process rights to a fair trial—asking whether the State has shown beyond a reasonable doubt that the error did not affect the outcome of the trial, in light of the whole record. *Sherman*, 305 Kan. at 109.

2. *Error Analysis*

Ninh asserts that the State committed five different prosecutorial errors during its opening statement and closing argument:

(1) the State inflamed the jury's prejudices and distracted the jury by discussing what "some rapists" do;
(2) the State's discussion of what other rapists do was a discussion of things not admitted into evidence;
(3) the prosecutor inflamed the jury by referring to Ninh as a "rapist";
(4) the prosecutor misstated the evidence when she asserted that the jury would hear evidence that Ninh put his finger inside of the victim's vagina and that she thought it hurt; and
(5) the prosecutor misstated the law in her closing argument when she said that Ninh's "form of force was grooming."

a. *The Prosecutor's Reference to the Types of Force Used by "Some Rapists" Was Not Error*

In the State's closing argument, Ninh claims the prosecutor committed reversible error when she said:

"He's treating her like she's special. She described how that type of touching he would engage in all through her teenage years, it wasn't the type of touching where—you know, *some rapists* are sadists. Some of them cause pain. *Some rapists* use alcohol so a victim doesn't know or is incapacitated and can't respond back. His form of force was grooming." (Emphases added.)

Ninh argues that what "some rapists" do to overcome a victim by force or fear was irrelevant to his case.

Pointing out what "some rapists" do was not wholly irrelevant to remind the jury there are many ways the crime of rape may be accomplished. Kansas law does not require the victim to be "physically overcome by force" through violence or physical restraint—it requires that the victim did not consent and was overcome by force or fear. *Borthwick*, 255 Kan. 899, Syl. ¶ 7. In this case, the victim was not physically overpowered, injured, or restrained. Therefore, the prosecutor's statements about "some rapists" illustrates the applicable law that those methods are not the only means for committing rape in Kansas. The statements may not have been relevant to Ninh's actions, but they were not irrelevant under Kansas law to demonstrate the range of actions that could satisfy the material elements of Ninh's charges.

Additionally, the prosecutor's statement about the types of force "some rapists" use were all referenced by Detective C.Z. in his trial testimony, where he stated:

"Q: Okay. Force can come in many different styles, many different types?
"A: Yes.
"Q: Grooming behavior, is that one type of force that you've seen used?
"A: Yes.
"Q: You've seen other types of force that include incapacitating someone with alcohol or drugs?
"A: Several times.
"Q: Other types of force may be excessive types of force to the point where the victim of the sexual assault requires genital reconstructive surgery?
"A: I've seen that, yes.
"Q: Okay. So in your training, your experience and your years as a detective with EMCU, you've seen force be applied through many different mechanisms?
"A: Yes."

Ninh did not object to Detective C.Z.'s direct testimony regarding the different types of force used by some rapists. Therefore, Ninh's second claim that the prosecutor's statements about "some rapists" were not admitted into evidence also fails.

b. *The Prosecutor Did Not Repeatedly Refer to Ninh as a Rapist and Did Not Err in Her Comments Regarding Rapists*

Ninh claims that the State erred by "repeatedly calling [him] a rapist," because it was inflammatory and improper. See *State v. Scott*, 271 Kan. 103, 114, 21 P.3d 516 (2001) (the court found it was improper to call the accused a "killer"). While Ninh alleges the State "repeatedly" referred to him as a rapist, the record reveals just one instance where this arguably occurred—in the State's closing argument.

During closing argument, when discussing the DNA evidence found on the victim's right breast, the prosecutor said:

"And when they get investigated, the evidence that is found is the evidence that the defendant, the suspect, leaves behind. *It is the evidence that the rapist leaves behind*. He did away with the evidence by wiping it off of [the victim]. He may not have even ejaculated fully, but ultimately he wiped away whatever evidence was going to be on his body. He wiped away the evidence he thought he had left behind on her body. He forgot . . . he didn't wipe away her breast. He didn't wipe his saliva off of her breast, and ultimately that saliva was preserved

and it was intact because [the victim] was wearing the same bra that she had worn prior to the attack . . . ." (Emphasis added.)

Not only was this a single reference to a "rapist," and not "repeatedly" as alleged by Ninh, but it was done in the context of an evidentiary discussion and not as a way to name, identify, or refer to Ninh.

The Kansas Supreme Court has held that a prosecutor's statements referring to a defendant as a murderer based on something other than the evidence presented are improper. See *State v. Scott*, 286 Kan. 54, 80-82, 183 P.3d 801 (2008), *overruled on other grounds by State v. Dunn*, 304 Kan. 773, 375 P.3d 332 (2016). Thus, "a prosecutor may refer to the defendant as a murderer or killer in the course of arguing the evidence shows the defendant committed the murder." *Scott*, 286 Kan. at 81. The court further explained:

"However, where such statements imply the prosecutor believes something other than the evidence shows the defendant to be a murderer, such as the prosecutor's belief the defendant 'looks like a murderer' or has 'cold-blooded killing eyes,' or the statements do not relate to the evidence but are simply made to inflame the jury, such as a comment telling the jurors they are 'eight feet from a killer,' the argument will be held improper." 286 Kan. at 81-82.

To date, it does not appear that the Kansas Supreme Court has analyzed this issue in the context of the term "rapist," but panels of this court have addressed the issue. See *State v. Ahmedin*, No. 105,378, 2012 WL 1919925, at *4-5 (Kan. App. 2012) (unpublished opinion) (finding no error when the prosecutor called the defendant a rapist in closing argument because the statement was made in the context of arguing the evidence showed Ahmedin committed the rape); *State v. Moore*, No. 100,090, 2009 WL 3630897, at *2-4 (Kan. App. 2009) (unpublished opinion) (finding error when the prosecutor called the defendant a rapist in closing argument because the defendant was charged with *attempted* rape, not rape, and thus the statement was not based on the evidence).

In *Scott*, the prosecutor during closing argument said, "'[Y]ou have about eight feet separating you from the hands of a killer right here.'" 271 Kan. at 114. There, the prosecutor specifically named, identified, and referred to the defendant as a "killer." And

the Kansas Supreme Court held that the comment was inflammatory and improper, especially considering Scott was asserting a theory of self-defense and did not deny he caused the victim's death. 271 Kan. at 114.

Here, Ninh was charged with multiple counts of rape. In her closing argument, the prosecutor said that when investigating a crime, the police look at "the evidence that the rapist leaves behind." She then noted that Ninh used a towel to wipe evidence away from his penis and the victim's vagina, but he failed to wipe away DNA evidence from her breast. During trial, the prosecutor introduced evidence that DNA was found on her breast and Ninh could not be excluded as the source of that DNA. The prosecutor's statement in her closing argument was clearly referring to the specific evidence in the case, the DNA found on the victim's breast, and arguing that evidence showed Ninh's guilt. The prosecutor's statement also went to refute Ninh's general denial of all of the victim's allegations. Had Ninh put forth a defense giving a reasonable explanation for why his DNA might be found on her breast, this would be a closer call. But given the evidence and defense, the prosecutor's statement was not improper or inflammatory and Ninh's third claim of error fails.

c. *The Prosecutor Did Not Misstate the Evidence*

In Ninh's fourth claim of prosecutorial error, he alleges that the prosecutor misstated the evidence in both her opening statement and closing argument when she said that the jury would hear evidence that Ninh put his finger inside the victim's vagina and she thought it hurt. Specifically, Ninh alleges the prosecutor's following statements misstated the evidence:

"She'll describe that he will, when she's 14 years of age, start coming into her room when she's sleeping. *He'll put a finger inside of her vagina. She'll describe that it hurt.*" (Emphasis added.)

"We then move to Count 2 and Count 3. . . . Those are both for when she is 14 years of age . . . and that specific conduct that is described in those two counts is the *defendant's finger being inserted into her vagina*." (Emphasis added.)

"Again, this Count 2 is for rape. . . . *He puts his finger in her vagina*. When she describes this action, she describes that it's in between my labia, massaging with his fingertips. . . . *She also described that it would hurt* so she usually pulled away." (Emphases added.)

Ninh contends that the victim did not testify that Ninh penetrated her vagina with his fingers but that he only put his finger "between the skin flaps, i.e. her labia." He also argues that because she testified that the sexual contact was "not ever honestly painful," the prosecutor's statements about her describing Ninh's actions as "hurting" misstated the evidence. Although the testimony could be more clear or consistent, there is some evidence to support the prosecutor's statements.

When describing what Ninh would do with his hands underneath her underwear, the victim testified that Ninh's "finger would go between my *vagina* and he would try to, I guess, massage it." (Emphasis added.) She also testified that "he would just undo my bra and he would start grabbing my breast, and for a couple minutes he'll pull down my pants and he'll start to massage my vagina." At another point, she testified that Ninh would pull ". . . down my pants and start touching my vagina" with his hands and he would "cup around my vagina and then start to run his finger in between and then he started massaging it." When the prosecutor tried to clarify and said, "I want to make sure we're all very clear. When you say finger in between, he would actually insert his finger—" then the victim said, "No" before the prosecutor finished the question. The prosecutor then said, "[I]n between—at least in between the labia?" and she said, "Yes." Later, the prosecutor again asked, "[H]is finger would go inside those flaps of skin" and she replied, "Yes." The prosecutor then said, "[O]n your—in your vagina?" and she replied, "Yeah." She described how he touched her vagina at this time as "a circular motion, up and down my vagina, not around it." While her testimony might have some inconsistencies, taken as a whole, her testimony sufficiently supports the prosecutor's claims in her opening statement and closing argument that Ninh penetrated the victim's vagina with his fingers.

Ninh argues that the victim's testimony that "[i]t was not painful. It was not ever honestly painful. It was just—I guess it was just buildup in tension and sensation as that—that's what I would feel," demonstrates that the prosecutor's statements that the victim would say it hurt was error. However, Ninh fails to acknowledge the contradictory evidence. The jury saw the victim's interview with Detective C.Z. where she said that between August 2014 and

May 2015 when Ninh tried to put his finger in her vagina "it was uncomfortable for me, it was hurting me. So, I usually just pull [*sic*] away when I feel like he's going to do that." There is a difference between nonexistent evidence and contradictory evidence. Where there is evidence that could lead a reasonable fact-finder to conclude something did or did not happen, it is up to that fact-finder—the jury—to weigh the evidence and make that credibility determination. Here, the prosecutor's statements could not be considered a misstatement of evidence in the record because there was evidence in the record that the victim said Ninh's attempts to penetrate her vagina and touching her vagina hurt. Therefore, Ninh's fourth claim of error fails.

d. *The Prosecutor Misstated the Law in Her Closing Argument*

In his final claim of prosecutorial error, Ninh argues that the prosecutor misstated the law in her closing argument when she said that Ninh's "form of force was grooming." Ninh argues that grooming is something that takes place before an offense, while force is something that must be present at the same time as the other elements of the offense—essentially at the same time as the nonconsensual sexual intercourse or sodomy. Ninh relies on *State v. Akins*, 298 Kan. 592, 606, 315 P.3d 868 (2014), for the proposition that the force must occur at the same time as the sexual intercourse or sodomy. But, as Ninh acknowledges, the error in *Akins* was different than that alleged here. In *Akins*, the prosecutor implied that the defendant's grooming satisfied the specific intent element of his charge of aggravated indecent liberties with a child. Here, the prosecutor argued that Ninh's grooming satisfied the element of "force" in the context of Ninh's general intent crimes of rape and aggravated criminal sodomy. However, the State has failed to provide any legal authority supporting the prosecutor's statement that grooming can constitute a form of force sufficient to sustain a conviction for rape or aggravated criminal sodomy in Kansas.

This court has also found no authority supporting the prosecutor's statement of the law, and as such, the prosecutor's state-

ment that Ninh's "form of force was grooming" was a misstatement of the law and constitutes prosecutorial error. This court must next determine whether this error prejudiced Ninh's right to a fair trial.

3. *Prejudice Analysis and Reversibility*

When error is found, this court must next determine whether that error prejudiced the defendant's due process rights to a fair trial. To determine if Ninh was prejudiced in his right to a fair trial, this court considers all alleged indicators of prejudice and determines whether the State has shown beyond a reasonable doubt that the error did not affect the outcome of the trial. *Sherman*, 305 Kan. at 109. The "prosecutorial error is harmless if the State can demonstrate 'beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, where there is no reasonable possibility that the error contributed to the verdict.'" 305 Kan. at 109 (quoting *State v. Ward*, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 [2011], *cert. denied* 565 U.S. 1221 [2012]).

Ninh claims the prosecutor's statement about grooming as force prejudiced him because it was one of the last statements she made in her closing argument. The State cannot show the jury did not rely on "grooming" as force for its verdict. While it is true that the prosecutor made the grooming statement toward the end of her rebuttal closing argument, that was her only reference to grooming as a form of force and it came after she made arguments about Ninh's other forms of force and fear.

In her closing argument, the prosecutor discussed multiple other types of "fear or force" that supported the charges. In the State's initial closing argument, the prosecutor identified evidence demonstrating the victim felt "force or fear," such as when "[s]he grabs his hands and moves them off of her body," or when "[s]he pushes his hand down off of her breast," or when she "moved away . . . stood up . . . walked away." The prosecutor said "[t]hese are all actions that are communicating . . . describing and she is showing the defendant that she's not okay with this form of contact." The prosecutor also discussed the victim's testimony and interviews where she expressed fear of not submitting would break

up her family, would harm her siblings, or cause her to lose social access to her peers. The prosecutor also suggested that Ninh's measure of force was "playing on her fears of a broken family" and his "parental authority." The primary evidence of the victim being overcome by force or fear related to her fear of her family breaking up or suffering, her siblings suffering, facing social consequences, Ninh's persistence in his physical actions, and her fear that Ninh would "forcefully just do the things that he does to me" if she resisted more.

Reviewing the record as a whole, the amount of the nongrooming force or fear evidence shows that there is no reasonable doubt that the State's error did not affect the outcome of Ninh's trial, and thus such error was harmless.

IV. THE STATE DID NOT VIOLATE NINH'S CONSTITUTIONAL OR STATUTORY RIGHT TO A UNANIMOUS VERDICT

Ninh's final claim asserts that he was denied his right to a unanimous verdict in violation of his Sixth Amendment rights, his section 5 rights under the Kansas Constitution, and K.S.A. 22-3421. He argues that the State did not provide sufficient evidence for the jury to agree to a unanimous verdict on any of his convictions such that he is entitled to reversal on all six convictions.

1. *Preservation and Standard of Review for Unanimity Challenges*

This court generally does not review claims seeking reversal on constitutional grounds that are brought up for the first time on appeal. *State v. Daniel*, 307 Kan. 428, 430, 410 P.3d 877 (2018). Ninh raised the unanimity challenge in his motion for a new trial under the Sixth Amendment to the United States Constitution and K.S.A. 22-3421 but did not argue a violation of section 5 of the Kansas Constitution below. This court recognizes several exceptions to the general prohibition that, when applicable, can be asserted to permit review of a constitutional objection for the first time on appeal. Those exceptions include circumstances when the claim involves only questions of law and is finally determinative of the case, or when resolution of the claim is necessary to prevent the denial of fundamental rights. See *Johnson*, 309 Kan. at 995.

Ninh argues that his section 5 argument should be heard for the first time on appeal under both exceptions. This court agrees and will address Ninh's unanimity challenge under the Sixth Amendment, K.S.A. 22-3421, and under section 5 of the Kansas Constitution Bill of Rights.

Ninh had a statutory right to a unanimous jury verdict. K.S.A. 22-3421; see *State v. Santos-Vega*, 299 Kan. 11, 18, 321 P.3d 1 (2014). Additionally, the United States Supreme Court held that the Sixth Amendment right to a jury trial in federal criminal cases should be incorporated, via the Fourteenth Amendment, to state criminal prosecutions thus extending the Sixth Amendment right to a unanimous verdict in federal criminal proceedings to state court criminal defendants. See *Ramos v. Louisiana*, 590 U.S. ___, 140 S. Ct. 1390, 1396-97, 206 L. Ed. 2d 583 (2020). While the Kansas Supreme Court has not yet addressed whether the Kansas Constitution provides similar protections post-*Ramos*, prior panels of this court have presumed so, and this court finds no reason to disagree. See *State v. Spackman*, No. 122,021, 2021 WL 4929156, at *4 (Kan. App. 2021) (unpublished opinion) ("[T]here is a right to unanimous jury verdicts in criminal cases grounded in [section] 10 of the Kansas Constitution Bill of Rights and, perhaps, in [section] 5.").

When a defendant asserts a violation of their right to a unanimous jury verdict, an appellate court must first determine whether it is presented with a case involving multiple acts. This determination presents a question of law over which appellate courts exercise unlimited review. *Santos-Vega*, 299 Kan. at 18. If the case involves multiple acts,

> "the appellate court must then determine whether error was committed because either the State must have informed the jury which act to rely upon for each charge during its deliberations or the district court must have instructed the jury to agree on the specific criminal act for each charge in order to convict. The failure to elect or instruct is error." 299 Kan. at 18.

If the appellate court finds an error, it then determines whether the error was harmless or requires reversal, using the constitutional harmlessness standard for constitutional claims and the statutory harmlessness standard for statutory claims. See *Lowery*, 308

Kan. at 1235; *Sherman*, 305 Kan. at 109; *Santos-Vega*, 299 Kan. at 18.

2. *Unanimity Analysis*

The facts are clear, and the State concedes that it presented evidence of multiple acts for each of Ninh's six convictions. So, this is a multiple-acts case, and this court moves to the next step of the analysis—whether an error occurred in instructing the jury about what to rely upon for each charge.

The district court issued a multiple acts instruction for each of Ninh's six convictions that the jury "must unanimously agree upon the same underlying act" for each of Counts 1-6. This court must presume the jury followed these instructions. See *State v. Gray*, 311 Kan. 164, 172, 459 P.3d 165 (2020) ("[W]e presume jury members follow instructions."). Because the district court "instructed the jury to agree on the specific criminal act for each charge in order to convict," Ninh cannot show error arose from the district court's actions. See *Santos-Vega*, 299 Kan. at 18.

Next, Ninh claims that despite the multiple-acts instruction, the State violated his right to a unanimous verdict because of "the way in which the State chose to present its case." Ninh asserts that even with the unanimity jury instructions, the State did not provide enough evidence of each encounter between the victim and Ninh for the jury to unanimously agree on the underlying acts for each conviction. This is essentially a recitation of Ninh's claims challenging the sufficiency of the evidence.

A panel of this court addressed a similar argument in *State v. Hunt*, 61 Kan. App. 2d 435, 503 P.3d 1067 (2021). In *Hunt*, the defendant was convicted of two counts of aggravated indecent liberties with a child. Hunt appealed, asserting the State violated his right to a unanimous verdict under the Sixth Amendment, section 5 of the Kansas Constitution, and K.S.A. 22-3421 because one count dealt with multiple-acts evidence—the victim testified about a specific sex act and alleged it occurred on six different occasions within a certain time span. Just as Ninh asserts, Hunt argued that the State did not provide any evidence for the jury to differentiate between the alleged instances of misconduct, such that the jury could

not have unanimously agreed on any given incident. The *Hunt* panel addressed this argument as follows:

"Hunt's case is typical of many cases alleging the defendant committed a sex act against a child. The child can often describe the sex act but is unsure of the time frame or how many times the act occurred. Unless the State presents evidence of separate and distinct acts that could cause jurors to disagree on which act supports the charge, there is no jury unanimity issue.

"But even if count two can somehow be analyzed as a multiple acts crime, the district court instructed the jurors that they 'must unanimously agree upon the same underlying act.' Hunt cannot have it both ways. If the State's evidence did not separate and distinguish the acts supporting count two, then there is no jury unanimity issue. But if the State's evidence was presented in a way that could have caused jurors to disagree on which act supported the charge, then the jurors were instructed to unanimously agree on the act. . . . Either way, the State's prosecution of count two did not violate Hunt's constitutional and statutory rights to a unanimous verdict." 61 Kan. App. 2d at 446.

Like the defendant in *Hunt*, Ninh cannot have it both ways. If this court accepts Ninh's argument that the State did not provide enough evidence to separate and distinguish the victim's multiple allegations supporting each of Ninh's individual convictions, then a true multiple-acts issue did not exist and there was no violation of Ninh's right to a unanimous verdict. However, if this court accepts Ninh's assertion that the State's evidence was presented in a way that the jurors could disagree as to which of the multiple acts supported each charge, then the multiple-acts instruction attached to Counts 1-6 cured any potential unanimity issues.

Ninh's unanimity argument is less rooted in a traditional multiple acts challenge and is more akin to a challenge of the sufficiency of the testimony supporting his convictions for Counts 1-6. He argues that the victim's testimony regarding the dozens and dozens of sexual assaults was not specific enough for the jury to have unanimously agreed on the underlying acts supporting each conviction. A panel of this court addressed a similar argument in *State v. Spackman*, No. 122,021, 2021 WL 4929156, at *4 (Kan. App. 2021) (unpublished opinion). In *Spackman*, the defendant was convicted of six felony sex crimes against a child but argued on appeal that the victim's testimony "was so nonspecific the jurors could not have reached a constitutionally permissible unanimous verdict." 2021 WL 4929156, at *2. Similar to Ninh, Spackman's defense at trial was that the incidents did not occur and the child was making the allegations up. The *Spackman* panel addressed the argument as follows:

"We feel adrift in navigating Spackman's constitutional argument. The jurors had to resolve a credibility contest between L.S. and Spackman and did so in favor of L.S. If believed, L.S.'s testimony established physical acts on Spackman's part that entailed sexual contact proscribed under the applicable statutes. L.S. described where the acts took place and identified Spackman as her abuser. Although the abuse involved repeated instances of the same sort of conduct, that does not amount to a constitutional defect in the State's proof. Spackman has not satisfactorily explained why we should treat it that way. A putative victim's unusually generic testimony about the charged criminal conduct might open a line of attack on [their] credibility and a closing argument urging the jurors to find a reasonable doubt about what really happened. But that's far different from a constitutional defect requiring reversal of a conviction for lack of jury unanimity. Spackman hasn't crossed that threshold." 2021 WL 4929156, at *4.

As in *Spackman*, the jury in this matter had to resolve a credibility determination between Ninh and the victim, and clearly did so in favor of the victim. While her testimony lacked some specificity, it was clearly sufficient to establish that Ninh engaged in physical acts with her that were prohibited under each applicable statute and which occurred during the timespans alleged by the State for each individual count. The victim described the numerous sexual acts, testified where the acts took place, estimated how many times the acts occurred, and identified Ninh as the abuser each time. At trial, Ninh had the opportunity to question the reliability of those statements, and effectively did so as to the count for which the jury did not convict him. Ninh cannot now rely on a claim of unspecific testimony to create a unanimity issue requiring reversal. Ninh's final claim of error fails.

CONCLUSION

A jury convicted Ninh of one count of aggravated indecent liberties with a child, three counts of rape, and two counts of aggravated criminal sodomy stemming from his abuse of the victim over the course of four years—and this court finds no reversible error with the charged statutes, sufficiency of the evidence, prosecutorial error, or unanimity of the verdict. Ninh's convictions are affirmed.

Affirmed.

(525 P.3d 789)

No. 124,998

AMERICAN WARRIOR, INC., and BRIAN F. PRICE, *Appellants*, v. BOARD OF COUNTY COMMISSIONERS OF FINNEY COUNTY, KANSAS, and HUBER SAND, INC., *Appellees*.

Petition for review filed March 10, 2023

SYLLABUS BY THE COURT

CITIES AND MUNICIPALITIES—*Conditional-Use Permits Issued by Governing Bodies— Must Be Issued in Compliance with Statute.* Since our Supreme Court has held governing bodies must follow the procedures laid out in K.S.A. 2021 Supp. 12-757 when issuing conditional-use permits, conditional-use permits which were not issued in compliance with this statute are void and unenforceable.

Appeal from Finney District Court; WENDEL W. WURST, judge. Opinion filed February 10, 2023. Reversed and remanded with directions.

Patrick A. Edwards and *David E. Bengtson*, of Stinson LLP, of Wichita, and *Benjamin C. Jackson*, of Jackson Legal Group, LLC, of Scott City, for appellants.

Linda J. Lobmeyer and *Shane Luedke*, of Calihan Law Firm, P.A., of Garden City, for appellees.

Before ARNOLD-BURGER, C.J., GARDNER and CLINE, JJ.

CLINE, J.: This case involves an appeal from a decision of the district court of Finney County affirming the validity of a conditional-use permit issued by the Board of Zoning Appeals (BZA) of Finney County to Huber Sand, Inc. to operate a sand and gravel quarry. The Appellants argue the procedures for reviewing and issuing a conditional-use permit adopted by Finney County—in which the BZA, rather than the planning commission and board of county commissioners, can issue conditional-use permits—impermissibly varies from the procedures mandated by the Legislature. As a result, they claim the permit issued here is void and unenforceable.

Because our Supreme Court has held governing bodies must follow the procedures laid out in K.S.A. 2021 Supp. 12-757 in issuing conditional-use permits, we find that Finney County has impermissibly delegated authority to issue conditional-use permits

to its BZA. Accordingly, we reverse the district court and find that the conditional-use permit granted to Huber Sand is void and unenforceable.

FACTS

Shortly after purchasing land in Finney County (the Tract), Huber Sand applied to the BZA for a conditional-use permit to operate a sand and gravel quarry on the Tract. Under Finney County Zoning Regulations (the Zoning Regulations), a property owner must apply to the BZA for a conditional-use permit. The Zoning Regulations provide a nonexclusive list of factors for the BZA to consider in deciding whether to grant the permit and require the BZA to impose such restrictions, terms, time limitations, landscaping, and other appropriate safeguards as are necessary to protect adjoining property.

Huber Sand applied to the BZA for a conditional-use permit on May 12, 2021. Several weeks later, the BZA published notice of Huber Sand's application, stating that it would be heard at a public meeting on June 16, 2021. Neighborhood and Development Services, a joint department of Finney County and the cities of Garden City and Holcomb, staffed by Garden City employees, prepared a staff report which recommended approval of the permit. At the meeting, the BZA received public comment on the permit and voted to table the application until its next meeting. Five days later, the BZA met again and, after receiving additional public comment, approved the conditional-use permit, subject to several restrictions on the operation of the quarry.

After the permit was approved, American Warrior, Inc., the owner of an oil and gas lease covering the Tract, sent a letter to Finney County officials contending that the permit violated state law and was thus void, as the County had not followed the procedures required under K.S.A. 2021 Supp. 12-757 in issuing the permit. It asked the Finney County Commission to vote at their next meeting to revoke Huber Sand's invalid permit and order Huber Sand to halt all sand and gravel mining operations on the Tract. The County Commission declined to act on Huber Sand's conditional-use permit.

American Warrior, Inc. and Brian Price, a Finney County resident who owns land next to the Tract, (the Appellants) then sued in Finney County District Court, challenging the validity of Huber Sand's conditional-use permit. The parties submitted competing motions for summary judgment on stipulated facts.

The Appellants argued that K.S.A. 2021 Supp. 12-757 provides mandatory procedures for issuing a conditional-use permit in Kansas and requires that a permit application first be reviewed by a county's planning commission before going to the board of county commissioners for final approval. In support, the Appellants noted that the Kansas Supreme Court has held this statute applies to the issuance of conditional- and special-use permits, citing *Manly v. City of Shawnee*, 287 Kan. 63, 67-74, 194 P.3d 1 (2008), and *Crumbaker v. Hunt Midwest Mining, Inc.*, 275 Kan. 872, 886-87, 69 P.3d 601 (2003). The Appellants also cited several unpublished cases from this court applying K.S.A. 2021 Supp. 12-757 to review the issuance of conditional- and special-use permits. See *Ternes v. Board of Sumner County Comm'rs*, No. 119,073, 2020 WL 3116814, at *7-8 (Kan. App. 2020) (unpublished opinion); *Vickers v. Board of Franklin County Comm'rs*, No. 118,649, 2019 WL 3242274, at *4-6 (Kan. App. 2019) (unpublished opinion); *Rural Water District #2 v. Board of Miami County Comm'rs*, No. 105,632, 2012 WL 309165, at *4-6 (Kan. App. 2012) (unpublished opinion). Because Finney County did not follow this procedure and instead allowed the BZA to review and approve Huber Sand's conditional-use permit application, the Appellants argued the permit was void and unenforceable.

Huber Sand and the Finney County Board of County Commissioners (the Appellees) responded that the zoning statutes gave Finney County broad authority to adopt regulations for the issuance of conditional-use permits, including the authority to allow the BZA to issue conditional-use permits. The Appellees argued the requirements of K.S.A. 2021 Supp. 12-757 do not apply "to the consideration of and decision on [conditional-use permit] applications," noting that it does not mention conditional-use permits and by its text only applies to changes in zoning or amendments to zoning regulations. Thus, the Appellees claimed, K.S.A.

2021 Supp. 12-757 did not limit counties from adopting their own procedures for the issuance of conditional-use permits.

The district court disagreed with the Appellants' interpretation of *Manly* and determined *Crumbaker* was wrongly decided. It similarly distinguished the unpublished Court of Appeals cases cited by the Appellants, noting they were not binding precedent as unpublished opinions and finding they did not address the specific question of whether K.S.A. 2021 Supp. 12-757 precluded counties from delegating the authority to issue conditional-use permits to a BZA. It found Huber Sand's permit was validly issued and granted Appellees summary judgment.

ANALYSIS

On appeal, the Appellants claim the district court erred in finding the procedures outlined in K.S.A. 2021 Supp. 12-757 do not apply to the issuance of conditional-use permits. They ask us to find Huber Sand's permit is void because Finney County failed to follow these procedures.

When, as it did here, a district court has granted summary judgment based on stipulated facts, our review is de novo. *Crumbaker*, 275 Kan. at 877.

Whether K.S.A. 2021 Supp. 12-757 applies to conditional-use permits

A county has no inherent power to enact zoning laws. Rather, a county's zoning power is derived solely from the grant of authority in the zoning statutes. *Crumbaker*, 275 Kan. at 884. The zoning statutes, K.S.A. 12-741 et seq., grant counties the authority to enact and enforce other zoning regulations which do not conflict with the zoning statutes. K.S.A. 12-741(a). But a county's power to "change the zoning of property—which includes issuing special-use permits—can only be exercised in conformity with the statute which authorizes the zoning." 275 Kan. at 886. A county's failure to follow the zoning procedures required by state law renders its action invalid. *Zimmerman v. Board of Wabaunsee County Comm'rs*, 289 Kan. 926, 939, 218 P.3d 400 (2009).

Under K.S.A. 12-755(a)(5), counties may adopt zoning regulations which provide for the issuance of "special use or conditional use permits." K.S.A. 2021 Supp. 12-757, in turn, provides the procedures governing bodies must follow when amending zoning regulations or the zoning of a specific property. While K.S.A. 2021 Supp. 12-757 only explicitly applies to zoning "amendments," the Kansas Supreme Court has determined the procedures laid out in that statute also apply to the issuance of special-use permits. *Manly*, 287 Kan. at 67; *Crumbaker*, 275 Kan. at 886.

The Appellants contend *Crumbaker* and *Manly* control and require counties to comply with K.S.A. 2021 Supp. 12-757 when issuing a conditional-use permit. In support, they note that other panels of this court have consistently found that K.S.A. 2021 Supp. 12-757 provides mandatory procedures for the issuance of special- or conditional-use permits. See *Pretty Prairie Wind v. Reno County*, 62 Kan. App. 2d 429, 437-42, 517 P.3d 135 (2022); *Kaw Valley Companies, Inc. v. Board of Leavenworth County Comm'rs*, No. 124,525, 2022 WL 3693619, at *8 (Kan. App. 2022) (unpublished opinion); *Ternes*, 2020 WL 3116814, at *7-8; *Vickers*, 2019 WL 3242274, at *4-6; *Rural Water District #2*, 2012 WL 309165, at *4-6; *Blessant v. Board of Crawford County Comm'rs*, No. 89,916, 2003 WL 23018238, at *1 (Kan. App. 2003) (unpublished opinion).

The Appellees, on the other hand, disagree that *Crumbaker* and *Manly* control and ask us to independently interpret K.S.A. 2021 Supp. 12-757 to determine, as a matter of first impression, whether that statute's procedures govern the issuance of conditional-use permits.

The Appellees first claim our Supreme Court incorrectly equated a governing body changing the zoning of property to the issuance of a special-use permit in *Crumbaker*, mirroring the district court's discussion of the case. Alternatively, they argue the most logical reading of *Crumbaker* is that when a special-use permit changes the zoning of a parcel, the governing body must follow the procedures laid out in K.S.A. 2021 Supp. 12-757. They note the conditional-use permit here did not change the property's zoning classification, so they argue *Crumbaker* does not apply.

As for *Manly*, the Appellees claim it merely held that K.S.A. 2021 Supp. 12-757 controls the limited question of whether, under the circumstances of that case, the city could grant the special-use permit at issue with a simple majority vote. And they claim the court in *Manly* invalidated the special-use permit because it was issued in violation of the governing body's own zoning regulations, not K.S.A. 2021 Supp. 12-757.

To begin with, insofar as the Appellees claim *Crumbaker* was wrongly decided, their argument is inconsequential. We are duty-bound to follow controlling Supreme Court precedent absent an indication that the court is departing from its previously stated position. *Tillman v. Goodpasture*, 56 Kan. App. 2d 65, 77, 424 P.3d 540 (2018), *aff'd* 313 Kan. 278, 485 P.3d 656 (2021). The Appellees make no argument that the Supreme Court is departing from its position in *Crumbaker*.

While we cannot accept the Appellees' invitation to depart from controlling precedent, we can look at whether that precedent is distinguishable from this case and thus determine whether it is controlling. But we do not find merit in their efforts to distinguish *Crumbaker* and *Manly.* As a result, we find those cases control the outcome here.

Crumbaker involved the City of De Soto's annexation of a quarry. The central issue on appeal was whether the City could change land use via an annexation agreement and bypass the procedures laid out in K.S.A. 2021 Supp. 12-757. Before annexation, the quarry had been operating under a conditional-use permit issued by the Johnson County Board of County Commissioners. Under the annexation agreement, the City allowed the quarry owners to continue and expand their operations. Following annexation, a group of adjoining landowners filed suit, alleging that the City, through the annexation agreement, had effectively issued a conditional-use permit to the quarry owners without following the procedures required by law and its own zoning regulations. Their claim presumed that the annexation agreement represented a change in land use from that previously allowed under the conditional-use permit granted by Johnson County. The quarry owners argued, as relevant here, that the procedures set forth in the zoning statutes were not mandatory and could be bypassed under the City's home rule powers.

Our Supreme Court rejected the quarry owner's argument that the procedures laid out in the zoning statutes were open to modification. As the court explained, once a governing body chooses to wield the authority granted to it by the Legislature in the zoning statutes, it must follow the procedures laid out in those statutes. If a city were allowed to adopt alternative procedures by charter ordinance, the entire purpose of the zoning statutes—to provide a comprehensive method of governance for zoning regulation—would be seriously impaired. *Crumbaker*, 275 Kan. at 885. As a result, the court explained, the power of a city government to change the zoning of property—which it held includes issuing special-use permits—can be exercised only in conformity with the statute that grants this power. And because the City did not follow the procedures required by K.S.A. 2021 Supp. 12-757 in adopting the portions of the annexation agreement dealing with land use, e.g., the continuation and expansion of the quarrying operations, the court found those portions were invalid. 275 Kan. at 886-87.

In other words, the court held that because the portions of the annexation agreement dealing with land use were the functional equivalent of a conditional- or special-use permit, they had to be enacted in conformity with the procedures required by K.S.A. 2021 Supp. 12-757. This analysis suggests the Supreme Court views the procedures provided in K.S.A. 2021 Supp. 12-757 as mandatory for the issuance of all conditional-use permits.

Although the court did not explicitly explain its logic in equating the issuance of a special-use permit with a change in zoning, it apparently relied on the definition of "zoning" provided in the zoning statutes. K.S.A. 12-742(a)(10) defines the term as "the regulation or restriction of the . . . uses of land." Thus, the court noted, to change zoning is "to regulate or restrict land use." *Crumbaker*, 275 Kan. at 885. While the court in *Crumbaker* did not identify the definition for "special use permit" used by the City in that case, that term generally has the same meaning in American zoning law as the definition for conditional-use permit used by Finney County here. See 2 Salkin, Am. Law. Zoning, Special use permits, generally, § 14:1 (5th ed. 2022). A special- or conditional-use permit allows for land to be put to an otherwise prohibited use. And in granting the permit, county officials can impose special conditions

and safeguards on the use in the name of the public interest. In deciding whether to allow land to be put to a new, otherwise prohibited use, potentially with special conditions and safeguards, the court found a governing body is regulating land use. As a result, under *Crumbaker*, when a governing body issues a special- or conditional-use permit, the statutory procedures required to change the zoning of land must be followed.

The dissent dismisses *Crumbaker*'s statement requiring the issuance of special-use permits to conform "with the statute which authorizes the zoning" as obiter dictum. But "even dicta or obiter dictum 'should not be lightly disregarded' by lower courts." *In re Estate of Lentz*, 312 Kan. 490, 506, 476 P.3d 1151 (2020) (Luckert, C.J., concurring). And while the dissent does not read *Crumbaker* to require application of K.S.A. 2021 Supp. 12-757 to conditional-use permits, that is just what the Supreme Court did five years later in *Manly*. In *Manly*, the court reviewed the City of Shawnee's issuance of a special-use permit to the Shawnee Mission School District for the construction of a softball complex. The district court invalidated the permit, finding that the city council had approved the permit with a simple majority over the recommendation of the planning commission, in violation of K.S.A. 2021 Supp. 12-757(d). The question on appeal was whether the City could grant the special-use permit with a simple majority vote, after the planning commission reconsidered the proposal and reaffirmed its initial recommendation to deny the permit. The court identified the controlling statutory provision on this question as K.S.A. 2021 Supp. 12-757(d). *Manly*, 287 Kan. at 67. Interpreting that provision, the court upheld the validity of the permit, as a majority vote was all that the statute required for the City to overrule the recommendation of the planning commission after reconsideration. 287 Kan. at 74.

Contrary to the Appellees' (and the dissent's) claims, the court in *Manly* did not attempt to limit its discussion of K.S.A. 2021 Supp. 12-757 to the specific circumstances of that case or the governing body's zoning regulations. Instead, it gave a comprehensive description of the statute's procedural requirements, explaining that they apply any time a governing body "wants to take action upon a proposed zoning amendment." 287 Kan. at 68. And implicit in this discussion of the statute is the court's determination

that the issuance of a special-use permit constitutes a "zoning amendment."

Similarly, the Appellees' claim that the *Manly* court invalidated the permit based on noncompliance with the City's zoning regulations reflects a fundamental misunderstanding of the case; the court *upheld* the permit because the procedure used complied with the *statutory* requirements of K.S.A. 2021 Supp. 12-757.

Furthermore, while the Appellees and the dissent are correct that the court in *Manly* did not address the specific question of whether a governing body may delegate authority to issue conditional-use permits to a BZA, its discussion of the zoning statutes and the role of the separation of powers in zoning shows that this sort of delegation is impermissible under *Manly*'s interpretation of K.S.A. 2021 Supp. 12-757.

To begin with, the court's conclusion in *Manly* that K.S.A. 2021 Supp. 12-757(d) was the controlling statutory provision signifies that the procedures in that statute govern the issuance of any special- or conditional-use permit. 287 Kan. at 67. The Appellees' and the dissent's suggestion that *Manly* is silent on the applicability of K.S.A. 2021 Supp. 12-757 to conditional- or special-use permits is misplaced. And as the Appellants note, *Manly* explains that the procedures employed by Finney County not only violate K.S.A. 2021 Supp. 12-757, but also violate separation of powers principles, as they place final authority for a zoning decision in the hands of an unelected advisory body. 287 Kan. at 70-71.

In its analysis, the *Manly* court also discussed how the doctrine of separation of powers supported its interpretation of K.S.A. 2021 Supp. 12-757. It observed that requiring a two-thirds vote on the commission's resubmitted recommendation to the City Council unacceptably "would permit a simple majority of the planning commission to govern over a simple majority of the City Council." 287 Kan. at 71. And while a planning commission is an unelected advisory body, "'[t]he final authority in zoning matters rests with the governing body possessing legislative power.'" 287 Kan. at 71. Accordingly, "[i]f the legislature intended to allocate the ultimate authority to grant or deny a zoning amendment to the planning commission, it would be impermissibly shifting the City's govern-

ance from the elected City Council to an appointed advisory commission." 287 Kan. at 71. As the Appellants note, like a planning commission, a BZA is an unelected body and is thus prohibited under separation of powers principles from exercising final authority on decisions to change zoning—including the issuance of special- or conditional-use permits.

The Kansas Supreme Court has since reaffirmed the analysis of K.S.A. 2021 Supp. 12-757 and the limits separation of powers principles place on zoning decisions given in *Manly*. See *Zimmerman*, 289 Kan. at 940-44. While the dissent correctly notes that the question of whether K.S.A. 2021 Supp. 12-757 applies to the issuance of a special-use permit was not at issue in *Zimmerman*, the *Zimmerman* decision still provides insight into the Supreme Court's view on the matter. The Supreme Court discussed *Manly* in detail in *Zimmerman*, describing its resolution of the application of requirements under K.S.A. 2021 Supp. 12-757(d) to the special-use permit at issue in *Manly.* And it characterized the decision in *Manly* as upholding the validity of the special-use permit for its compliance with K.S.A. 12-757(d). 289 Kan. at 944.

Appellants aptly note that *Crumbaker*, *Manly*, and *Zimmerman* all apply K.S.A. 2021 Supp. 12-757 to different aspects of the two-part process required for conditional- and special-use permits. If that statute did not apply to conditional- or special-use permits, there would be no need to analyze the process followed in each case in light of that statute's requirements or even mention it.

We believe a fair reading of *Crumbaker* and *Manly* requires application of K.S.A. 2021 Supp. 12-757 to conditional-use permits and, indeed, several panels of this court have so held. See *Pretty Prairie Wind*, 62 Kan. App. 2d at 437-42; *Kaw Valley Companies, Inc.*, 2022 WL 3693619, at *8; *Ternes*, 2020 WL 3116814, at *7-8; *Vickers*, 2019 WL 3242274, at *4-6; *Rural Water District #2*, 2012 WL 309165, at *4-6; *Blessant*, 2003 WL 23018238, at *1. We thus see no indication that our Supreme Court is departing from its interpretation of that statute, so we cannot weigh in on whether *Crumbaker* and *Manly* were wrongly decided. *Tillman*, 56 Kan. App. 2d at 77. Even if we agreed with the Appellees' and the dissent's points that K.S.A. 2021 Supp. 12-757, by its text, does not apply to the evaluation or issuance of a conditional-use

permit and instead only applies when a governing body is supplementing, changing, or revising the boundaries or regulations in its zoning regulations by amendment, our hands are tied.

But while we cannot depart from controlling precedent, we can urge the court to revisit its interpretation of K.S.A. 2021 Supp. 12-757, just like it revisited its interpretation of workers compensation statutes in *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, Syl. ¶ 2, 214 P.3d 676 (2009) (noting "[a] history of incorrectly decided cases does not compel the Supreme Court to disregard plain statutory language and to perpetuate incorrect [statutory] analysis"). As Justice Johnson aptly noted in his dissenting opinion in *In re N.A.C.*, 299 Kan. 1100, 1124, 329 P.3d 458 (2014), the Kansas Supreme Court has moved away from "court-made policy interpretations" in favor of "plain-language statutory interpretations." (Citing *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 527, 154 P.3d 494 [2007], [overruling over 70-year-old caselaw that was contrary to plain statutory language].) Perhaps a fresh look at K.S.A. 2021 Supp. 12-757 will generate a similar shift in Kansas zoning law.

CONCLUSION

The district court's finding that K.S.A. 2021 Supp. 12-757 does not apply to applications for conditional-use permits contradicts controlling Kansas Supreme Court precedent. And the parties concede that the procedure for addressing such applications enacted by Finney County conflicts with K.S.A. 2021 Supp. 12-757's requirement that conditional-use permits be first reviewed by a governing body's planning commission and then voted upon by the governing body itself. See K.S.A. 2021 Supp. 12-757.

Because Finney County did not follow the procedures required under K.S.A. 2021 Supp. 12-757 and instead allowed its BZA to independently review and issue the conditional-use permit to Huber Sand, the permit is void and unenforceable. Accordingly, we must reverse the district court's grant of summary judgment to the Appellees and remand with instructions to grant summary judgment to the Appellants.

Reversed and remanded with directions.

* * *

ARNOLD-BURGER, C.J., dissenting: I respectfully dissent. The majority holds that "[b]ecause our Supreme Court has held governing bodies must follow the procedures laid out in K.S.A. 2021 Supp. 12-757 in issuing conditional-use permits, we find that Finney County has impermissibly delegated authority to issue conditional-use permits to its BZA." The central problem with this conclusion is that our Supreme Court has never so held and in fact such a finding conflicts with the clear language of K.S.A. 2021 Supp. 12-757. I would affirm the district court's grant of summary judgment for the reasons below.

UNDISPUTED RELEVANT FACTS

Huber Sand Company (Huber) owns the surface rights to a piece of land in Finney County referred to simply as the Tract. American Warrior, Inc. (AWI) has an oil and gas lease covering the Tract. It operates one active gas well on the Tract. AWI also owns and maintains underground pipe on the Tract to transport natural gas. And Brian Price, a Finney County resident, owns land next to the Tract.

Huber sought to operate a sand and gravel quarry on the Tract. The land is zoned by Finney County as agricultural. Finney County Zoning Regulations provide that a sand and gravel quarry is allowed on land zoned as agricultural after the use is reviewed and approved as a permitted conditional use by the Board of Zoning Appeals (BZA). See Finney County, Kansas, Zoning Regulations, §§ 4.010, 4.030(6), and 28.030(6); 29.040 (2021).

Huber filed the necessary application for a conditional-use permit with the BZA as required by the Finney County, Kansas, Zoning Regulations. The BZA issued Huber a conditional-use permit. It is critical to note that on appeal neither AWI or Smith challenge the fact that Huber properly followed the procedure set out in the Finney County, Kansas, Zoning Regulations, and the conditional-use permit was issued by the BZA in compliance with that procedure. Their claim rests solely on their position that the Finney County Zoning Regulations violate K.S.A. 2021 Supp. 12-757 and thus render the BZA's grant of a conditional-use permit to Huber "invalid, void, and unenforceable." The only issue before

us is whether K.S.A. 2021 Supp. 12-757 applies to the grant of a conditional-use permit in Finney County. The district court granted summary judgment for Huber, finding that the process and procedures used by Finney County for Huber's conditional-use permit complied with Kansas law. This appeal followed. AWI and Smith, the Appellants, will be collectively referred to as AWI.

ANALYSIS

The review of the grant or denial of a motion for summary judgment is de novo. *First Security Bank v. Buehne*, 314 Kan. 507, 510, 501 P.3d 362 (2021). And appellate courts interpret statutes de novo, giving effect to the express language used when it is plain and unambiguous. *State v. Moler*, 316 Kan. 565, 571, 519 P.3d 794 (2022).

With the standard of review clearly in mind, I will first examine the statute, K.S.A. 2021 Supp. 12-757, and then the cases interpreting the statute.

I. K.S.A. 2021 SUPP. 12-757 DOES NOT APPLY TO THE ISSUANCE OF CONDITIONAL-USE PERMITS

A. *K.S.A. 2021 Supp. 12-757 is clear and unambiguous in its application to changes in zoning regulations by amendment.*

K.S.A. 2021 Supp. 12-757(a) begins with a clear grant of authority to governing bodies to "supplement, change or generally revise the boundaries or regulations contained in zoning regulations by *amendment*." (Emphasis added.) It then explains who may request such an amendment. If the amendment aligns with the land use plan adopted by the governmental entity it is presumed reasonable.

At subsection (b), the statute outlines how a zoning change or regulation must be amended. It requires action by the planning commission with notice to property owners affected by the amendment. Subsection (d) provides that a majority of the members of the planning commission must approve or deny the request for the zoning amendment and then forward its recommendation to the governing body, which is required to act on it.

There is no question that the procedure Finney County has in place for the approval of conditional-use permits does not follow the procedure outlined in K.S.A. 2021 Supp. 12-757. But that does not end the analysis.

B. *The grant of a conditional-use permit is not an amendment to a zoning regulation under state law.*

Because the term conditional-use permit is not used in the statute at all, the first question we must examine is whether the granting of a conditional-use permit is an amendment to zoning regulations. If it is not, then on its face K.S.A. 2021 Supp. 12-757 has no application to conditional-use permits.

I begin with the definition of a zoning regulation. State law defines it as "the lawfully adopted zoning ordinances of a city and the lawfully adopted zoning resolutions of a county." K.S.A. 12-742(a)(11).

A conditional-use permit does not change the existing zoning of a tract of land. The Tract here is zoned agricultural and remains zoned agricultural. Under the Finney County, Kansas, Zoning Regulations sand and gravel quarries are allowed on land zoned as agricultural. So anyone purchasing property around agriculturally zoned property is on notice that sand and gravel quarries are permitted. But the county may place conditions on the use of the land. The placement of these conditions does not constitute an amendment to the zoning regulations or the zoning of the tract. It is and remains agricultural. The zoning regulations of the county remained the same both before and after the issuance of the conditional-use permit here. That accords with both the county definition of a conditional-use permit and the generally accepted definition of a conditional use.

The Finney County, Kansas, Zoning Regulations section 2.030 (36) defines a conditional use as the

"use of any building, structure or parcel of land that, by its nature, is perceived to require special care and attention in siting so as to assure compatibility with surrounding properties and uses. Conditional uses are allowed only after public notice, hearing and approval as prescribed in these Regulations and may have special conditions and safeguards attached to assure that the public interest is served."

The terms conditional use and special use are often used interchangeably—although sometimes they are separate processes set out in city ordinance or county regulation. Finney County, Kansas, Zoning

Regulations do not have any permit titled a "special-use permit." State law does not specifically define a conditional use or special use. But these terms are common in the area of land use planning.

"Special use permits are intended to provide flexibility in the siting of uses that may have adverse effects on neighboring properties under some circumstances but which may be harmonious with the neighborhood in other cases. Instead of being permitted as of right, property owners seeking to establish special uses must apply for a permit and demonstrate compliance with standards and criteria enumerated in the ordinance. The process allows local land use officials to consider aspects of proposed special uses such as their size, location, and design, as well as concerns from the public, before deciding whether the use would be appropriate and consistent with the intent of the zoning regulations." 2 Salkin, Am. Law. Zoning, Special use permits, generally § 14:1 (5th ed. 2022).

In other words, special- and conditional-use permits "allow the establishment of uses that are generally permitted in the zoning district subject [to] administrative approval." 2 Am. Law. Zoning § 14:1.

C. *Kansas statutes explicitly allow governing bodies to adopt their own procedures related to conditional-use permits.*

Counties may enact laws and regulations related to planning and zoning as long as they do not conflict with state law. K.S.A. 12-741(a). And at least since 1992, concurrent with the adoption of K.S.A. 12-757, governing bodies have been statutorily granted the authority to adopt zoning regulations which provide for the issuance of special-use or conditional-use permits. K.S.A. 12-755(a)(5). No specific procedure is mandated as it is for a zoning amendment. Governing bodies are given authority to adopt the procedures they see fit. BZAs are given broad authority to issue permits. K.S.A. 12-759(d). This variance in statutory treatment is a recognition that conditional-use and special-use permits are different than zoning amendments. Finney County adopted its own procedure for the approval of conditional-use permits and that procedure does not conflict with any applicable state law.

Support for this conclusion can be found at K.S.A. 19-2956 et seq. These provisions apply to urban counties, which have been defined as Johnson and Sedgwick counties. K.S.A. 2021 Supp. 19-2654. In these two urban counties,

"[t]he issuance of any conditional use permit [in unincorporated portions of the county] shall be considered a change or revision to the zoning map and shall be subject to the

same notice, hearing and voting requirements prescribed herein for rezonings." K.S.A. 2021 Supp. 19-2960(b).

It then requires that all conditional-use permits first must be submitted to either the planning commission or the appropriate zoning board. If first submitted to the zoning board, it must be referred to the planning commission and then the board of county commissioners just as a rezoning or change in the comprehensive plan must be. K.S.A. 19-2958(b); K.S.A. 2021 Supp. 19-2960(b). These provisions have been in effect at least since 1984. Knowing that, the Legislature did not place such requirements on conditional-use permits in non-urban counties. Instead, it left the procedures for the issuance of conditional-use permits up to the county and did not equate it with a change in the zoning regulations.

For these reasons, I believe it is clear under the plain language of K.S.A. 2021 Supp. 12-757 it does not apply to the issuance of conditional-use permits in Finney County.

II. THE CASELAW INTERPRETING K.S.A. 2021 SUPP. 12-757 DOES NOT HOLD THE STATUTE APPLICABLE TO CONDITIONAL-USE PERMITS

AWI argues that any interpretation of K.S.A. 2021 Supp. 12-757 other than the one it proposes—that the issuance of a conditional-use permit is a rezoning requiring adherence to the procedure outlined in K.S.A. 2021 Supp. 12-757—strays from Kansas caselaw. Because the Court of Appeals is duty bound to follow Supreme Court precedent, the next step is to determine whether AWI is correct. See *Johnson v. Westhoff Sand Co., Inc.,* 281 Kan. 930, 952, 135 P.3d 1127 (2006) (The Court of Appeals has no authority to overrule decisions of the Kansas Supreme Court and is duty bound to follow Kansas Supreme Court precedent.).

A. *For stare decisis to compel a particular result, the cases relied on must be* indistinguishable.

To assert that this court is duty bound to follow the decisions of the Kansas Supreme Court is another way to say that the doctrine of stare decisis compels a particular result. The doctrine of stare decisis "'compels adherence to a prior factually indistinguishable decision of a controlling court.'" *Nippon Shinyaku Co., Ltd. v. Iancu*, 369 F. Supp.

3d 226, 237 (D.D.C. 2019), *aff'd* 796 Fed. Appx. 1032 (Fed. Cir. 2020) (unpublished opinion). So a review of the facts and actual holdings of each case is important. "'Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.'" 369 F. Supp. 3d at 237. It requires the issues raised be identical to those raised in the prior case to apply. See *In re Equalization Appeal of Walmart Stores, Inc.*, 316 Kan. 32, 62, 513 P.3d 457 (2022). To consider a prior case to be binding precedent, the holding relied on must relate to the same issue presented and argued in the current case. The holding of a court is defined as "[a] court's determination of a matter of law pivotal to its decision; a principle drawn from such a decision." Black's Law Dictionary 879 (11th ed. 2019). Also described as the *ratio decidendi* or reason for deciding, it is "a general rule without which a case must have been decided otherwise." Black's Law Dictionary 1514 (11th ed. 2019).

B. *If the statements in the opinion were not essential to the holding in the case, they are considered dicta and not binding.*

The holding of a case should not be confused with judicial dictum within an opinion. Black's Law Dictionary 569 (11th ed. 2019) defines judicial dictum as "[a]n opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is *not* essential to the decision." (Emphasis added.). Nobody is bound by dictum, not even the court itself. Our Supreme Court has appreciated the fact that after further consideration and briefing of the parties the court's opinion may mature when the question is squarely presented for decision. *Law v. Law Company Building Assocs.*, 295 Kan. 551, 564, 289 P.3d 1066 (2012). Our Supreme Court has further defined a subset of dictum called obiter dictum. Obiter dictum is defined as "'[w]ords of a prior opinion entirely unnecessary for the decision of the case.'" *State v. Fortune*, 236 Kan. 248, 251, 689 P.2d 1196 (1984). It is a statement in an opinion where courts indulged in generalities that have no actual bearing on issues involved. 236 Kan. at 251. In fact, its Latin translation means "'something said in passing'" or "'by the way.'" Black's Law Dictionary 569 (11th ed. 2019). It is entitled to even less weight than judicial dictum which involves a question

directly involved and argued in the case, but not essential to its decision. *Jamerson v. Heimgartner*, 304 Kan. 678, 686, 372 P.3d 1236 (2016). Obiter dictum involves issues that have no direct bearing on the issues in the case and may not have even been argued by the parties.

I will start with a review of the cases relied on by AWI that could be binding on this court as precedent, those from the Kansas Supreme Court. Our rules are clear that unpublished opinions are not binding precedent and are not favored for citation. Supreme Court Rule 7.04(g)(2) (2022 Kan. S. Ct. R. at 47). And the fact that the Supreme Court may have denied a petition for review on an unpublished case, "imports no opinion on the merits of the case." Supreme Court Rule 8.03(h) (2022 Kan. S. Ct. R. at 59). Moreover, one Kansas Court of Appeals panel is not bound by another panel's decision. See *State v. Fleming*, 308 Kan. 689, 706, 423 P.3d 506 (2018).

With that foundation laid, I turn to the card on which the majority's house is built, "[b]ecause our Supreme Court has held governing bodies must follow the procedures laid out in K.S.A. 2021 Supp. 12-757 in issuing conditional-use permits, we find that Finney County has impermissibly delegated authority to issue conditional-use permits to its BZA." 63 Kan. App. 2d at 123-24. Such a statement has never been part of any *holding* by the Kansas Supreme Court. Granted it does appear in one Supreme Court decision, which will be discussed below, but its appearance in that case—which is then cited in other cases—is nothing more that obiter dictum. A review of the cases follows.

C. *Decisions of the Kansas Supreme Court do not conflict with a finding that the procedures required for rezoning under K.S.A. 2021 Supp. 12-757 do not apply to the grant or denial of a conditional-use permit.*

The first case AWI cites in its brief on appeal is *Johnson County Water Dist. No. 1 v. City of Kansas City*, 255 Kan. 183, 186, 871 P.2d 1256 (1994). AWI admits that there is but one fleeting reference in the case to K.S.A. 12-757. This probably explains why this case was not presented to the district court as supporting AWI's position in its motion for partial summary judgment. The citation has absolutely nothing to do with whether the city council had to follow K.S.A. 2021 Supp. 12-757 before granting a special-use permit or a conditional-use permit and it is not essential to the holding in the case. The crux of the case

was whether the governing body's actions setting conditions on the granting of a special-use permit were reasonable and whether the Water District was entitled to immunity from local zoning regulations. This case does not hold, nor even remotely suggest, that governing bodies must follow the procedures laid out in K.S.A. 2021 Supp. 12-757 in issuing conditional-use or special-use permits.

Next, AWI cites *Crumbaker v. Hunt Midwest Mining, Inc*., 275 Kan. 872, 69 P.3d 601 (2003). Again, the actual holding has nothing to do with the mandatory application of the procedures set out in K.S.A. 12-757 to the issuance of a conditional-use permit.

The City of DeSoto sought to address a land use issue through an Annexation Agreement without following its own rezoning procedures and issuing a special-use permit. Neighboring property owners sued alleging that the legal effect of the Annexation Agreement was to change the land use previously restricted by the county under a conditional-use permit. The City's ordinances required it to regulate land use as provided by K.S.A. 12-741 et seq. So the application of the provisions of the statutes was never in question. Moreover, DeSoto is located in Johnson County, and as already noted K.S.A. 2021 Supp. 19-2960(b) defines conditional-use permits as zoning changes in Johnson County.

Instead, the Supreme Court held that when a county property is annexed by a city, "the property retains its county zoning classification and any accompanying land use restrictions until the annexing city *changes the zoning*." (Emphasis added.) 275 Kan. 872, Syl. ¶ 1. As noted, DeSoto ordinances required public hearings for rezonings *and* special-use permits, and it was trying to avoid that process by incorporating the changes in the Annexation Agreement. There is no discussion of the legality of procedures established under K.S.A. 12-755(a)(5) or any procedure similar to the one used by Finney County. The parties agreed that the City failed to follow its own zoning procedures in passing the resolution authorizing the mayor to execute the Agreement and failed to follow its own zoning procedures when it enacted the annexation ordinance authorized by that Agreement.

Granted *Crumbaker* does state that "we have long held that the power of a city government to change the zoning of property—

which includes issuing special-use permits—can only be exercised in conformity with the statute which authorizes the zoning." 275 Kan. at 886. Up until *Crumbaker*, it is the *only* Supreme Court case in which this statement appears. But the case it cites for this proposition, *Ford v. City of Hutchinson*, 140 Kan. 307, 311, 37 P.2d 39 (1934), does not support this statement. *Ford* was a zoning change from a residential district to a commercial zone and did not involve conditional-use permits or special-use permits. The terms are nowhere in the opinion. The *Ford* opinion does not equate the issuance of a conditional-use permit or a special-use permit with a change in zoning. And finding that a special-use permit was a change in zoning was not essential to the holding in *Crumbaker*. Given the city regulations and the fact that it was not argued by the parties, the broad statement with the inclusion of the clause "which includes issuing special-use permits" is no more than *obiter dictum* and binds no one.

Five years after *Crumbaker*, the Kansas Supreme Court decided *Manly v. City of Shawnee*, 287 Kan. 63, 194 P.3d 1 (2008), the third case on which AWI relies. It also involved a special-use permit. And, similar to *Johnson County Water District No. 1*, the sole issue was whether the City could grant the special-use permit with a simple majority vote after the planning commission had recommended denial. The court found the answer in K.S.A. 12-757(d). There was no dispute among the parties related to the application of K.S.A. 12-757 and the court proceeded with the assumption that it did apply. As already noted, K.S.A. 2021 Supp. 19-2960(b) defines conditional-use permits as changes to zoning in Johnson and Sedgwick counties and requires the same notice, hearing, and voting requirements as a rezoning. To surmise from *Manly* that conditional-use permits issued in counties other than Johnson or Sedgwick *must* follow the procedure in K.S.A. 12-757(d) or be void when that was not an issue raised in the case would be foolhardy. Context matters. Facts matter. The Supreme Court does not repeat the dictum from *Crumbaker* in *Manly*.

Finally, a year later, the Supreme Court decided *Zimmerman v. Board of Wabaunsee County Comm'rs*, 289 Kan. 926, 218 P.3d 400 (2009). In 2002, the Board of Wabaunsee County Commissioners (Board) was met with inquiry from a company desiring to build a commercial wind farm. After placing a temporary moratorium

on the acceptance of applications for conditional-use permits for wind farm projects, the county embarked on a two-year process of reviewing its zoning regulations as they related to wind farms. The Board of County Commissioners determined that wind farms should be prohibited in the county. It adopted a county resolution *amending* the county's zoning regulations to impose that restriction. A lawsuit followed.

As in the other cases, whether the procedures required by K.S.A. 12-757(d) applied to the case was not in dispute. The opening sentence of the opinion makes that clear; "[t]his appeal results from the decision of the [Board] to amend its zoning regulations." 289 Kan. at 929. The issue was whether a super-majority vote was required under the statute to return the amendment recommendation to the planning commission. Again there is no binding precedent in this case to conclude that conditional-use permits are changes in zoning, in counties other than Johnson and Sedgwick, that require adherence to the procedures in K.S.A. 12-757.

It is also significant that by the time *Zimmerman* was decided the Supreme Court was omitting the clause "which includes issuing special use permits" from its quotations of *Crumbaker*, 275 Kan. 886. In both *Zimmerman* and *Genesis Health Club, Inc. v. City of Wichita*, 285 Kan. 1021, 1033, 181 P.3d 549 (2008), the Supreme Court simply noted that it had held that "'the power of a city government to change the zoning of property . . . can only be exercised in conformity with the statute which authorizes the zoning.' As a result, a city's failure to follow the zoning procedures in state law renders its action invalid. [Citations omitted.]" *Zimmerman*, 289 Kan. at 939. Perhaps this was a recognition that the inclusion of the broad clause equating special-use permits with rezonings was unsupported by the statute.

But that did not stop our court from continuing to rely on the dictum from *Crumbaker* as the expression of a solid legal principle.

D. *The unpublished opinions relied on by AWI are also easily distinguishable.*

Although this court owes no deference to unpublished opinions, those relied on by AWI to support its position, that the conditional-use permit granted to Huber is void, suffer the same malady as the published opinions—they are factually distinguishable and did not involve the legal question presented here.

Ternes v. Board of Sumner County Comm'rs, No. 119,073, 2020 WL 3116814 (Kan. App.) (unpublished opinion), *rev. denied* 312 Kan. 902 (2020), the case at the heart of AWI's original petition—in fact the only case it cites in its petition—involved the application for a zoning change *and* the necessary conditional-use permit. The land on which Invenergy wished to install a wind farm was zoned Rural District. Wind farms were only allowed on land zoned Agricultural Commercial, and even then the applicant had to obtain a conditional-use permit to operate the commercial wind farm. So clearly the procedure set out in K.S.A. 12-757 applied to the rezoning application. Invenergy applied for both. There were problems with the notices sent. But the planning commission took up both applications and recommended to the Board of County Commissioners that the zoning change be denied. There would be no need to even address the conditional-use permit if the zoning was denied. One depended on the other. But the planning commission also denied the conditional-use permit—apparently consistent with Sumner County zoning ordinances. The matter went before the Board which voted to grant the zoning change *and* the conditional-use permit. The surrounding neighbors led by Martin Ternes appealed arguing among other issues that the planning commission was the sole arbiter of the conditional-use permit, not the Board, based on the county zoning regulations.

This court's decision revolved around an interpretation of the county zoning regulations and their requirements about conditional-use permits, *not* K.S.A. 12-757. But then, while recognizing that K.S.A. 12-755(a)(5) allowed the county to adopt procedures related to the issuance of conditional-use permits, it turned to the wholly unsupported language that "Kansas courts have consistently found that the procedures in K.S.A. 2019 Supp. 12-757 apply to *conditional use and* special use permits." (Emphasis added.) 2020 WL 3116814, at *7. It cites *Manly* for this holding. Not only did the panel add to the *Crumbaker* language to include conditional-use permits, it treated the dictum as controlling legal principle even though it highlighted the fact that such an interpretation deviated from K.S.A. 12-755(a)(5). *Ternes*, 2020 WL 3116814, at *7.

Making an unsupported statement several times in a string of cases does not make it true. The panel concluded that only the

Board could grant a conditional-use permit based on the language of K.S.A. 12-757 no matter if the planning commission approves. *Ternes*, 2020 WL 3116814, at *8. Accordingly, I cannot agree with the decision in *Ternes* when it improperly cites an unsupported legal principle—particularly when the conclusion was unnecessary for a decision in the case. The panel already noted that the Sumner County zoning regulations provided that the planning commission only serves in an advisory role, so its decision could not be the final one if it was simply making recommendations to the Board. *Ternes*, 2020 WL 3116814, at *6. The zoning regulations did not conflict with K.S.A. 12-757. This is simply another case of obiter dictum.

To avoid continuing to belabor this, the other three unpublished cases AWI relies on are readily distinguishable as well. *Vickers v. Board of Franklin County Comm'rs*, No. 118,649, 2019 WL 3242274 (Kan. App. 2019) (unpublished opinion) (same distinguishing facts as *Ternes*); *Rural Water Dist. No. 2 v. Board of Miami County Comm'rs*, No. 105,632, 2012 WL 309165 (Kan. App. 2012) (unpublished opinion) (vote required and reasonableness of decision denying conditional-use permit—application of K.S.A. 12-757 was uncontested); *Blessant v. Board of Crawford County Comm'rs*, No. 89,916, 2003 WL 23018238 (Kan. App. 2003) (unpublished opinion) (sole issue was reasonableness of the Board's decision to deny a conditional-use permit—application of K.S.A. 12-757 was uncontested).

Finally in its reply brief, AWI alerts us to yet two more cases which it contends support its position. *Kaw Valley Companies, Inc. v. Board of Leavenworth County Comm'rs*, No. 124,525, 2022 WL 3693619 (Kan. App. 2022) (unpublished opinion) (no dispute that statutory procedures were followed, no challenge to their application, and *Manly* cited for the dictum from *Crumbaker*), and *Pretty Prairie Wind LLC v. Reno County*, 62 Kan. App. 2d 429, 517 P.3d 135 (2022) (considering whether K.S.A. 2021 Supp. 12-757[f] or K.S.A. 25-3601 et seq. applied to filing of a protest petition to a conditional-use permit—no dispute it was one of the two and no discussion of application of K.S.A. 12-757 in situations like those presented here).

So I conclude by reiterating that facts matter, context matters, and words matter. As our Supreme Court has recognized, sometimes appellate courts use dicta. Sometimes that dicta is persuasive when applied to the right situations, but sometimes that dicta is just a statement in passing to be reconsidered in the right situation where the specific legal principle at issue has been properly briefed. The foundational card on which the majority builds its house is a statement of obiter dictum that causes the house to come crashing down when applied to a case that merits reconsideration of that dictum when the question is squarely presented for decision.

CONCLUSION

The statutes are clear. Conditional-use permits in counties other than Johnson and Sedgwick are governed by K.S.A. 12-755, not K.S.A. 2021 Supp.12-757. They are not amendments to the zoning regulations. And based on K.S.A. 12-755 the county may adopt any procedures it desires to approve such permits as long as it does not conflict with state law. The procedures adopted by Finney County do not conflict with state law. If the citizens of Finney County find the process distasteful, they may use their political will to get the regulations changed. But until then, the parties agree that Finney County complied with its regulations. Accordingly, the district court's grant of summary judgment should be affirmed.

No. 125,144

ISMAEL LOPEZ, *Appellant*, v. STEVE M. DAVILA, *Appellee*.

SYLLABUS BY THE COURT

1. CIVIL PROCEDURE—*Negligence Claims—File within Two Years from Negligent Act*. Under K.S.A. 60-513(a)(4), a plaintiff must commence his or her negligence claims within two years from the date of the negligent act.

2. SAME— *Negligence Claims—Accrual of Cause of Action under K.S.A. 60-513(b*). Under K.S.A. 60-513(b), the cause of action listed in K.S.A. 60-513(a) "shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party."

3. SAME—*Substantial Injury Definition—Actionable Injury*. The term "substantial injury" in K.S.A. 60-513(b) means the victim must have reasonably ascertainable injury to justify an action for recovery of damages; in other words, an "actionable injury."

4. SAME—A*ccrual of Cause of Action under K.S.A. 60-513(b).* Under K.S.A. 60-513(b), a cause of action accrues as soon as the right to maintain a legal action arises; that is, when the plaintiff could first have filed and prosecuted his or her action to a successful conclusion.

5. SAME—*Commencement of Limitations Period under K.S.A. 60-513(b)—Three Triggering Events*. Under K.S.A. 60-513(b), we review three triggering events to determine when the limitations period commences: (1) the act which caused the injury; (2) the existence of a substantial injury; and (3) the victim's awareness of the fact of injury. Without the existence of a substantial injury, though, the consideration of the reasonably ascertainable nature of the injury is irrelevant.

Appeal from Johnson District Court; RHONDA K. MASON, judge. Opinion filed March 3, 2023. Affirmed in part, reversed in part, and remanded with directions.

Stephen P. Weir, of Stephen P. Weir, P.A., of Topeka, for appellant.

Justen P. Phelps, Shannon L. Holmberg, and *Michelle M. Watson*, of Gibson, Watson, Marino, LLC, of Wichita, for appellee.

Before MALONE, P.J., HURST and COBLE, JJ.

COBLE, J.: After a car accident in 2019 left him injured, Ismael Lopez attempted to access the personal injury protection (PIP) coverage he believed he purchased in 2013 as part of an umbrella policy from Steve M. Davila, an agent with Farmers Insurance. When Farmers denied his PIP claim for lack of coverage, Lopez sued Davila and made claims in both contract and tort. Davila filed a motion for summary judgment contending Lopez' claims were barred by the statutes of limitations, and the district court granted Davila's motion. Lopez appeals, arguing the district court erred by ignoring his motion for summary judgment and granting Davila's motion for summary judgment because the district court did not consider his alleged facts or give him the benefit of reasonable inferences, and it made insufficient findings of fact and conclusions of law.

On review, we find that, although the district court appropriately applied Kansas Supreme Court Rule 141 (2022 Kan. S. Ct. R. at 223) and Supreme Court Rule 165 (2022 Kan. S. Ct. R. at 234) from a technical standpoint, the district court erred in granting summary judgment to Davila by finding the statute of limitations prevented Lopez' tort claims from moving forward. Although we affirm the district court's grant of summary judgment on Lopez' contract claim, we reverse the district court's grant of summary judgment on Lopez' tort claims and remand for further proceedings on those tort claims.

FACTUAL AND PROCEDURAL BACKGROUND

Since 1998, Davila has been an insurance agent affiliated with Farmers Insurance. Around 2007, Lopez became Davila's client. In 2013, Lopez contacted Davila to request an increase to his underlying auto coverages, to obtain an umbrella policy, and to discuss life insurance. While discussing an umbrella policy, Davila advised Lopez the umbrella policy included excess coverage for all of Lopez' underlying home and auto coverages. Davila indicated to Lopez that the personal umbrella policy included excess PIP coverage.

Davila did not recall Lopez requesting to increase his PIP coverage on his underlying auto policy during this meeting. Davila also did not recall Lopez asking for the umbrella policy specifically because he wanted more PIP coverage.

After the meeting, Lopez' wife applied for the personal umbrella policy. The application did not specifically request excess PIP coverage, but it did ask for excess uninsured motorist and underinsurance motorist coverage. After the increased policies were issued, Lopez and Davila spoke a few times a year. From 2013 until 2019, Davila and Lopez spoke occasionally about Lopez' policies, but most of the communication related to upcoming renewal dates. The parties did not discuss whether excess PIP coverage was included in the umbrella policy. And neither Lopez nor Davila remember specifically discussing PIP coverage after the 2013 meeting.

Lopez received annual renewal offers from Farmers for all policies, which included a declaration page, detailing the coverages. Lopez acknowledged that while his auto policy declaration pages listed PIP coverage, his umbrella policy declaration page did not, and if he had reviewed his declaration pages each year, he would have seen that PIP was not listed on the umbrella policy.

Almost six years after Lopez purchased the umbrella policy, on February 14, 2019, he was injured in a single-car accident while driving his son's truck. Lopez subsequently submitted claims under both his auto and umbrella policies. Farmers Insurance denied Lopez' excess PIP claim under his umbrella policy and specifically noted that the umbrella policy did not provide PIP coverage.

In January 2021, Lopez filed a petition against Davila alleging claims of negligent misrepresentation, breach of contract, and breach of professional duty. Lopez claimed that he requested, and Davila represented to provide, umbrella coverage that included $1,025,000 for PIP. But after relying on Davila's representations, procuring the represented insurance policy, and subsequently getting in a car accident that resulted in injuries, Lopez' insurance provider denied his claim for excess PIP coverage. Davila admitted he mistakenly believed and represented to Lopez that the personal umbrella policy applied to all underlying auto coverages, including PIP benefits.

Lopez moved for partial summary judgment based on liability in May 2021. Davila responded and filed his own motion for summary judgment a few months later.

On October 6, 2021, the district court held a hearing on the motions for summary judgment. The transcript of this hearing is not included in the record on appeal. In an order filed a few months later, the district court granted Davila's motion for summary judgment. The district court found Lopez' claims in contract and tort were barred by the statute of limitations because the "lack of excess PIP coverage within [Lopez'] personal umbrella policy was reasonably ascertainable from the time that it was first issued in 2013." Because of the nearly eight-year time lapse between the issuance of the policy in 2013 and the filing of the action in 2021, the district court found Lopez' "claims in either contract or tort are barred by the applicable statute of limitation." Because the district court found Lopez' claims were barred, the court entered summary judgment in favor of Davila on all claims and found all other issues raised by the parties to be moot.

A few weeks later, Lopez moved to alter or amend the district court's summary judgment order. Lopez argued the district court erred in resolving facts and inferences in favor of Davila, the defendant, rather than in favor of Lopez, the plaintiff. Lopez also argued the district court legally erred in finding the lack of excess PIP coverage in the umbrella policy was reasonably ascertainable in 2013, erred in finding Lopez had some obligation to review and understand his insurance policy, and erred when it made no findings of fact or law regarding Davila's duty to notify Lopez of Davila's lack of procurement of PIP coverage.

The district court held a hearing on Lopez' motion to alter or amend the district court's summary judgment order in March 2022. The court granted Lopez' motion, in part, because it had not previously stated its findings of fact and conclusions of law on which it denied Lopez' motion for partial summary judgment. Even so, the district court found Lopez did not meet his burden of controverting the facts set out in Davila's motion for summary judgment and it reaffirmed Lopez' minimum duty to read the insurance policy. The district court concluded by again finding the lack of excess PIP coverage was reasonably ascertainable when the coverage was initially procured in 2013 and therefore the claims were barred by the statutes of limitations.

Lopez appeals.

DID THE DISTRICT COURT ERR IN GRANTING DAVILA'S MOTION FOR SUMMARY JUDGMENT?

Lopez argues the district court erred in granting Davila's motion for summary judgment by challenging multiple aspects of the court's decision. Primarily, he argues the court erred by finding his claims are barred by the statutes of limitations. He also argues the court did not make sufficient findings of fact and conclusions of law on his motion for partial summary judgment, and in that vein, he argues the district court erred in relying only on Davila's factual statements when granting summary judgment and not relying on his purported facts for consideration of the summary judgment motions.

In response, Davila argues the district court did not err in granting summary judgment because Lopez did not controvert the facts set out in Davila's motion for summary judgment, the court made adequate findings of fact and conclusions of law, and Lopez' causes of action were barred by the statutes of limitations.

The standard of review for appeals from an order of summary judgment is well settled:

"Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and supporting affidavits show that no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. The district court must resolve all facts and reasonable inferences drawn from the evidence in favor of the party against whom the ruling is sought. When opposing summary judgment, a party must produce evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issue in the case. Appellate courts apply the same rules and, where they find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment is inappropriate. Appellate review of the legal effect of undisputed facts is de novo." *GFTLenexa, LLC v. City of Lenexa*, 310 Kan. 976, 981-82, 453 P.3d 304 (2019).

An "issue of fact is not genuine unless it has legal controlling force as to the controlling issue. A disputed question of fact which is immaterial to the issue does not preclude summary judgment." *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 934, 296 P.3d 1106 (2013). In other words, "if the disputed fact, however resolved, could not affect the judgment, it

does not present a genuine issue" for purposes of summary judgment. 296 Kan. at 934.

As noted, Lopez makes multiple arguments contending the district court erred in granting Davila's motion for summary judgment. On review, however, only one question is dispositive. The controlling question on appeal is whether the applicable statutes of limitations barred Lopez' claims, as a matter of law. First, though, we briefly address the parties' arguments related to the district court's technical findings of fact and conclusions of law under Kansas Supreme Court Rules 141 and 165.

The parties' arguments under Kansas Supreme Court Rule 141 and Rule 165 are not determinative of this appeal.

The district court did not abuse its discretion in relying on Davila's statement of uncontroverted facts under Supreme Court Rule 141, and the court's orders adequately included findings of fact and conclusions of law under Supreme Court Rule 165.

First, in its order granting summary judgment, the district court referenced Rule 141 and the progeny of cases that indicate the importance of comporting with the rule. Although the district court did not explicitly apply Rule 141 to its initial summary judgment order, its reference to the rule and statement of facts—which largely follows Davila's—suggest the district court found Lopez' brief in opposition to Davila's motion for summary judgment did not properly controvert Davila's facts. And the district court's later order denying Lopez' motion to alter or amend explicitly found "many times" that Lopez did not controvert the facts set out in Davila's motion for summary judgment.

Supreme Court Rule 141 outlines the requirement for briefing summary judgment motions and related filings, and in particular requires a brief opposing summary judgment to "concisely summarize" the conflicting evidence and "provide precise references as required in subsection (a)(2)" to the record. Supreme Court Rule 141(b)(1)(C) (2022 Kan. S. Ct. R. at 224). Lopez cut corners in his response to Davila's summary judgment motion. In the response, Lopez did not cite to specific facts in the record. Instead, his controverted facts section in large part referenced either his own earlier motion for partial summary judgment or his reply to

Davila's response to that same motion. This would, no doubt, require the district court to repeatedly refer back to Lopez' earlier briefing to discover the locations in the record which he contended supported his factual statements.

This briefing technique likely frustrated the district court's ability to determine whether facts were controverted, and our courts have found that a party fails to comply with Supreme Court Rule 141 at its own peril. *Slaymaker v. Westgate State Bank*, 241 Kan. 525, 531, 739 P.2d 444 (1987) ("A party whose lack of diligence frustrates the trial court's ability to determine whether factual issues are controverted falls squarely within the sanctions of Rule 141."); *Business Opportunities Unlimited, Inc. v. Envirotech Heating & Cooling, Inc.*, 26 Kan. App. 2d 616, 618, 992 P.2d 1250 (1999) ("A party ignores Rule 141 at its peril."). Supreme Court Rule 141(f) grants the district court the discretion to deem the party opposing summary judgment as having admitted the uncontroverted facts in the movant's statement, which "will not be disturbed on appeal without a clear showing of abuse." *Ruebke v. Globe Communications Corp.*, 241 Kan. 595, 604, 738 P.2d 1246 (1987).

Although the Rule 141 issue is mentioned in both the district court's rulings and Davila's appellate briefing, Lopez fails to present any argument on the issue in his appellate briefing. So, Lopez fails to meet his burden to demonstrate any abuse of discretion in the district court's recitation of the facts.

Likewise, we fail to find any abuse of discretion in how the district court outlined its findings of fact and conclusions of law under Supreme Court Rule 165. Lopez complains the court did not adequately make findings of fact and conclusions of law in its order granting summary judgment and in its order denying his motion to alter or amend.

Supreme Court Rule 165 and K.S.A. 2021 Supp. 60-252 impose on the district court the primary duty to provide adequate findings of fact and conclusions of law to explain the court's decision on contested matters. The district court's findings should sufficiently resolve the parties' issues, and the findings should adequately advise the parties which standards the court applied and what reasons persuaded the court to arrive at its decision. See

Gannon v. State, 305 Kan. 850, 875, 390 P.3d 461 (2017). In other words, "'the court's findings and conclusions should reflect the factual determining and reasoning processes through which the decision has actually been reached.'" 305 Kan. at 875.

The district court's initial order granting summary judgment specified that it considered "the briefs and attached exhibits filed and arguments made by the parties." The order identified 24 findings of fact, and the 15 conclusions of law reflected the standards for summary judgment, Supreme Court Rule 141, and the statutes of limitations. The order concluded by making findings applying the law to the factual statements. The district court's identified conclusions of law show the district court understood its burden and requirements for resolving alleged factual disputes and evaluating the appropriateness of summary judgment.

The order goes on to state the statutes of limitations for contract and tort, noting there is no tolling provision in the contract statute of limitations. K.S.A. 60-512. The order identified the statute that requires the period of limitation for tort to not commence "until the fact of injury becomes reasonably ascertainable to the injured party." K.S.A. 60-513(b). The district court also noted that Kansas courts have recognized "some obligation on the insured to review and understand an insurance policy." See *Jones v. Reliable Security, Inc.*, 29 Kan. App. 2d 617, 632, 28 P.3d 1051 (2001). Applying the findings of fact to the conclusions of law, the district court determined the applicable statutes of limitations bar consideration of Lopez' claims under contract or tort because the lack of excess PIP coverage—the injury—was reasonably ascertainable to the injured party—Lopez—when he received the policy in 2013.

The district court's initial summary judgment order did not, however, specifically address why it denied Lopez' motion for partial summary judgment, aside from noting all remaining issues were moot. But acknowledging its failure, the court granted Lopez' motion to alter or amend, in part, to make the appropriate findings. The district court amended its order granting summary judgment to find Lopez' argument in his motion for partial summary judgment contending Davila failed to procure the excess PIP coverage could not overcome the expiration of the applicable statutes of limitations. The district court noted that although Davila

did not make the procurement, the statute of limitations "began to run when the breach occurred in 2013." The district court concluded Lopez' claims were barred by the statutes of limitations because Lopez failed to bring his claims within two or three years. The district court's order goes on to find Lopez did not controvert Davila's facts because Lopez' brief did not comply with Supreme Court Rule 141.

Lopez has not shown the district court erred in its application of Rule 165 and K.S.A. 2021 Supp. 60-252 because the district court met its duty of providing adequate findings of fact and conclusions of law to explain its decision. See *Gannon*, 305 Kan. at 875. And the district court's findings have not prevented this court from adequately reviewing the district court's decision.

Although Lopez does not meet his burden to demonstrate an abuse of discretion in either the way the district court relied on Davila's statement of uncontroverted facts under Rule 141 or announced its findings of fact and conclusions of law under Rule 165, these concerns are not determinative of this appeal.

Ultimately, despite the parties' disagreements regarding how Lopez' briefing or the district court's recitation of its findings affected the court's final decision, the facts critical to this appeal remain uncontroverted. Davila himself acknowledged that during his conversation with Lopez in early 2013, he misstated to Lopez that the umbrella policy included excess PIP coverage, and Davila mistakenly believed the personal umbrella policy included excess PIP coverage. This conversation between Davila and Lopez occurred before Lopez' 2013 application for the umbrella policy. Between 2013 and 2019, Davila and Lopez did not specifically discuss whether excess PIP coverage was included in the personal umbrella policy. Lopez did receive annual renewal offers, which included a declaration page, with a summary of the insurance coverages, limits, and deductibles. The declaration page of his umbrella policy included "General Liability, Uninsured and Underinsured Motorist coverages, but not PIP." Lopez first attempted to access excess PIP coverage after his February 2019 car accident, and his claim was denied because there was no excess PIP coverage through the umbrella policy. Lopez then filed this lawsuit in January 2021.

Based on these uncontroverted facts, we find no error in the district court's grant of summary judgment on the contract claim, but find the court erred in granting summary judgment on the tort claims by misapplying the law to those facts.

Lopez argues that the district court erred in granting summary judgment on both his contract and tort claims based on the expiration of the limitations period for both types of claims. He argues the sole breach of contract was not in 2013, but that "[e]ach year was a new representation and new contract." We find his arguments lacking substance and are unpersuasive. Regarding his tort claims, Lopez contends the district court made an error of law by finding he could have reasonably ascertained his injury in 2013 after Davila initially failed to procure excess PIP coverage. Below, and now on appeal, Lopez contends his injury was not reasonably ascertainable until the time of his car accident in 2019. Although we find Lopez' arguments too narrow, we agree the district court erred in applying the law to the facts before it on the tort claims.

To reiterate, "[s]ummary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and supporting affidavits show that no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law." *GFTLenexa, LLC*, 310 Kan. at 981-82. "Appellate review of the legal effect of undisputed facts is de novo." 310 Kan. at 982. To the extent resolution of this issue requires statutory interpretation, appellate review is unlimited. *Nauheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019).

Applicable statutes of limitations

The claim Lopez presents is for Davila's failure to procure specific insurance coverage. In *Marshel Investments, Inc. v. Cohen*, 6 Kan. App. 2d 672, 683, 634 P.2d 133 (1981), this court explained:

> "It has been explicitly stated an action for the breach of this duty may be brought in contract or in tort. Although no Kansas cases reveal particular exposition of legal analysis for the ability to bring the action on these alternative theories, it might be said the duty is both an implied contractual term of the undertaking (contract duty) and a part of the fiduciary duty owed the client by reason of the principal-agent relationship arising out of the undertaking (tort duty)."

Here, Lopez' petition alleged both contract and tort causes of action, arguing: "The Plaintiff has demanded payment for his medical expenses and loss of income damages which should have been covered under an umbrella PIP policy but for Defendant's Negligent Misrepresentations; Breach of Contract and Breach of Duty to the Plaintiff owed by the Defendant Professional."

The parties agree that the contract limitations period is provided by K.S.A. 60-512 which states: "The following actions shall be brought withing three (3) years: (1) All actions upon contracts, obligations or liabilities expressed or implied but not in writing." The parties likewise agree that the limitations period for the tort claims is governed by K.S.A. 60-513(a)(4): "An action for injury to the rights of another, not arising on contract," must be brought within two years.

Lopez' breach of contract claim is barred by the statute of limitations.

Lopez' argument regarding the district court's finding that the statute of limitations bars his breach of contract claim is essentially that Davila made a new representation for PIP coverage every year through the policy renewals, and a new breach then occurred with each new representation. Lopez does not elaborate, but his argument seems to assume that each alleged annual representation created a new oral contract that Davila subsequently breached.

Even so, Lopez does not benefit this court with an analysis of precisely which actions by Davila constituted a new oral contract each time the policy was renewed, nor does he even outline basic contract principles. He simply argues summarily that "[e]ach year was a new representation and new contract." He made a similar imprecise argument in his motion for partial summary judgment.

But these vague assertions are not enough. A plaintiff bringing a cause of action based on an oral contract bears the burden of proving the contract's existence by a preponderance of the evidence. *U.S.D. No. 446 v. Sandoval*, 295 Kan. 278, 282, 286 P.3d 542 (2012). No doubt, the question of whether a contract was formed is a question of fact that depends on the intention of the parties, and the existence of a contract is generally inappropriate

for decision on summary judgment. See *In re Estate of Hjersted*, 285 Kan. 559, 589, 175 P.3d 810 (2008); *Reimer v. Waldinger Corp*., 265 Kan. 212, 214, 959 P.2d 914 (1998). But even so, the minuscule argument Lopez presented in his motion for partial summary judgment, and now on appeal, contending a new contract was formed for each annual renewal, is not persuasive to meet even his most minimal burden.

The only support Lopez provides for his claim that "[e]ach year was a new representation and new contract" is his factual assertion that Davila "continued to assert [Lopez] had excess PIP coverage even after the 2019 accident and all the way up to the denial letter from the insurance company." But this assertion is not persuasive for two reasons. First, the fact is not supported by the record. The uncontroverted facts found by the district court state that "[d]uring the time period between 2013 and 2019, [Davila and Lopez] did not specifically discuss whether excess PIP coverage was included in his personal umbrella policy." And more pointedly, "After the policy was issued in early 2013 up through the time of [Lopez'] accident in 2019, Defendant Davila did not make any representations to [Lopez] regarding whether the personal umbrella policy contained excess PIP coverage."

And second, even if Lopez had met his burden of properly controverting Davila's facts under Supreme Court Rule 141 with his own factual allegations, he provides no analysis to meet his burden of demonstrating that a new contract arose from each annual renewal. He simply presses the point without providing supporting authority or showing why it is sound despite a lack of authority. This is not persuasive, and we find the argument waived or abandoned. See *In re Adoption of T.M.M.H.,* 307 Kan. 902, 912, 416 P.3d 999 (2018) (failing to support a point with pertinent authority or failing to show why a point is sound despite a lack of supporting authority is like failing to brief the issue).

The uncontroverted facts do, however, support the district court's finding that Lopez' breach of contract claim is barred by the statute of limitations. "Under the provisions of K.S.A. 60-512 a cause of action for breach of contract not in writing must be instituted within three years. It is axiomatic that the three-year period commences to run from the date of the breach of the contract." *Wolf v. Brungardt*, 215 Kan. 272, 279, 524 P.2d 726 (1974). The

Wolf court opined that "[t]he crucial inquiry" is whether the plaintiff's cause of action for breach of contract was "instituted within three years of the date of the breach of the oral agreement." 215 Kan. at 279. And of relevance here: "A cause of action for breach of contract accrues when a contract is breached by the failure to do the thing agreed to, irrespective of any knowledge on the part of the plaintiff or of any actual injury it causes." *Pizel v. Zuspann*, 247 Kan. 54, 74, 795 P.2d 42 (1990), *modified on other grounds* 247 Kan. 699, 803 P.2d 205 (1990).

The record is silent on a specific date that any oral contract was formed, but the uncontroverted facts show Davila and Lopez allegedly entered into an oral contract for Davila to procure an umbrella insurance policy with excess PIP coverage in early 2013. Davila admits he did not procure such policy at any point after their conversation in early 2013. Thus, the cause of action for the alleged breach of oral contract accrued when Davila ostensibly did not procure the agreed-upon coverage. The record is also silent as to an exact date Davila failed to procure the excess PIP coverage, but the resulting policy was issued on March 22, 2013. Lopez did not initiate this cause of action until January 26, 2021, nearly eight years later.

Because K.S.A. 60-512 requires an action for breach of oral contract to be filed within three years of the breach, and the statute contains no tolling provision, Lopez has not shown the district court erred in finding the statute of limitations barred consideration of his breach of contract claim.

The district court erred in applying the law to Lopez' tort claims.

Under K.S.A. 60-513(b), the limitations period for Lopez' tort claims does not commence

> "until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party."

That is, the "'statute of limitations starts to run in a tort action at the time a negligent act causes injury if *both* the act and the resulting injury are reasonably ascertainable by the injured person.'"

(Emphasis added.) *Bott v. State*, 62 Kan. App. 2d 625, 637, 521 P.3d 740 (2022) (quoting *Roe v. Diefendorf*, 236 Kan. 218, 222, 689 P.2d 855 [1984]).

When applying this statute to Lopez' claims, the district court failed to consider when his injury first caused substantial injury, under the first clause of the statute. Instead, the court solely focused on determining when his injury became reasonably ascertainable. This was a critical misstep. But what is a "substantial injury" under K.S.A. 60-513(b)? To determine this, we look to definitions provided by earlier decisions.

One of the more illuminating and recent decisions is found in *LCL v. Falen,* 308 Kan. 573, 422 P.3d 1166 (2018). In *Falen*, our Supreme Court examined when the statute of limitations began to run on a negligence claim. There, a surface real estate owner brought a quiet title action against Gregory and Julie Falen and others (trustees and beneficiaries of a trust) who had owned mineral rights in the subject land prior to 2008, when the land was conveyed to new owners. Although the mineral rights were intended to be reserved, in the 2008 deed prepared by the closing agent and title insurer, the mineral reservation to the Falens and others was erroneously omitted. But the Falens and others continued receiving royalties and continued to pay property taxes, until the land was sold again in 2014 to LCL. When LCL questioned the mineral rights discrepancies in both the 2008 and 2014 deeds, royalty payments were suspended and LCL filed the quiet title action. The Falens filed a third-party petition against the title company alleging both negligence and contracts claims.

The quiet title action settled, and the title company filed a motion for summary judgment on the Falens' third-party claims on statute of limitations grounds. The district court granted summary judgment, finding the claims untimely. As to the negligence claims, it focused on when the injury became reasonably ascertainable, and found the injury was reasonably ascertainable when the initial erroneous deed was filed in 2008. On appeal, a panel of this court—shifting its focus to the injury itself—examined when the Falens suffered a substantial, actionable injury, and reversed the district court's summary judgment decision, finding no substantial injury occurred until the Falens stopped receiving royal-

ties in 2014. The Court of Appeals found the Falens "had no cognizable monetary damages until the royalties stopped." 308 Kan. at 581.

Our Supreme Court disagreed with both lower courts' analyses, although it also found summary judgment was entered in error and reversed the judgment. The court determined that the Falens "immediately suffered more than a mere paper injury" when the first erroneous deed was recorded in 2008, because a cloud on their title to the mineral interest arose, equitable relief was immediately available, and seeking that relief was "bound to be a costly process." 308 Kan. at 583-84. It found, though, that disputed evidence existed when the injury became reasonably ascertainable and remanded the case for further proceedings. 308 Kan. at 587-88.

In *Falen*, the Supreme Court restated the definition of "substantial injury" it had defined in earlier cases: The term "substantial injury" in K.S.A. 60-513(b) means "'the victim must have sufficient ascertainable injury to justify an action for recovery of the damages'"; in other words, "'actionable injury.'" 308 Kan. at 583 (quoting *Moon v. City of Lawrence*, 267 Kan. 720, 727-28, 982 P.2d 388 [1999]; *Roe*, 236 Kan. at 222).

Years earlier, in *Pancake House, Inc. v. Redmond*, 239 Kan. 83, 716 P.2d 575 (1986), our Supreme Court examined the definition of "substantial injury." It did so in the context of a legal malpractice action by the Pancake House Inc. (PHI) against the attorneys who represented the corporation for many years, then chose to represent the individual interests of some stockholders in a lawsuit against the corporate client. The court addressed varying theories on the accrual of the limitations period, settling on the "substantial injury" theory. 239 Kan. at 88. Although the attorney defendants argued the tort limitations period accrued when the suit against PHI was filed by its stockholders, the Supreme Court disagreed. The court found that, although the act of alleged malpractice itself was the filing of the suit against PHI, the corporation did not suffer substantial damages until after the trial and resulting judgment against it. 239 Kan. at 88. The court found that PHI did not suffer damages until it had to defend against the suit filed by its former attorneys—when it suffered sufficient damages for the

tort to accrue. On that basis, the Supreme Court reversed the district court's dismissal of PHI's tort claims. 239 Kan. at 88-89.

Prior to its discussion in *Falen*, our Supreme Court again observed the rule expressed in *Pancake House* in another legal malpractice claim, stating: "'A cause of action accrues when the right to institute and maintain a suit arises, or when there is a demand capable of present enforcement.'" *Mashaney v. Board of Indigents' Defense Services*, 302 Kan. 625, 633, 355 P.3d 667 (2015) (quoting *Holder v. Kansas Steel Built, Inc*., 224 Kan. 406, 410, 582 P.2d 244 [1978]).

Our Supreme Court has addressed "substantial injury" in the tort context under other circumstances. In *Keith v. Schiefen-Stockham Insurance Agency, Inc*., 209 Kan. 537, 544-45, 498 P.2d 265 (1972), the surviving heirs of two deceased workers brought suit against the workers' insurance brokers for failure to procure workmen's compensation coverage for the employer of the decedents, and the brokers moved to dismiss the petition for failure to state a claim upon which relief could be granted. Addressing the limitations period for tort, the court discussed that the action accrues not when the alleged tortious act was committed, but when actual damages resulted from the act. However, the situation in *Keith* and earlier cases on which it relied was that the plaintiffs were effectively prevented from suing the defendants by the pendency of other legal proceedings. 209 Kan. at 543-44 (citing *Price, Administrator v. Holmes*, 198 Kan. 100, 422 P.2d 976 [1967]; *In re Estate of Brasfield*, 168 Kan. 376, 214 P.2d 305 [1950]).

And, in another legal malpractice action, *Webb v. Pomeroy*, 8 Kan. App. 2d 246, 250, 655 P.2d 465 (1982), a Court of Appeals panel found the tort limitations period did not accrue until an underlying lawsuit had resolved because until then, the plaintiff would have suffered no injury.

Other panels of this court have discussed the "substantial injury" question while attempting to cohesively explain the "substantial injury" *or* "reasonably ascertainable" clauses found in K.S.A. 60-513(b). Although analyzing the limitations period for an action for fraud, rather than negligence, in *Bryson v. Wichita State University*, 19 Kan. App. 2d 1104, 1107, 880 P.2d 800

(1994), this court recognized that a cause of action for fraud accrues under K.S.A. 60-513(b) upon discovery only if the party has suffered an "ascertainable injury" at that point.

In 2013 and 2019, separate panels of this court examined K.S.A. 60-513(b) and tried to clarify the two clauses found in the statute, focusing on the "reasonably ascertainable" question. *Foxfield Villa Assocs. v. Robben*, 57 Kan. App. 2d 122, 128, 449 P.3d 1210 (2019); *Dumler v. Conway*, 49 Kan. App. 2d 567, 576, 312 P.3d 385 (2013). In *Foxfield Villa*, the panel made clear that the "'only "triggering events" under the statute are (1) the act which caused the injury; (2) the existence of substantial injury; and (3) the injured party's awareness of the fact of injury.'" 57 Kan. App. 2d at 128 (quoting *Dumler*, 49 Kan. App. 2d at 576). In *Dumler*, the court explained:

> "The clear language of the statute indicates the limitation period is triggered by both the *act* which causes injury and the existence of substantial injury. It is only when the injured party is unaware of the fact of injury (*i.e.,* unaware that he or she has been injured) that the limitation period starts later." 49 Kan. App. 2d at 576.

More recently, in *Bott*, a panel of this court reviewed the Supreme Court's prior interpretations of "substantial injury" under K.S.A. 60-513(b) in the context of a tort claim for a state employee's wrongful rejection of his request to participate in a deferred retirement option program. 62 Kan. App. 2d at 636-37. Because the panel found both that Bott's injury occurred in 2016, and he could have reasonably ascertained his injury at that same time, the court found his lawsuit filed in 2019 untimely under K.S.A. 60-513. 62 Kan. App. 2d at 637-38.

Synthesizing this caselaw, we must identify three "triggering events" to determine when the limitations period began to run on Lopez' tort claims: (1) the act which caused the injury; (2) the existence of Lopez' substantial injury; and (3) Lopez' awareness of the fact of injury. *Foxfield Villa*, 57 Kan. App. 2d at 128. The parties do not dispute that Davila's failure to procure the excess PIP coverage was the act, so we proceed to the other two questions. Here, the district court focused exclusively on the final question—Lopez' awareness—but erroneously bypassed the existence of Lopez' substantial injury. The district court failed to

consider the substantiality of the injury—when Lopez' injury became actionable—instead solely focusing on determining when Lopez' injury became reasonably ascertainable.

Again, when reviewing this question, as defined by our Supreme Court in *Falen*, a "'substantial injury'" must be an "'*actionable* injury.'" (Emphasis added.) *Falen*, 308 Kan. at 582-83. Lopez did not suffer an "actionable injury" until all the elements of the cause of action were in place—that is, when he suffered a loss and was unable to realize on his promised policy. See 308 Kan. at 583. In other words, "'a cause of action accrues, so as to start the running of the statute of limitations, as soon as the right to maintain a legal action arises. . . . [A]n action accrues [when] the plaintiff could first have filed and prosecuted his action *to a successful conclusion*.'" (Emphasis added.) *Mashaney*, 302 Kan. at 631 (quoting *Pancake House*, 239 Kan. at 87).

So, we look, then, to the elements of his tort claims, generally, to determine if Lopez could have filed his lawsuit earlier and prosecuted it successfully. Lopez' tort claims for negligent representation and professional negligence, generally combined, require that he show the existence of a relationship between he and Davila, giving rise to a duty; that Davila breached that duty by failing to exercise reasonable care and/or making a false statement regarding the excess PIP coverage; that Lopez justifiably relied on the information Davila provided; and that Davila's breach caused Lopez to suffer damages. See *Stechschulte v. Jennings*, 297 Kan. 2, 22, 298 P.3d 1083 (2013) (citing *Mahler v. Keenan Real Estate, Inc*., 255 Kan. 593, 604, 876 P.2d 609 [1994]); Restatement (Second) of Torts § 552 (1976); PIK Civ. 4th 127.43; see also *Phillips v. Carson*, 240 Kan. 462, 476, 731 P.2d 820 (1987) (outlining the elements of professional negligence, though in a legal malpractice action).

For our purposes here, we need not focus on Davila's duty of care or the breach but zero in on the final element required for Lopez to successfully pursue his negligence claim—that he suffered damages. The medical expenses and loss of income damages Lopez seeks to recover all stem from his 2019 car accident—none of the damages sought existed prior to that time.

Under these circumstances, Lopez could not justify an action for the recovery of damages based on Davila's failure to procure

the excess PIP coverage until he suffered an actionable loss. And Lopez did not suffer a loss until he was unable to realize on his policy. See *Marshel Investments*, 6 Kan. App. 2d at 678-79. Although the district court's analysis focused on when the injury became reasonably ascertainable, the date the injury became ascertainable is only applicable when the actionable injury occurred before the injury was discoverable. Here, Lopez' injury simply did not happen until 2019, so whether he could have considered his potential injury at some date before is irrelevant because Davila could not be liable until Lopez suffered actionable damages.

Based on the foregoing analysis, the limitations period for Lopez' failure to procure insurance claim based on torts law did not commence until Lopez was unable to realize on the policy he believed Davila procured. The precise date of this loss is unclear—which is alone problematic for summary judgment purposes—but the record shows Lopez' car accident occurred on February 14, 2019, and he brought his lawsuit on January 26, 2021. So, it is likely his claim was filed within two years of the loss.

In sum, under K.S.A. 60-513(b) the determining question before us is not when Lopez should have reasonably ascertained Davila's failure to act, but when was Lopez injured by the failure? Finding the district court erred by ignoring this threshold question, it is unnecessary for us to examine the district court's finding, as a matter of law, that the lack of procurement was reasonably ascertainable in 2013. Were we to analyze that finding, we might address factual questions regarding what conduct would have been reasonable on Lopez' part to investigate the lack of PIP coverage. See *Falen*, 308 Kan. at 585-86 (finding if the Falens signed the 2008 deed without reviewing and understanding it, they did not have notice of its content, which was a genuine issue of material fact preventing summary judgment) (citing *Armstrong v. Bromley Quarry & Asphalt, Inc*., 305 Kan. 16, 378 P.3d 1090 [2016]). But whether the district court improperly converted a question of fact for the jury into a question of law is an inquiry we need not go so far as to answer.

For these reasons, we conclude the district court erred in terminating Lopez' tort claims based upon its erroneous application

of K.S.A. 60-513(b). We affirm the district court's grant of summary judgment to Davila on Lopez' contract claim, but we reverse the district court's grant of summary judgment to Davila on Lopez' tort claims and remand for further proceedings on those tort claims.

Affirmed in part, reversed in part, and remanded for further proceedings.

No. 125,410

STATE OF KANSAS, *Appellant*, v. JEREMY A. CLINE, *Appellee*.

Petition for review filed March 30, 2023

SYLLABUS BY THE COURT

1. CONSTITUTIONAL LAW—*Protection from Unreasonable Searches and Seizures under Both Constitutions*. Both the United States and Kansas Constitutions protect against unreasonable searches and seizures.

2. SEARCH AND SEIZURE—*Seizure of Person under Kansas Law—Reasonable Person Not Free to Leave and Submits to Show of Authority*. Kansas law is clear that a seizure of a person occurs if there is the application of physical force or if there is a show of authority which, in view of all the circumstances surrounding the incident, would communicate to a reasonable person that he or she is not free to leave, and the person submits to the show of authority.

3. CONSTITUTIONAL LAW—*Claim of Excessive Force during Seizure—Analysis under Fourth Amendment's Objective Reasonableness Standard.* The United States Supreme Court has held that all claims that law enforcement used excessive force during a seizure should be analyzed under the Fourth Amendment's objective reasonableness standard.

4. SAME—*Determination Whether Reasonable Seizure—Application of Test Balancing Nature and Quality of Intrusion on Individual against Governmental Interest*. Determining whether the force used to carry out a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake. The proper application of this test requires careful attention to the facts and circumstances of each case.

5. SAME—*Constitutions Do Not Prohibit Use of Evidence Obtained in Violation of Provisions—Exclusionary Rule Created as Deterrent by United States Supreme Court*. Neither the Fourth Amendment to the United States Constitution nor section 15 of the Kansas Constitution Bill of Rights expressly prohibits the use of evidence obtained in violation of their respective provisions. Instead, to supplement the bare text of the Fourth Amendment, the United States Supreme Court created the exclusionary rule as a deterrent barring the introduction of evidence obtained in violation of the Fourth Amendment in criminal prosecutions. The exclusionary rule is not an individual right and applies only when it results in appreciable deterrence.

Appeal from Shawnee District Court; RACHEL L. PICKERING, judge. Opinion filed March 3, 2023. Affirmed.

Jodi Litfin, deputy district attorney, *Steven J. Obermeier*, assistant solicitor general, and *Derek Schmidt*, attorney general for appellant.

Reid T. Nelson and *Laura Stratton*, of Capital and Conflicts Appeals Office, for appellee.

Before MALONE, P.J., HILL and HURST, JJ.

MALONE, J.: A Kansas Highway Patrol (KHP) trooper tried to pull over Jeremy A. Cline for a broken windshield, but Cline did not stop. The trooper pursued Cline through residential streets of north Topeka and, after a few minutes of chasing, decided to perform a tactical intervention maneuver to immobilize Cline's vehicle. The maneuver caused Cline's car to spin, and it ran off the road into a utility pole, causing the death of Cline's passenger. As a result, the State charged Cline with felony murder and several other crimes. The district court granted Cline's motion to suppress all evidence recovered after the maneuver to force his car off the road, finding the trooper's actions were an objectively unreasonable use of excessive force to carry out the seizure.

The State appeals the district court's suppression order and raises two related issues. First, the State claims the district court erred in finding the seizure was objectively unreasonable in violation of the Fourth Amendment to the United State Constitution. Second, the State claims the district court erred in applying the exclusionary rule to suppress all evidence following the seizure. For the reasons we will carefully explain in this opinion, we disagree with the State's claims and affirm the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In the late afternoon of March 6, 2021, Trooper Justin Dobler of the KHP was working with a task force called Operation Frontier Justice, a combined operation between federal and local law enforcement agencies intended "to enforce and help crack down [on] the rise of criminal activity in the City of Topeka." Dobler had just come on shift and decided to check out a neighborhood where a suspected drug house was located. Despite the stated goal of Operation Frontier Justice, participating law enforcement officers were instructed to avoid any vehicle pursuits; the operation

plan specifically stated: "'Any pursuits that [do] occur should be constantly reevaluated and may be discontinued at any time'" and that "'[p]aramount consideration and prioritizing will be given to the safety of the public and the risk of pursuing individuals[.]'" Dobler had been discouraged from engaging in vehicle pursuits, unless necessary, and had received warnings for violating KHP's pursuit policies.

Dobler was sitting at the intersection of Northwest Taylor and Northwest Lower Silver Lake Road, near the suspected drug house and in the same area he had often patrolled, when he noticed a white sedan with a smashed windshield. Dobler believed the broken windshield obstructed the driver's view and was both a safety issue and a traffic infraction. He also thought the car possibly matched the description of one that had been reported stolen. As the car turned and drove past him, Dobler believed the people in the car—a male driver and female passenger—seemed suspicious because they "were locked up, nervous, as they were completely looking away from me. As if, I don't see you, you don't see me type mentality." At that point, Dobler was "starting to develop a case."

Based solely on the broken windshield infraction, Dobler flicked on his emergency lights, pulled a U-turn, and started to follow the car. Dobler would later recall that he had no suspicion that the occupants of the car were felons, nor that they were engaged in any felonious activity, except for the possible car theft. As he began to follow, Dobler could make out the car's license plate, and he reported it to dispatch. He also immediately determined that the driver was not going to stop—the car turned right and began trying to evade him. In response, Dobler turned on his siren and informed dispatch of his pursuit, but the car still made no signs of pulling over.

As Dobler continued the pursuit, the fleeing car made many turns, often using its turn signals, and slowing—but not stopping—at several stop signs. Dobler later reported that he was concerned for his safety and for pedestrians along the road. But the dashcam footage recovered from his patrol car showed that the streets were almost empty—Dobler later agreed that he saw no pedestrians on the road at that point in the chase. Around this time,

Dobler was informed that the car was not stolen, first over the radio from another officer and later from dispatch. Even so, Dobler continued the chase.

Dobler followed the car as it pulled into a trailer court. At that point, he thought about trying to perform a tactical vehicle intervention (TVI) "[d]ue to the high risk and how dangerous" the pursuit was, but he was unable to do so because of the cramped roadway. A TVI is a maneuver intended to end a car chase by forcing a fleeing vehicle off the road—in Dobler's words, the goal of a TVI is to cause the other car to do a "controlled spin . . . with the intention of disabling [the] vehicle to end a pursuit safely." Dobler was taught the maneuver by the KHP and had employed it "an abundance of times"—he recalled at least 15 times, including 10 times in that specific neighborhood. Because he could not accomplish a TVI in the trailer court, Dobler backed off and continued his pursuit. As he trailed the car around the trailer court, Dobler noticed children playing close to the roadway. The fleeing car continued to use its brakes and turn signals as it passed through the trailer court, driving around 20-30 miles per hour, and it eventually left the trailer court and back out onto the street.

The car made a wide turn onto Tyler Street, a two-lane road, and Dobler decided to try a TVI. Dobler later testified that his main concern at the time was a car down the road that he believed was driving towards them. Dobler explained that he chose to perform the TVI "[b]ecause the individual fleeing placed an innocent bystander in immediate harm with his vehicle by going head on in the opposite direction with him." But the dashcam footage and photographs introduced into evidence showed that the approaching car was already pulled off to the side of the road. Dobler also acknowledged that the many obstructions on the side of the roadway made the location he performed the TVI less than ideal. In any event, Dobler accelerated to pull alongside the fleeing car, matched its speed, and then nudged the back right bumper of the car to begin the TVI.

Dobler's TVI succeeded; after nudging the bumper, the fleeing car spun around the front of his patrol vehicle, and then off the road. By the time Dobler turned around to see the result of the TVI, the car "was sideways and up against a utility pole." Dashcam footage from another officer's patrol car confirmed Dobler's

recollection, showing the car spinning off the road and slamming into a telephone pole on its passenger side. In all, the pursuit lasted about 3 minutes and 35 seconds.

Dobler and another officer removed the driver, later identified as Cline, from the driver's side window of the car and placed him in handcuffs. Officers eventually found a knife, a bag of methamphetamine, and drug paraphernalia in Cline's possession. The passenger, Anita Benz, was incoherent and slouched back in her seat. Both Cline and Benz were promptly transported to the hospital. Once at the hospital, Cline was interviewed by a KHP trooper and gave several explanations about his decision to flee from Dobler. Benz' injuries were severe, and four days later, she died from the blunt force head and pelvic injuries she sustained in the crash.

The State charged Cline with felony murder for Benz' death, fleeing or attempting to elude, possession of methamphetamine, possession of drug paraphernalia, interference with a law enforcement officer, and several traffic violations. After conducting a preliminary hearing, the district court bound Cline over for trial.

Cline later moved to dismiss the felony murder charge, arguing his actions were not the proximate cause of Benz' death. He also moved to suppress "any and all evidence flowing from the use of excessive force to seize his person." The suppression motion argued that Dobler violated KHP policies and Kansas law by beginning and continuing the car chase and using excessive force to carry out the seizure in violation of the Fourth Amendment. Cline requested that all evidence obtained after the TVI be suppressed including the medical evidence and reports establishing Benz' death. The State responded that Dobler's decision to use the TVI was not excessive, that he had reasonable grounds to stop Cline by such means, and that Cline's own criminal actions justified the use of deadly force. The State agreed that a seizure occurred when Dobler performed the TVI.

Evidence at the suppression hearing

At the suppression hearing, Dobler testified about his decision to pursue Cline as well as his rationale for performing the TVI. Dobler explained that he decided to execute the TVI because he

believed Cline presented an "immediate threat," and that he executed the maneuver in accordance with his training. Dobler identified the immediate threat as "the endangerment of the innocent bystander motorist . . . in the opposite lane." Dobler also testified that he knew that he had "a lot more resources available, just because of the other agencies involved, . . . So I knew I had immediate help somewhere." But when he did not hear back from other officers about setting up spike strips, Dobler decided to perform a TVI. Dobler conceded that the area he decided to perform the TVI was less than ideal because of the many telephone poles and ditches along the roadway.

On cross-examination, Dobler agreed that an officer is not supposed to perform a TVI and should instead disengage a pursuit if the danger of performing the maneuver is greater than the danger of letting the suspect escape. Dobler admitted that before the car chase with Cline, he had been discouraged from engaging in vehicle pursuits, unless necessary, and had received written warnings for violating KHP's pursuit policy. The dashcam video from Dobler's patrol car and the dashcam video from another patrol car involved in the incident with Cline were admitted into evidence at the hearing. The evidence showed that speed of the cars during the chase was usually within the 35-mph speed limit except for a few stretches that Cline drove up to 55 mph.

The State also called KHP Master Trooper Scott Moses who testified that he interviewed Cline in the hospital after giving him his *Miranda* warnings, while Cline was being guarded and handcuffed to a hospital bed. The State introduced into evidence an audio recording of that interview.

Cline called some of Dobler's superiors from the KHP to testify. Lieutenant Bryce Whelpley testified that he had sent an email informing Dobler and other troopers that "'[g]iven the legal stance on pursuits, I would discourage pursuing anything less than a person felony.'" It also stated that "'[e]ven then I would think very hard about pursuing inside the city limits, probably wouldn't do it, unless someone's life is in danger.'"

Captain Joseph Witham of the KHP similarly explained that Dobler had been instructed in directives delivered to the whole troop "not to pursue in the City of Topeka unless he's chasing a violent felon." And this instruction had been echoed to Dobler in

both personal conversations and emails. After analyzing Dobler's dashcam footage, Witham described that the area where Dobler executed the TVI was not ideal because it was residential and there were many obstacles around the road. As for the testimony about the presence of children in the trailer court, Witham stated this fact would be a reason not to continue the pursuit. He explained that KHP troopers should, but are not required, to get authorization before performing a TVI and Dobler did not have approval to perform the TVI. He testified that Dobler's "entire pursuit should have been avoided [and] should not have occurred. . . . He was chasing, ultimately, a windshield violation."

Major Eric Sauer, who also reviewed Dobler's dashcam video and report, testified that Dobler failed to follow KHP directives about pursuing vehicles within Topeka. Sauer believed that the chase created a greater risk than giving up the pursuit of Cline. He testified that all five of the KHP's majors concluded that Dobler's pursuit—in its initiation, continuation, and conclusion—was against KHP policy. Sauer stated that the KHP's executive command review board unanimously recommended that Dobler be dismissed for his actions. Cline introduced letters from Colonel Herman Jones, superintendent of the KHP, without objection by the State, showing that Dobler was fired from the KHP on July 19, 2021, because he had been warned several times not to begin and pursue car chases like the one with Cline.

After both parties presented their evidence, Cline asked the district court to suppress "everything from—that follows from the moment of contact, which we see is the seizure. So that would be the evidence of the crash, the death of Miss Benz, and any item recovered from the vehicle." Cline contended that he was seized the moment that Dobler's patrol car contacted the bumper of his car while performing the TVI and that Dobler's decision was objectively unreasonable. The State countered that Dobler faced a split-second decision and reasonably believed that he needed to perform the TVI to protect the driver of the car approaching them in the opposite lane

The district court's ruling

One week later, the district court orally announced its ruling from the bench. The district court denied Cline's motion to dismiss the felony murder charge "at this time," explaining that the motion raised both a factual and a legal question and the court did not find

"substantial support of case law" to support the motion to dismiss. But the district court granted Cline's motion to suppress the evidence, finding that "the Fourth Amendment [was] violated due to the unreasonableness in the seizure, resulting in the death of the passenger." The district court elaborated:

"The Motion to Suppress will be granted. I must point out that this is a very rare case, very rare case, that this court is indeed granting the Motion to Suppress. I base this on the argument that the Fourth Amendment was violated by unreasonable seizure.

"Recently, in March of 2021, United States Supreme Court reaffirmed that a defendant is seized when touched. Here that is in *Torres v. Madrid*[, 592 U.S. ___, 141 S. Ct. 989, 998, 209 L. Ed. 2d 190 (2021)]. And this Court does find indeed that Mr. Cline was seized when the trooper did hit his car.

"So the question of him being seized is not the issue. The issue is whether that was an unreasonable seizure.

"This Court does find, in looking at the totality of the circumstances, under the objective reasonableness, that—balancing the nature and quality of the intrusion against the countervailing government interest at stake.

"The interest at stake here was a cracked windshield. The seizure taken was one that I believe is rare for law enforcement to do, and why it did indeed result in his release from Kansas Highway Patrol, and that is the TVI action which resulted in the fatality of the passenger.

"This Court does find that this indeed was excessive force. I've looked at all the circumstances including the—we all watched the videos, heard all the testimony presented. By no means am I seeing this as anything but a Fourth Amendment violation. I do not comment on the Kansas Highway Patrol's own policies. That is their policies. But the actions taken here by the trooper, this Court does find were unreasonable.

"This Court does recognize that it did violate the Kansas Highway Patrol policy, did violate direct orders to prevent vehicle pursuit within the City of Topeka. And that's done for cases just like this one. This Court does understand that this excessive force violated the Fourth Amendment.

"The trooper used deadly force to apprehend a suspect fleeing. And that prior to that, the officer had learned that the car was not stolen. That was advised to him. This Court finds that the chase put the public in danger, but certainly not necessary for the amount of force used. And so—because there was no suspicion of a dangerous or violent crime.

"Again, even his supervisors stated it was a windshield crack. This is a traffic infraction that reasonable course would have been to decline pursuit, especially when there was oncoming cars. And so therefore this Court adopting the arguments made by the defense, does grant the Motion to Suppress.

"I have to note this is very rare for this Court to make such a ruling. But I think the parties can agree this is a rare case where the officer used quite excessive force and therefore the Motion to Suppress is granted. This Court will grant their request to have the—all evidence from the fruit of the poisonous tree theory resulting in that being suppressed."

The district court clarified that it was suppressing everything from after the point of vehicle contact between Dobler and Cline, including the drugs and drug paraphernalia in Cline's possession and Cline's statements to law enforcement at the hospital. The order still allowed the State to prosecute Cline for fleeing or attempting to elude and the various traffic violations, but it suppressed the evidence supporting the felony murder charge and the drug-related charges. The State timely filed an interlocutory appeal.

DID THE DISTRICT COURT ERR IN FINDING THE SEIZURE VIOLATED THE FOURTH AMENDMENT?

The State first claims the district court erred in finding the seizure was objectively unreasonable in violation of the Fourth Amendment. More specifically, the State asserts that the district court (1) inappropriately focused on Dobler's initial reason for the pursuit and conflated the pursuit with the eventual seizure in its analysis; (2) improperly relied on KHP policies and procedures and the opinions of Dobler's superiors in evaluating the reasonableness of his decision to execute the TVI; and (3) wrongly concluded that Dobler's use of force to carry out the seizure was excessive and unreasonable.

Cline contends that the district court's factual findings were supported by substantial competent evidence. He asserts that the district court correctly concluded that Dobler's decision to deploy the fatal TVI was objectively unreasonable under the circumstances, and the seizure violated the Fourth Amendment.

"On a motion to suppress, an appellate court generally reviews the district court's findings of fact to determine whether they are supported by substantial competent evidence and reviews the ultimate legal conclusion de novo." *State v. Cash*, 313 Kan. 121, 125-26, 483 P.3d 1047 (2021). In reviewing the factual findings, an appellate court does not reweigh the evidence or assess the credibility of witnesses. *State v. Hanke*, 307 Kan. 823, 827, 415 P.3d 966 (2018). The State carries the burden to prove that the search and seizure were lawful. K.S.A. 22-3216(2); *Cash*, 313 Kan. at 126.

In granting Cline's motion to suppress, the district court ruled from the bench and did not clearly delineate its factual findings in

making its ruling. But the State did not object to the adequacy of the district court's factual findings. Thus, this court may presume that the court made findings necessary to support its judgment. *State v. Jones*, 306 Kan. 948, 959, 398 P.3d 856 (2017). Likewise, "[i]n determining whether substantial competent evidence supports the district court findings, appellate courts disregard any conflicting evidence or other inferences that might be drawn from the evidence." *Gannon v. State*, 298 Kan. 1107, 1175-76, 319 P.3d 1196 (2014).

We begin by examining the text of the applicable constitutional provisions. Both the United States and Kansas Constitutions protect against unreasonable searches and seizures. The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . . " U.S. Const. amend. IV. Similarly, section 15 of the Kansas Constitution Bill of Rights states, "[t]he right of the people to be secure in their persons and property against unreasonable searches and seizures, shall be inviolate." Kan. Const. Bill of Rights, § 15. The Kansas Supreme Court has held that these two constitutional provisions provide the same rights and protections. *State v. Neighbors*, 299 Kan. 234, 239, 328 P.3d 1081 (2014).

Kansas law is clear that "[a] seizure of a person occurs if there is the application of physical force or if there is a show of authority which, in view of all the circumstances surrounding the incident, would communicate to a reasonable person that he or she is not free to leave and the person submits to the show of authority." *State v. Morris*, 276 Kan. 11, Syl. ¶ 5, 72 P.3d 570 (2003). The parties agree that terminating a car chase by striking a fleeing vehicle—that is, performing a TVI—constitutes a seizure. See *Brower v. County of Inyo*, 489 U.S. 593, 597, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989). Recently, the United State Supreme Court has clarified: "A seizure requires the use of force *with intent to restrain.* Accidental force will not qualify. Nor will force intentionally applied for some other purpose satisfy this rule. [Citation omitted.]" *Torres v. Madrid*, 592 U.S. ___, 141 S. Ct. 989, 998, 209 L. Ed. 2d 190 (2021). There is no debate about whether Dobler intentionally applied physical force by performing the TVI,

nor whether he objectively manifested an intent to stop Cline from driving away. Thus, a seizure occurred when Dobler performed the TVI maneuver.

Because a seizure unquestionably occurred, the relevant issue is whether that seizure was reasonable under the circumstances in which it was made. In *Graham v. Connor*, 490 U.S. 386, 392-97, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989), the United States Supreme Court held that all claims that law enforcement used excessive force during a seizure should be analyzed under the Fourth Amendment's "objective reasonableness" standard. See also *Torres*, 592 U.S. at ___, 141 S. Ct. at 998 ("Only an objective test 'allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment.'"). Here too, the parties agree that the ultimate question this court must resolve is whether Dobler's decision to execute a TVI on Cline's car was objectively reasonable under the circumstances.

The *Graham* Court explained that "[d]etermining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of '"the nature and quality of the intrusion on the individual's Fourth Amendment interests"' against the countervailing governmental interests at stake." 490 U.S. at 396. The *Graham* Court also cautioned:

> "Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. [Citation omitted.]" 490 U.S. at 396.

The district court applied the correct test in analyzing the evidence presented at the suppression hearing about Dobler's use of force to carry out the seizure: "This Court does find, in looking at the totality of the circumstances, under the objective reasonableness, that—balancing the nature and quality of the intrusion against the countervailing government interest at stake. . . . This Court does find that this indeed was excessive force." The State asserts that "[a]lthough the district court mentions the objective

reasonableness of the officer, it does not truly analyze the issue using this standard."

The State first asserts that the district court inappropriately focused only on the cracked windshield as the reason Dobler began the pursuit and erroneously conflated Dobler's pursuit of Cline with the seizure of Cline. Although the pursuit began over a cracked windshield, the State argues that it led to a fleeing and eluding situation that endangered the public, so it was reasonable for Dobler to execute the TVI under the circumstances. The State contends that a court must focus only on the moment the seizure occurred—the moment Dobler decided to execute the TVI—to decide whether the seizure was objectively reasonable under the circumstances.

We find that the severity of the reason for an officer to initiate a vehicle pursuit is one factor to consider under all the circumstances in deciding whether the officer's use of force to carry out a seizure is objectively reasonable. *Graham*, 490 U.S. at 396. But even if we focus only on the moment the seizure occurred, as the State suggests, Dobler's decision to execute a TVI was problematic based on the evidence. Dobler executed the TVI after Cline had exited the trailer court, so the fact that Dobler said he saw children playing close to the roadway in the trailer court did not factor into the decision. Dobler stated the immediate threat that caused him to execute the TVI was the innocent bystander in the approaching car on the two-lane road. But the dashcam footage and photographs introduced into evidence showed that the car had pulled off to the side of the road before Dobler executed the TVI on Cline's car. If the reason for Dobler to execute the TVI was to protect the driver of the car that had pulled off to the side of the road, this reason does not appear to outweigh the danger involved in performing the maneuver.

One fact that is strikingly absent from Dobler's testimony is any concern he should have had for the safety of Cline's passenger, Benz. She, too, was a member of the public that Dobler should have been trying to protect. There is no evidence in the record that Benz was linked to Cline's criminal activity or that she was encouraging him to evade law enforcement. Dobler testified that the location he performed the TVI was less than ideal because of the telephone poles and other obstructions on the side of the roadway.

Witham confirmed that the area where Dobler executed the TVI was not ideal because it was residential and there were obstacles around the road. Dobler could foresee that Cline's car might crash into a utility pole if he performed the TVI at the location he chose, but he performed the maneuver despite the risk—an action that contributed to Benz' death.

The State also argues the district court improperly relied on KHP policies and procedures and the opinions of Dobler's superiors in evaluating the reasonableness of his decision to execute the TVI—not on what a reasonable officer would have done under the circumstances. But the district court made clear it was basing its decision on the Fourth Amendment rather than KHP policies: "By no means am I seeing this as anything but a Fourth Amendment violation. I do not comment on the Kansas Highway Patrol's own policies. That is their policies." In any event, the fact that Dobler violated KHP policies and had been discouraged from engaging in vehicle pursuits like the one with Cline was relevant as one of many circumstances for the district court to consider in deciding whether his actions were objectively reasonable. Dobler's disciplinary proceedings and the fact that he was fired because of repeated violations was possibly less relevant to this issue, but this evidence was admitted without objection by the State and was not the focus of the district court's decision to suppress the evidence.

The State argues that the district court wrongly concluded that Dobler's use of force to carry out the seizure was excessive and unreasonable. The State relies mainly on *Scott v. Harris*, 550 U.S. 372, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007), a 42 U.S.C. § 1983 civil rights case, in which the United States Supreme Court held that a police officer may use force—even deadly force—to terminate a dangerous high-speed chase. Harris claimed that law enforcement used excessive force resulting in an unreasonable seizure when an officer used his cruiser to ram his car off the highway and into a ditch, rendering Harris a quadriplegic. The Supreme Court disagreed, stressing the importance of a fact-specific inquiry in making its decision and explaining that Harris had led the officers on "a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury." 550 U.S. at 380.

In finding the officer's actions were reasonable, the Court observed that (1) Harris posed an imminent threat to the public; (2) Harris was driving well over the speed limit, mostly on two-lane roads; (3) the officers had to perform hazardous maneuvers to keep up with Harris in a chase that covered ten miles; (4) Harris smashed his way through an attempted trap by the police; (5) Harris swerved around more than a dozen cars on the road, forcing other drivers to swerve out of the way; and (6) the officer requested and received permission to force Harris off the road before doing so. Although the Court noted that excessive force by law enforcement could render a seizure unreasonable, it held: "[A] police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." 550 U.S. at 386.

The *Harris* Court refused to make any bright-line rule forbidding law enforcement officers from trying to terminate dangerous vehicle pursuits, and instead stressed the importance of analyzing whether a seizure is objectively reasonable under the circumstances presented. The facts in *Harris* involved a vehicle pursuit much more dangerous to the public than the facts here, and the case offers little support for the State's position that Dobler's actions in seizing Cline were objectively reasonable.

As we observed earlier, the district court did not clearly delineate its factual findings in making its ruling. But without an objection to the adequacy of the district court's findings, we can presume the district court made all the necessary findings from the evidence to support its judgment. *Jones*, 306 Kan. at 959. Here, the evidence showed that the encounter started over a cracked windshield. Dobler had no reason to believe that Cline was a dangerous felon. He also knew there was a passenger in the front seat of Cline's car. For the most part, the pursuit did not involve high speeds, and the traffic was light with few pedestrians near the roadway. Dobler had Cline's license plate number and he knew the car was not stolen, so he could have later tracked down the registered owner. He also knew that other officers were nearby and available to help stop Cline. As for the approaching driver, the evidence showed that he had pulled off to the side of the road. Dobler knew he was performing the TVI in a risky area. Dobler

knew his actions violated KHP policy, and he had been warned before not to pursue car chases and run vehicles off the road under the exact circumstances he was facing with Cline. These circumstances raise serious doubts about the reasonableness of Dobler's decision to execute the TVI, a maneuver that he readily conceded was a dangerous tactic.

"The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. The district court heard the evidence and was tasked with the responsibility of balancing the nature and quality of the intrusion on Cline's Fourth Amendment rights against the countervailing governmental interests at stake. The Fourth Amendment does not require law enforcement officers to simply let fleeing suspects go on their merry way. And courts recognize that officers must often make split-second decisions to protect the public safety. But based on the evidence offered at the suppression hearing and considering all the facts and circumstances, the district court found that Dobler used excessive force to seize Cline. The record presented for our review reflects that the district court's findings were supported by substantial competent evidence and supported the district court's legal conclusion that Dobler's seizure of Cline was objectively unreasonable in violation of the Fourth Amendment.

DID THE DISTRICT COURT ERR IN APPLYING THE EXCLUSIONARY RULE TO SUPPRESS THE EVIDENCE?

The State next claims the district court erred in applying the exclusionary rule to suppress all evidence following the seizure. The State asserts that suppression of evidence is proper only when necessary to deter police misconduct, and it was an inappropriate remedy for the district court to apply in this case. Cline argues that suppression of the evidence was an appropriate remedy for Dobler's constitutional violations and that nothing else has deterred his misconduct until this case. As we stated in the last section of this opinion, an appellate court exercises unlimited review over the district court's ultimate legal conclusion to suppress evidence. *Cash*, 313 Kan. at 125-26.

Neither the Fourth Amendment to the United States Constitution nor section 15 of the Kansas Constitution Bill of Rights expressly prohibits the use of evidence obtained in violation of their respective provisions. Instead, to supplement the bare text of the Fourth Amendment, the United States Supreme Court created the exclusionary rule as a deterrent barring the introduction of evidence obtained in violation of the Fourth Amendment in criminal prosecutions. See *Weeks v. United States*, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914) (recognizing exclusionary rule in criminal prosecutions in federal court); see also *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961) (applying exclusionary rule in state court prosecution through the Fourteenth Amendment).

"[T]he exclusionary rule encompasses both the 'primary evidence obtained as a direct result of an illegal search or seizure' and . . . 'evidence later discovered and found to be derivative of an illegality,' the so-called '"fruit of the poisonous tree."' [Citation omitted.]" *Utah v. Strieff*, 579 U.S. 232, 237, 136 S. Ct. 2056, 195 L. Ed. 2d 400 (2016). "[T]he exclusionary rule is not an individual right and applies only where it 'results in appreciable deterrence.' [Citation omitted.]" *Herring v. United States*, 555 U.S. 135, 141, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009).

The State cites one Kansas case to support its claim that the district court erred in applying the exclusionary rule to suppress the evidence. In *State v. McCloud*, 257 Kan. 1, 12, 891 P.2d 324 (1995), the Kansas Supreme Court addressed the defendant's argument that the district court should have suppressed evidence as a result of law enforcement's unnecessary and unreasonable use of force in executing a search warrant. In that case, the police executed a search warrant at McCloud's residence just after midnight by throwing a "flash bang" device through a side window as a diversionary tactic and entering the residence through the front door. An officer testified at trial that the police chose this manner of executing the search warrant because of the serious nature of McCloud's crimes, because McCloud had used a firearm in the commission of robberies, and for the safety of the officers executing the search warrant and the surrounding neighborhood. McCloud was not injured by the device, and he was arrested without incident.

In finding no constitutional violation, the *McCloud* court explained that "[a]n officer is justified in the use of any force which such officer reasonably believes to be necessary to effect the arrest or to defend the officer's self from bodily harm while making the arrest." 257 Kan. at 12. The court also found that an "officer is justified in using force likely to cause death or great bodily harm if the officer reasonably believes that such force is necessary to prevent the arrest from being defeated by resistance, or the suspect is attempting to escape by use of a deadly weapon." 257 Kan. at 12.

Even though the *McCloud* court found no constitutional violation, it also addressed whether the exclusionary rule would have been an appropriate remedy to suppress the evidence seized under the search warrant. The court explained that whether it is necessary to apply the exclusionary rule is determined by "weighing the extent to which its application will deter law enforcement officials from using excessive force in executing a valid search warrant against the extent to which its application will deflect the truth-finding process, free the guilty, and generate disrespect for the law and the administration of justice." 257 Kan. at 14. Under the facts, the court found that the exclusionary rule should not apply to the defendant's claim. 257 Kan. at 14. In doing so, the court found that "the right to bring a civil action against an officer is usually a sufficient deterrent to an officer's use of unreasonable force." 257 Kan. at 14.

The facts here are distinguishable from the facts in *McCloud*. As a result, the case offers little support for the State's claim that the district court erred in applying the exclusionary rule to suppress the evidence following Cline's seizure. Moreover, because the Kansas Supreme Court found no constitutional violation in *McCloud*, the court's analysis of whether the exclusionary rule would have been an appropriate remedy to suppress the evidence was unnecessary dicta in that case.

Although not cited by the State, we observe that federal courts have come down on either side of whether the exclusionary rule is the appropriate remedy in cases involving the unreasonable and excessive use of force by law enforcement officers, or if such a violation should instead be addressed in a civil action under 42

U.S.C. § 1983. Some courts have suggested that exclusion of evidence is an inappropriate remedy when a defendant alleges that officers used excessive force during a stop because the appropriate avenue for relief is a lawsuit under 42 U.S.C. § 1983. See, e.g., *United States v. Watson*, 558 F.3d 702, 705 (7th Cir. 2009) ("Application of the exclusionary rule would be particularly gratuitous in this case because the defendant has an adequate remedy by way of a civil action—a remedy better calibrated to the actual harm done the defendant than the exclusionary rule would be."). Other circuits have stated that the exclusionary rule may be invoked to suppress evidence in an excessive force case if the officer's actions are objectively unreasonable and a sufficient causal nexus exists between the excessive use of force and the evidence the defendant seeks to suppress. See, e.g., *United States v. Ankeny*, 502 F.3d 829, 836-37 (9th Cir. 2007).

The facts and circumstances of this case demonstrate that the exclusion of evidence because of Dobler's conduct falls within the purpose of the exclusionary rule. Based on Dobler's own testimony, his actions were not an isolated incident; he had used TVI maneuvers "an abundance of times" and had received reprimands for violating policies about pursuits. As Cline notes, these policies and reprimands did nothing to influence Dobler's actions. While the fact that Dobler was fired from the KHP makes it unlikely that he will cause this situation to recur as a KHP trooper, the record reflects that Dobler has simply moved on to a different law enforcement agency and was employed by the Jackson County Sheriff's Office at the time of the suppression hearing. Dobler's actions were part of a pattern of intentional conduct—as such, exclusion of the evidence derived from his unreasonable seizure would serve its intended remedial purpose.

More importantly, law enforcement officers from all agencies frequently deal with vehicle pursuits in which they may need to apprehend fleeing suspects. Encounters like the one between Dobler and Cline will likely happen again. Law enforcement officers need to know the parameters for properly using a TVI maneuver and the consequences of engaging in improper and highly dangerous car chases. Suppression of the evidence removes the incentive for officers such as Dobler to disregard policies and perform dangerous maneuvers simply to bring a hastier end to an ill-advised

pursuit. The exclusion of evidence in circumstances like this one—although a drastic remedy—will likely deter future unconstitutional misconduct during car chases.

Perhaps most importantly, we have a direct causal connection between Dobler's use of excessive force and the evidence Cline seeks to suppress supporting the felony murder charge. While it is plainly true that Cline is not without fault in these unfortunate events, Dobler's use of the TVI maneuver caused the car crash and directly led to Benz' death. For all these reasons, we conclude the district court did not err in applying the exclusionary rule to suppress all evidence following the seizure.

Before concluding, we note that in one paragraph of its appellate brief, the State argues that the district court erred in applying the exclusionary rule because the evidence suppressed by the district court would have been inevitably discovered by law enforcement. The State made this argument in response to Cline's motion to suppress, but the district court did not address the issue. The inevitable discovery exception to the exclusionary rule allows the admission of otherwise unconstitutionally obtained evidence if law enforcement eventually would have found the evidence by lawful means. *State v. Baker*, 306 Kan. 585, 590-91, 395 P.3d 422 (2017). The State must prove by a preponderance of the evidence that the unlawfully seized evidence *would* have been found by lawful means; not just that it *may* have been found by lawful means. *State v. Salazar*, 56 Kan. App. 2d 410, 420, 431 P.3d 312 (2018). The inevitable discovery rule would not apply here because there is no showing that the evidence suppressed by the court would have been found by lawful means. Without the TVI, there would have been no evidence of the crash that contributed to Benz' death, and it is unclear whether Cline would have been arrested and searched leading to the discovery of the drug evidence.

The State also argues in one paragraph of its appellate brief that Cline's statement to Trooper Moses at the hospital should have been admissible because Cline received *Miranda* warnings before making the statement. The State's argument refers to what is known as the attenuation doctrine, although it fails to use this term. The State made this argument in response to Cline's motion

to suppress, but the district court did not address the issue. Under an attenuation analysis, courts generally consider (1) the time that elapsed between the illegal police misconduct and the acquisition of the evidence sought to be suppressed, (2) the presence of any intervening circumstance, and (3) the purpose and flagrancy of the official misconduct. *State v. Moralez*, 297 Kan. 397, 410, 300 P.3d 1090 (2013). The State has offered insufficient evidence and analysis for this court to decide whether Cline's statement to Moses made while he was being guarded and handcuffed to a hospital bed would be admissible under the attenuation doctrine. See *State v. Meggerson*, 312 Kan. 238, 246, 474 P.3d 761 (2020) (finding that a point raised incidentally in a brief and not adequately argued is considered waived or abandoned).

Affirmed.

(525 P.3d 803)

No. 125,084

LEAGUE OF WOMEN VOTERS OF KANSAS, LOUD LIGHT, KANSAS APPLESEED CENTER FOR LAW AND JUSTICE, INC., and TOPEKA INDEPENDENT LIVING RESOURCE CENTER, *Appellants*, v. SCOTT SCHWAB, in His Official Capacity as Kansas Secretary of State, and KRIS KOBACH, in His Official Capacity as Kansas Attorney General, *Appellees*.

Petition for review filed April 5, 2023

SYLLABUS BY THE COURT

1. APPELLATE PROCEDURE—*Order Involving Kansas Constitution Is Appealed to Court of Appeals by Statute*. An order that involves the Constitution of this state may be appealed to the Kansas Court of Appeals as a matter of right under K.S.A. 2021 Supp. 60-2102(a)(3).

2. SAME—*Final Decision in Actions Appealed to Court of Appeals by Statute—Exception if Required to Appeal to Supreme Court*. A final decision in any action, except in an action where a direct appeal to the Supreme Court is required by law, may be appealed to the Kansas Court of Appeals as a matter of right under K.S.A. 2021 Supp. 60-2102(a)(4).

3. KANSAS CONSTITUTION—*Grant of Judicial Power of State to Courts—Definition of Standing*. Article 3, section 1 of the Kansas Constitution grants the "judicial power" of the state to the courts. Judicial power is the power to hear, consider, and determine "controversies" between litigants. For an actual controversy to exist, a petitioner must have standing. Standing "means the party must have a personal stake in the outcome." Standing is a component of subject matter jurisdiction. It presents a question of law and can be raised at any time.

4. JURISDICTION—*Party Must Demonstrate Standing—Cognizable Injury and Causal Connection Requirements*. To demonstrate standing, a party must show a cognizable injury and establish a causal connection between the injury and the challenged conduct. A cognizable injury occurs when the party personally suffers an actual or threatened injury as a result of the challenged conduct. A threatened injury must be "impending" and "probable."

5. SAME—*Organization Suffers Cognizable Injury if Defendant's Action Impairs Its Ability to Carry Out Activities*. An organization has suffered a cognizable injury when the defendant's action impairs the organization's ability to carry out its activities and the organization must divert resources to counteract the defendant's action.

6. CONSTITUTIONAL LAW—*Right to Vote Is Foundation of Representative Government*. The right to vote is the foundation of a representative government that derives its power from the people. All basic civil and political rights depend on the right to vote.

7. SAME—*Supreme Court Holding that Legislature Must Not Deny or Impede Constitutional Right to Vote*. The Kansas Supreme Court has held that the Legislature "must not, directly or indirectly, deny or abridge the constitutional right of the citizen to vote or unnecessarily impede the exercise of that right." *State v. Beggs*, 126 Kan. 811, 816, 271 P. 400 (1928).

8. SAME—*Presumption State Action Is Constitutional—Dilutes Constitutional Protections*. Presuming a state action alleged to infringe a fundamental right is constitutional dilutes the protections established by our Constitution.

9. SAME—*Right to Vote Is Fundamental Right under Kansas Constitution—Application of Rule of Strict Scrutiny*. The right to vote is a fundamental right protected by the Kansas Constitution. The rule of strict scrutiny applies when a fundamental right is implicated. The rule of strict scrutiny applies here.

10. APPEAL AND ERROR—*District Court's Grant of Motion to Dismiss for Failure to State a Claim—Appellate Review*. Whether a district court erred by granting a motion to dismiss for failure to state a claim is a question of law subject to unlimited review. An appellate court will view the well-pleaded facts in a light most favorable to the plaintiff and assume as true those facts and any inferences reasonably drawn from them. If those facts and inferences state any claim upon which relief can be granted, then dismissal is improper. Dismissal is proper only when the allegations in the petition clearly show the plaintiff does not have a claim.

11. CIVIL PROCEDURE—*Notice Pleading in Kansas—Ultimate Decision of Legal Issues and Theories in a Case Is Pretrial Order.* Under Kansas' notice pleading, the petition is not intended to govern the entire course of the case. Rather, the ultimate decision as to the legal issues and theories on which the case will be decided is the pretrial order.

Appeal from Shawnee District Court; TERESA L. WATSON, judge. Opinion filed March 17, 2023. Reversed and remanded.

Pedro L. Irigonegaray, *Nicole Revenaugh*, *Jason A. Zavadil*, and *J. Bo Turney*, of Irigonegaray, Turney, & Revenaugh, LLP, of Topeka, for appellants.

Elisabeth C. Frost, *Henry J. Brewster*, *Mollie A. DiBrell*, and *Marisa A. O'Gara*, pro hac vice, of Elias Law Group LLP, of Washington, D.C., for appellants Loud Light, Kansas Appleseed Center for Law and Justice, Topeka Independent Living Resource Center, Charley Crabtree, Patricia Lewter, and Faye Huelsmann.

David Anstaett, pro hac vice, of Perkins Coie LLP, of Madison, Wisconsin, for appellant League of Women Voters of Kansas.

Bradley J. Schlozman and *Scott R. Schillings*, of Hinkle Law Firm LLC, of Wichita, *Brant M. Laue* and *Anthony J. Powell*, solicitors general, and *Kris Kobach*, attorney general, for appellees.

Before WARNER, P.J., GREEN and HILL, JJ.

HILL, J.: The history of the Kansas Territory joining the union of states is filled with grave struggle. In the Kansas Nebraska Act, 33 Cong. Ch. 59, 10 Stat. 277 (1854), Congress called for the residents of the Kansas Territory to decide if their new state would be free or allow the enslavement of people. The residents of the territory decided the question in two ways—by bloodshed and by the ballot. History teaches that the people finally decided that the Territory would join the United States as a free state. With this history of great struggle, it is not surprising that the Constitution of Kansas enshrines provisions for elections. The Constitution made sure voting rights would be preserved in this State's future. Voting was important then and voting is important now.

This case calls into question various election procedures and limits and asks us to examine the Kansas Constitution and decide if some recent enactments of the Legislature comply with its principles. Do these new laws promote or prohibit voting in accordance with the Kansas Constitution?

Citing the historical importance of voting in the Kansas Constitution, some groups and individuals came together and sued the State and some officials seeking to ban the implementation of some voting law changes made in 2021. They were unsuccessful in district court and therefore bring this appeal, asking us to reverse and remand for a trial on the merits of their claims.

During the 2021 session, the Legislature passed Senate Substitute for House Bill 2183, containing various new election laws. Governor Kelly vetoed the bill, but the Legislature overrode the veto. HB 2183 went into effect on July 1, 2021. L. 2021, ch. 96, § 2, 3, 5.

Relevant to this lawsuit, the bill:

- Created a new election crime called "False representation of an election official";

- mandated that election officials reject any advance ballot in which the signature on the ballot does not match the signature on file for the voter; and
- made it a crime to deliver more than 10 advance ballots to election officials on behalf of other voters. L. 2021, ch. 96, § 2, 3, 5.

The codified, signature matching requirement in the statute reads:

"(b) The county election officer shall attempt to contact each person who submits an advance voting ballot where there is no signature or where the signature does not match with the signature on file and allow such voter the opportunity to correct the deficiency before the commencement of the final county canvass.

. . . .

"(h) Subject to the provisions of subsection (b), no county election officer shall accept an advance voting ballot transmitted by mail unless the county election officer verifies that the signature of the person on the advance voting ballot envelope matches the signature on file in the county voter registration records, except that verification of the voter's signature shall not be required if a voter has a disability preventing the voter from signing the ballot or preventing the voter from having a signature consistent with such voter's registration form. Signature verification may occur by electronic device or by human inspection. In the event that the signature of a person on the advance voting ballot envelope does not match the signature on file in the county voter registration records, the ballot shall not be counted." K.S.A. 2021 Supp. 25-1124.

The ballot collection restriction states: "No person shall transmit or deliver more than 10 advance voting ballots on behalf of other voters during an election." K.S.A. 2021 Supp. 25-2437(c). A violation is a class B misdemeanor. K.S.A. 2021 Supp. 25-2437(d)(2).

THE PLAINTIFFS

All of the Plaintiffs, both groups and individuals, share an intense interest in promoting the electoral process in Kansas. They seek to educate the public and assist voters.

The League of Women Voters of Kansas, Loud Light, Kansas Appleseed Center for Law and Justice, Inc., and Topeka Independent Living Resource Center are nonpartisan, nonprofit organizations that endeavor to educate voters and encourage voting.

They all perform voter outreach, education, registration, and assistance activities.

The League members register voters, educate Kansans about the voting process, and assist those voters using advance ballots by collecting and delivering the ballots to election officials. In so doing, the League promotes its message of political and civic participation. League members in prior elections have collected and returned ballots well above the recently established 10-ballot limit.

Loud Light's mission is to engage, educate, and empower individuals from underrepresented populations, in particular young individuals, to become active in the political process. Loud Light focuses on strategies to increase turnout among young voters. Loud Light has encouraged and educated about advance voting. Loud Light also organizes ballot cure programs by contacting voters whose ballots are challenged by election officials and explain to them how to cure their challenged ballots so their votes will be counted and not rejected. Loud Light focuses on voters who election officials have been unable to contact and would have otherwise not known their ballot was rejected.

Kansas Appleseed educates and engages voters in Southwest and Southeast Kansas. In their view, this is where underrepresented populations are not afforded the same access to the ballot as other Kansans. Kansas Appleseed encourages and assists voters in remote and rural areas in returning their advance ballots.

The Center is operated and governed by people with disabilities seeking an opportunity for independent living. Its mission is to advocate for justice, equality, and essential services for people with disabilities. It registers, educates, and supports voters. The Center promotes the use of absentee ballots to increase voter turnout among people with disabilities. It collects and delivers ballots for individuals with disabilities. In 2020, several Center volunteers collected many more than 10 advance ballots from people with disabilities.

A Douglas County resident, Charley Crabtree, is a member of the League. He supplies local nursing homes with applications for advance ballots. He then collects the completed ballots from the nursing home residents who are unable to return the ballots to election officials. In 2020, Crabtree collected more than 75 ballots from nursing home residents.

Faye Huelsmann and Patricia Lewter are residents of Concordia. They are sisters of an institute of religious women of the Roman Catholic Church. They help their sisters who have mobility problems or face other obstacles and are unable to return their advance ballots. They collect and deliver the advance ballots to election officials.

THE DEFENDANTS

The two individuals most responsible for enforcing these election law changes are Defendants—Scott Schwab, the Kansas Secretary of State, and Kris Kobach (formerly Derek Schmidt), the Kansas Attorney General. They were sued in their official capacities by Plaintiffs.

The lawsuit

In June 2021, the Plaintiffs filed suit challenging the new election laws. They initially moved for a temporary injunction on the ground that the false representation law violated their rights under section 11 of the Kansas Constitution Bill of Rights. Defendants disputed Plaintiffs' interpretation of the false representation statute, contending it would not apply to Plaintiffs' activities. The district court denied the injunction motion and Plaintiffs appealed. A panel of this court dismissed the appeal for lack of standing. *League of Women Voters of Kansas v. Schwab*, 62 Kan. App. 2d 310, 513 P.3d 1222 (2022). Plaintiffs petitioned the Supreme Court for review, which was granted. That review is pending.

In their petition, Plaintiffs also challenged a new restriction that banned nonresidents from mailing advance ballot applications to Kansas voters. Two out-of-state organizations procured an injunction against that restriction in federal court because it violated the First Amendment to the United States Constitution. See *VoteAmerica v. Schwab*, 576 F. Supp. 3d 862, 892, 894 (D. Kan. 2021). Plaintiffs then voluntarily dismissed that claim from this suit.

Important here is that the Plaintiffs' petition alleged:

- The ballot collection restriction violates the right of freedom of speech and association under sections 3 and 11 of the Kansas Constitution Bill of Rights;
- both the ballot collection restriction and signature matching requirement violate the right to vote under article 5, section 1

of the Kansas Constitution and sections 1 and 2 of the Kansas Constitution Bill of Rights;

- the signature matching requirement violates the guarantee of equal protection under article 5, section 1 of the Kansas Constitution and sections 1 and 2 of the Kansas Constitution Bill of Rights; and
- the signature matching requirement violates due process under section 18 of the Kansas Constitution Bill of Rights.

Plaintiffs later moved for a partial temporary injunction against the signature matching requirement.

THE DISTRICT COURT'S RULING

The district court granted Defendants' motion to dismiss for failure to state a claim on all Plaintiffs' remaining claims except for Plaintiffs' challenge to the false representation statute, as that issue was pending with the Kansas Supreme Court. The court then denied Plaintiffs' injunction motion as moot. Plaintiffs appeal.

Do we have jurisdiction?

Before the parties submitted briefs in this appeal, Defendants moved to dismiss the case for lack of jurisdiction because the district court had not dismissed all claims. Some procedural history provides a helpful context to understand this argument.

Plaintiffs initially moved to temporarily enjoin enforcement of K.S.A. 25-2438(a)(2)-(3). Those subsections create a new election crime entitled "False representation of an election official." After the district court denied the motion for an injunction, Plaintiffs appealed. A panel of this court later dismissed the appeal for lack of standing. See 62 Kan. App. 2d 310. That standing ruling is now under review by our Supreme Court. Because that contest is pending in the Supreme Court, the district court concluded it did not have jurisdiction to consider a dismissal of Plaintiffs' claim regarding the false election official crime. Therefore, that claim lies fallow in the district court.

Whether the claims about the new false election official crime are revived awaits the ruling of our highest court. It is this idle claim concerning the new election crime that Defendants use as a

reason that we cannot entertain this appeal. In their view, the district court wrongly ruled it had no jurisdiction to rule on their motion to dismiss because the case is now in the Supreme Court. Because it remains in district court, we should not entertain this appeal.

Plaintiffs respond that this court has jurisdiction over the appeal under K.S.A. 2021 Supp. 60-2102(a)(2)—jurisdiction to review an order that refuses an injunction—and K.S.A. 2021 Supp. 60-2102(a)(3)—jurisdiction to review an order involving the Kansas Constitution.

The motions panel of our court denied Defendants' motion to dismiss on present showing. The appeal involves, in part, the denial of a temporary injunction with respect to the signature matching requirement giving rise to an appeal as of right under K.S.A. 2021 Supp. 60-2102(a)(2). The panel ordered the parties to address appellate jurisdiction under K.S.A. 2021 Supp. 60-2102(a)(3) in their briefs.

The right to appeal in a civil case comes from statutes and is not guaranteed by the United States or Kansas Constitutions. Kansas appellate courts have jurisdiction to entertain an appeal in a civil case only if the appeal is taken in the manner prescribed by statutes. *Wiechman v. Huddleston*, 304 Kan. 80, 86-87, 370 P.3d 1194 (2016). Whether jurisdiction exists is a question of law over which this court's scope of review is unlimited. *Via Christi Hospitals Wichita v. Kan-Pak*, 310 Kan. 883, 889, 451 P.3d 459 (2019).

The statute that controls this issue is K.S.A. 2021 Supp. 60-2102(a). That law sets out four categories of cases that may, as a matter of right, be appealed to this court. The categories begin with specific orders and extends to the more general category of all final dispositions, as discussed below.

(1) ***An order that discharges****, vacates, or modifies a provisional remedy.* In the law of injunctions, provisional remedies may be sought under K.S.A. 60-902. Examples of provisional remedies according to caselaw include a preliminary injunction, restraining order, prejudgment receivership, attachment, garnishment, and order of arrest. See *Edwards v. Edwards*, 182 Kan. 737, 747, 324 P.2d 150 (1958); *Macias v. Correct Care Solutions, Inc.*, 52 Kan. App. 2d 400, 407, 367 P.3d 311 (2016).

(2) ***An order that*** *grants, continues, modifies,* ***refuses,*** *or dissolves* ***an injunction****, or an order that grants or refuses relief in the form of mandamus, quo warranto, or habeas corpus.*

The rule on injunctions needs no further explanation but this section includes orders pertaining to the three great common-law writs.

(3) *An order that appoints a receiver or refuses to wind up a receivership or to take steps to accomplish the purposes thereof, such as directing sales or other disposal of property, or* ***an order involving*** *the tax or revenue laws, the title to real estate,* ***the constitution of this state*** *or the constitution, laws, or treaties of the United States.*

Several specific orders are included in this category. All are unique to the nature of the legal subject matter. The constitutional questions—the law that governs governments—is included in this subsection.

(4) ***A final decision*** *in any action, except in an action where a direct appeal to the Supreme Court is required by law. In any appeal or cross appeal from a final decision, any act or ruling from the beginning of the proceedings shall be reviewable.*

This is the general category of appeals. This category, frankly, makes up the bulk of our caseload.

What becomes manifest when reading this statute is that its drafting makes it clear that the Legislature wanted litigants to have an appeal as a matter of right on several specific categories as well as the more general category of final rulings. Otherwise, subsections 1-3 would be unnecessary.

But there is more. A policy comes into play here. In Kansas, our courts try to avoid piecemeal appeals which prolong litigation. We agree with our Supreme Court that the purpose of the Code of Civil Procedure is to assure the just, speedy, and inexpensive determination of disputes. *Harsch v. Miller*, 288 Kan. 280, 288, 200 P.3d 467 (2009). Those goals cannot be met if a litigant could interrupt a lawsuit with an appeal of every adverse ruling when it was made. With such a system, a case could drag on indefinitely and end up costing a fortune.

To this end, the Kansas Legislature limited the statutory categories of appeal under K.S.A. 2021 Supp. 60-2102. *Kansas Med.*

Mut. Ins. Co. v. Svaty, 291 Kan. 597, 610, 244 P.3d 642 (2010). "'Our code and our rules envision and are designed to provide but one appeal in most cases, that to come after all issues have been determined on the merits by the trial court. Interlocutory and fractionalized appeals are discouraged, and are the exceptions and not the rule.'" *In re Condemnation of Land for State Highway Purposes*, 235 Kan. 676, 682, 683 P.2d 1247 (1984) (concluding appeal did not lie under K.S.A. 60-2102[a][3] in original eminent domain proceeding).

A "final decision" under K.S.A. 2021 Supp. 60-2102(a)(4) generally disposes of the entire merits of the case and leaves no further questions or the possibility of future directions or actions by the lower court. *Kaelter v. Sokol*, 301 Kan. 247, 249-50, 340 P.3d 1210 (2015). When an action presents more than one claim for relief, a decision that adjudicates fewer than all the claims does not end the action and may be revised at any time before the entry of a judgment adjudicating all the claims. K.S.A. 2021 Supp. 60-254(b). Here, as Plaintiffs acknowledge, the district court's order was not a final decision because it did not dispose of the false representation issue.

PLAINTIFFS CAN APPEAL THE CONSTITUTIONAL RULINGS IN THIS CASE

Even though this court's jurisdiction to review "an order involving . . . the constitution of this state" under K.S.A. 2021 Supp. 60-2102(a)(3) has been rarely invoked, it is appropriate here. We acknowledge that despite the broad language, the statute does not create an absolute right to appeal any order involving a constitutional question. Our Supreme Court has held that the order involving the constitutional question "must constitute a final determination of the constitutional controversy." *Cusintz v. Cusintz*, 195 Kan. 301, 302, 404 P.2d 164 (1965).

In *Cusintz*, the district court denied the defendant's motion to dismiss a petition for alimony and child support. The defendant had argued a relevant alimony and child support statute was unconstitutional. He sought to appeal the denial of his motion to dismiss because the court's order involved a constitutional question, acknowledging that it was not a final decision disposing of the entire merits of the controversy. The Supreme Court ruled it did

not have jurisdiction. "[T]he order must have some semblance of finality. The fact that one of the parties raises a constitutional question does not permit an appeal to this court until the trial court has had an opportunity to make a full investigation and determination of the controversy." 195 Kan. at 302.

Later, in *In re Austin*, 200 Kan. 92, 94-95, 435 P.2d 1 (1967), the court ruled it did not have jurisdiction to hear an appeal from a pretrial order in which the petitioner was ordered to amend the petition and stated that the proceeding would be tried under the new act for obtaining a guardian or conservator that became effective January 1966. The appellant argued her constitutional rights would be violated if the district court proceeded under that act. The Supreme Court ruled it did not have jurisdiction:

"In the case at bar the pretrial orders complained of clearly lacked the requisite semblance of finality. No final determination affecting appellant's rights has been made. Her constitutional privileges have not been infringed in any way. No hearing on appellee's petition has been held and no adjudication of incapacity has been made. Nothing has really happened yet except the laying down of certain ground rules for the ultimate trial of the case, which rules may or may not be adhered to by the trial court in deprivation of appellant's constitutional rights." 200 Kan. at 94-95.

This court has followed the *Cusintz* holding by ruling a trial court's order of the sale of real property was not appealable under the broad "title to real estate" clause of K.S.A. 60-2102(a)(3) because the order had no semblance of finality. The trial court still had to confirm the sale. "[T]he statutes clearly provide for further action by the district court after the order of sale is issued, and the order has no semblance of being a final determination of the title to the real estate." *Valley State Bank v. Geiger*, 12 Kan. App. 2d 485, 486, 748 P.2d 905 (1988).

But this court has allowed an appeal under K.S.A. 60-2102(a)(3) of an order quieting title in a boundary line dispute because it involved the title to real estate and had some semblance of finality, though it did not resolve the defendant's claim for damages or the plaintiffs' third-party action. *Smith v. Williams*, 3 Kan. App. 2d 205, 206, 592 P.2d 129 (1979).

Here, Plaintiffs argue that K.S.A. 2021 Supp. 60-2102(a)(3) applies because the district court had the opportunity to make a full investigation and determination of the constitutional questions

at issue. They argue that K.S.A. 2021 Supp. 60-2102(a)(3) must require something less than a final decision that disposes of all the issues in the case. Otherwise, it would be superfluous of K.S.A. 2021 Supp. 60-2102(a)(4).

Defendants argue this court should not read the statute to permit piecemeal appeals of nonfinal judgments, warning of the deluge of interlocutory appeals that would follow. Defendants argue the court should allow interlocutory appeals of constitutional claims "only in those circumstances when foreclosing an immediate appeal of a non-final judgment would effectively deprive the litigant of any opportunity to meaningful relief on the claim."

The district court dismissed all of Plaintiffs' claims concerning the signature matching statute and the ballot collection statute. We consider this dismissal to be a final determination of the constitutional controversy concerning those statutes. The district court had the opportunity to fully investigate and determine those issues. The court gave no indication it would revisit its dismissal. The court explained it could not rule on the false representation issue only because it lacked jurisdiction over that issue while it was on appeal.

The plain language of the statute says that "an order involving . . . the constitution of this state" under K.S.A. 2021 Supp. 60-2102(a)(3) may be appealed. Such an order may be something less than a "final decision" under K.S.A. 2021 Supp. 60-2102(a)(4). The difference in language between (a)(3) and (a)(4), though, is striking. In fact, all of the orders listed in (a)(1)-(a)(3) may be something less than final decisions. There would be no need for the Legislature to list them that way otherwise.

The statute provides an appeal "as a matter of right" in such circumstances. K.S.A. 2021 Supp. 60-2102(a). The constitutional rights at issue in this case are important to all Kansans. We ask, in what circumstance could K.S.A. 2021 Supp. 60-2102(a)(3) be invoked if not in this case?

This case has already been split in two by the earlier appeal. Rejecting this appeal would only delay resolution of the constitutionality of these two separate statutes. The court can fully resolve the controversy concerning the signature matching and ballot collection statutes separate from the controversy concerning the false representation statute.

We hold that we have jurisdiction under K.S.A. 2021 Supp. 60-2102(a)(3) as a constitutional question.

THE PLAINTIFFS HAVE STANDING TO CHALLENGE THE SIGNATURE-MATCHING STATUTE

Defendants attack Plaintiffs' standing to sue on several fronts. They contend that none of the Plaintiffs have standing to challenge the signature matching requirement because in their petition they have alleged no cognizable injury. They first contend only the League is a membership organization that can assert associational standing. They further assert Plaintiffs have not alleged that any identified person associated with their organizations would have standing to challenge the signature matching requirement individually.

They also argue that a past injury cannot confer standing and that the potential for a future injury is too speculative to confer standing. And they argue the harm must be to one of Plaintiffs' members, not to Kansans generally. Defendants further claim Plaintiffs lack organizational standing because it is mere speculation that they will have to divert resources to ballot cure programs and that such diversion would not constitute an injury anyway.

In response, Plaintiffs first point out that only one Plaintiff need have standing for their claim to proceed. They argue that nonmembership organizations can assert standing on behalf of their beneficiaries. Plaintiffs contend that the injury to their members and to constituents is not hypothetical. The signature matching requirement will disenfranchise lawful voters due to the unreliability of a layperson matching signatures. In their view, this is particularly true for the signatures of voters who are older or disabled. Plaintiffs further contend they do have organizational standing because the signature matching requirement will force them to divert resources and frustrate their missions.

The district court did not address this issue. It assumed the existence of standing without so deciding.

A PARTY MUST PROVE TWO THINGS TO HAVE STANDING TO SUE: INJURY AND CAUSATION

Article 3, section 1 of the Kansas Constitution grants the "judicial power" of the state to the courts. Judicial power is the power to hear,

consider, and determine "controversies" between litigants. For an actual controversy to exist, a petitioner must have standing. Standing "means the party must have a personal stake in the outcome." *Baker v. Hayden*, 313 Kan. 667, 672, 490 P.3d 1164 (2021). Standing is a component of subject matter jurisdiction. It presents a question of law and can be raised at any time. 313 Kan. at 673.

Kansas courts use a two-part standing test. *Kansas Bldg. Industry Workers Comp. Fund v. State*, 302 Kan. 656, 680, 359 P.3d 33 (2015). To demonstrate standing, a party "'must show a cognizable injury and establish a causal connection between the injury and the challenged conduct.'" *State v. Stoll*, 312 Kan. 726, 734, 480 P.3d 158 (2021). A cognizable injury occurs when the party personally suffers an actual or threatened injury as a result of the challenged conduct. A threatened injury must be "impending" and "probable." *KNEA v. State*, 305 Kan. 739, 747, 387 P.3d 795 (2017). Federal courts also have a prudential standing requirement that the plaintiffs' grievance not be a general one shared by a large class of citizens. But Kansas has not explicitly adopted the federal model. *Kansas Bldg. Industry Workers Comp. Fund*, 302 Kan. at 679-80. The burden to establish standing rests with the party asserting it. *Gannon v. State*, 298 Kan. 1107, 1123, 319 P.3d 1196 (2014).

When standing is determined on a motion to dismiss without an evidentiary hearing, the court must resolve factual disputes in the plaintiffs' favor and plaintiffs need only make a prima facie showing of jurisdiction. *KNEA*, 305 Kan. at 747. That is how we shall proceed here.

An association has standing to sue on behalf of its members when:

- The members have standing to sue individually;
- the interests the association seeks to protect are germane to the organization's purpose; and
- neither the claim asserted nor the relief requested requires individual members' participation.

KNEA, 305 Kan. at 747.

Only the first element is at issue here—whether a member has standing to sue individually.

Our Supreme Court has called standing "'one of the most amorphous concepts in the entire domain of public law.'" *Board of Sumner County Comm'rs v. Bremby*, 286 Kan. 745, 750, 189 P.3d 494 (2008). To resolve this amorphous matter in this case, we must examine the Plaintiffs' claims.

In their amended petition, Plaintiffs alleged the signature matching requirement was "certain to disenfranchise lawful Kansas voters"—particularly those who are elderly, disabled, in poor health, young, and nonnative English speakers. Plaintiffs cited a study finding laypersons rejected authentic signatures 26 percent of the time. Age, illness, injury, medication, eyesight, alcohol use, drug use, pen type, ink, writing surface, position, paper quality, and state of mind can all affect a person's signature and cause an untrained layperson to mismatch a signature.

The League engages in efforts to get Kansas voters to use advance ballots. The League alleged injury to their members and the broader electorate:

> "The Signature Rejection Requirement is also harmful to the League's members, many of whom are older and are at significant risk of having their ballots flagged erroneously as having a mismatched signature. The League is also extremely concerned about the impact the Signature Rejection Requirement will have on the broader Kansas electorate, countless of whom will be disenfranchised as the result of inexpert and arbitrary decisions by elections officials ill-suited, ill-equipped, and untrained to be signature matching at all. Study after study has shown that not only non-experts particularly bad at accurately 'matching' signatures (something that is nearly impossible for even an expert to do accurately under the conditions that signatures are 'matched' in elections), but that they overwhelmingly misidentify valid signatures as 'mismatches.' Here, the consequences of that could mean total disenfranchisement."

The League further alleged injury to their organization:

> "Because of these inevitable consequences, the League will have to expend additional resources, including valuable and limited volunteer time, to develop and execute programs to ensure that eligible voters are educated about and ultimately are not disenfranchised by the Requirement. These are resources that the League would expend on other programs and initiatives but for the passage of the Signature Rejection Requirement."

Loud Light works "tirelessly to encourage voters to sign up for advance voting and to educate them on the process." Loud

Light organizes ballot cure programs, contacts voters whose ballots are challenged by election officers for mismatched signatures, and educates them on how to cure their ballots. "Much of Loud Light's efforts focus on voters who election officials have been unable to contact, and many of these voters would not have known about their rejected ballot if it had not been for Loud Lights' contact." Loud Light alleged it will be forced to expand its ballot cure program:

"Loud Light will have to expend greater resources educating the public about the lack of standards for signature rejection, and how to avoid its disenfranchising effects. Because counties will now be *required* to reject any signatures that an official believes is not a match—which will necessarily result in a greater number of mismatches, Loud Light will be forced to expend more resources recruiting and training additional staff and volunteers to help voters cure their ballots and combat the disenfranchising effects of county election officials rejecting purportedly mismatched signatures. These are resources that Loud Light would have expended on its other important programs and initiatives."

Kansas Appleseed encourages voters to sign up for advance voting. It alleged its constituencies "are far more likely to have their ballot rejected due to purportedly mismatched signatures."

The Center promotes advance voting to increase voter turnout among individuals with disabilities. The Center alleged its constituency is likely to vote by advance ballot, likely to have their ballots rejected due to an alleged signature mismatch, and that mismatches will be a burden to cure due to transportation concerns. The Center alleged:

"Because of the Requirement the Center will expend more resources, including limited staff hours, ensuring that people are educated about its disenfranchising effects and how to avoid them, as well as assisting any voters whose ballots are rejected as a result of a signature mismatch. These are resources the Center would expend on its other key services if the Restriction were not in place."

In conjunction with its motion for a partial temporary injunction, Plaintiffs provided an expert report from Dr. Linton Mohammed confirming that "'Kansas' signature matching procedures are all but guaranteed to result in the erroneous rejection of properly cast ballots.'" Signature verification is a difficult task even for a trained forensic document examiner because signatures are written in different styles with varying levels of readability and varia-

bility. Signatures also vary because of age, health, native language, and writing conditions. Dr. Mohammed confirmed particular groups of voters—the young, disabled, elderly, and nonnative English speakers—are more likely to have their ballots rejected.

We need not decide whether Plaintiffs' failure to identify a specific individual is fatal to their claim. The League, Loud Light, Kansas Appleseed, and the Center have shown that they have standing in their own right because they will have to divert resources from their usual activities to ballot cure programs.

An organization may assert standing in its own right if it can establish a cognizable injury and a causal connection between the injury and the challenged conduct. See *Gannon*, 298 Kan. at 1127.

We find law from a federal case persuasive on this point. It is generally accepted that an organization has suffered a cognizable injury when the defendant's action impairs the organization's ability to carry out its activities and the organization must divert resources to counteract the defendant's action. This theory was adopted by the United States Supreme Court in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982).

In *Havens Realty*, the Housing Opportunities Made Equal organization alleged that Havens Realty Corporation's racial steering practices frustrated their efforts to assist equal access to housing through counseling and referral services to low-income home seekers. HOME had to devote significant resources to identify and counteract the racially discriminatory steering practices. The Court held:

> "If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income home seekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests." 455 U.S. at 379.

HOME had standing in its own right. *Havens Realty*, 455 U.S. at 379.

Courts have distinguished *Havens Realty* in ways that do not apply here. Organizations do not have standing based on activities

that are no different from their daily operations. *Common Cause Indiana v. Lawson*, 937 F.3d 944, 955 (7th Cir. 2019). The costs of detecting an illegal practice, preparing for litigation, and mounting a legal challenge do not qualify as an injury. *OCA-Greater Houston v. Texas*, 867 F.3d 604, 611-12 (5th Cir. 2017); *Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1165-66 (11th Cir. 2008); *Black Voters Matter Fund, Inc. v. Kemp*, 313 Ga. 375, 386, 870 S.E.2d 430 (2022).

Some courts have demanded plaintiffs show what specific activities they would divert resources away from to counteract the challenged law. *Jacobson v. Florida Secretary of State*, 974 F.3d 1236, 1250 (11th Cir. 2020); *N.A.A.C.P. v. City of Kyle, Tex.*, 626 F.3d 233, 238-39 (5th Cir. 2010). But a broad allegation of diversion of resources is sufficient at the pleading stage. *Georgia Ass'n of Latino Elected Officials, Inc. v. Gwinnett County Board of Registration and Elections*, 36 F.4th 1100, 1115 (11th Cir. 2022).

Plaintiffs have alleged that they encourage advance voting and that they will have to divert resources from their other voter assistance activities to ballot cure programs to prevent voters from being disenfranchised by the new signature matching requirement. These are sufficient allegations to establish their standing at this point.

We hold that Plaintiffs have standing to sue.

DO THE TWO PROVISIONS IN THE NEW LAW VIOLATE THE RIGHT TO VOTE IN KANSAS?

In their amended petition, Plaintiffs alleged the signature matching requirement and ballot collection restriction violate the fundamental right to vote under the Kansas Constitution. They alleged that legal voters will be disenfranchised by the signature matching requirement because their ballots will be rejected. They contend the ballot collection restriction severely burdens the right to vote by limiting the pool of individuals who can help deliver ballots. It is their view that the ballot collection restriction will particularly affect senior citizens, minorities, people with disabilities, rural voters, natives living on tribal land, those with limited access to transportation, and those with work, school, and family care commitments.

The district court presumed the statutes were constitutional and decided that Plaintiffs were mounting a facial challenge to the statutes. The court chose to analyze whether Plaintiffs had established that "'no set of circumstances exist[ed]'" under which the statutes would be valid. The court made a rational-basis review of these claims and also applied the *Anderson-Burdick* balancing test. We find this approach and analysis to be erroneous. This is like saying, "This glass of water is pure, show me where there are any impurities." The correct inquiry should be, "This is important, show me this glass of water is entirely pure." The first test begins with the assumption that this is all pure. The second test requires proof that it is entirely pure.

Our Supreme Court has held that presuming a state action alleged to infringe a fundamental right is constitutional "dilutes the protections established by our Constitution." *Hodes & Nauser, MDs v. Schmidt*, 309 Kan. 610, 674, 440 P.3d 461 (2019). The court was referring to the right of personal autonomy protected by section 1 when it made that statement, but its reasoning was not limited to that one fundamental right. The court called the right to vote a "fundamental" right protected by the Kansas Constitution in the same opinion. 309 Kan. at 657. The court reiterated its holding that laws infringing fundamental rights are not presumed constitutional in *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 1132, 442 P.3d 509 (2019). So we see that the district court here erred by beginning with a presumption that the questioned statutes were constitutional.

There is no question that the right to vote is a fundamental right protected by the Kansas Constitution. The right to vote is the foundation of a representative government that derives its power from the people. All basic civil and political rights depend on the right to vote. We agree with the language of our Supreme Court in 1971:

> "The right to vote in any election is a personal and individual right, to be exercised in a free and unimpaired manner, in accordance with our Constitution and laws. The right is pervasive of other basic civil and political rights, and is the bed-rock of our free political system. . . . This right is a right, not of force, but of sovereignty. It is every elector's portion of sovereign power to vote on questions submitted. Since the right of suffrage is a fundamental matter, any al-

leged restriction or infringement of that right strikes at the heart of orderly constitutional government, and must be carefully and meticulously scrutinized." *Moore v. Shanahan*, 207 Kan. 645, 649, 486 P.2d 506 (1971).

Even earlier than that, the court held that the Legislature "'must not, directly or indirectly, deny or abridge the constitutional right of the citizen to vote or unnecessarily impede the exercise of that right.'" *State v. Beggs*, 126 Kan. 811, 816, 271 P. 400 (1928). Voting is serious in Kansas from the beginning of statehood to now.

Our Supreme Court has instructed that strict scrutiny "applies when a fundamental right is implicated." *Hodes*, 309 Kan. at 663. We follow the command and presume that strict scrutiny applies.

Turning to the use of a federal test by the district court, we find another error. Federal law is not controlling here. Federal courts use a flexible balancing test when evaluating the constitutionality of election laws that govern the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself (and that thereby burden the right to vote). The standard is known as the *Anderson-Burdick* flexible balancing test:

"A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'

"Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.' But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." [Citations omitted.] *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992) (state's interest in prohibiting write-in voting outweighed limited burden on voters' rights).

See also *Anderson v. Celebrezze*, 460 U.S. 780, 788-89, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983) (the burden filing deadline placed on voters' freedoms outweighed state's minimal interest in deadline).

Every voting rule imposes a burden of some sort. *Brnovich v. Democratic National Committee*, 594 U.S. ___, 141 S. Ct. 2321, 2338, 210 L. Ed. 2d 753 (2021). There is no litmus test for measuring the severity of the burden. *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 191, 128 S. Ct. 1610, 170 L. Ed. 2d 574 (2008). Under the *Anderson-Burdick* test, the court first determines the extent of the burden the challenged law places on the right to vote. A severe burden is subject to strict scrutiny. But if the court characterizes the burden as something other than severe, the court weighs the competing interests. This so-called "flexible" balancing test has led to a wide array of decisions on comparable state statutes.

One court reviewing a state's signature matching requirement stated, "If disenfranchising thousands of eligible voters does not amount to a severe burden on the right to vote, then this Court is at a loss as to what does." *Florida Democratic Party v. Detzner*, No. 4:16CV607-MW/CAS, 2016 WL 6090943, at *6 (N.D. Fla. 2016) (unpublished opinion). But not all courts agree.

Federal courts have come to differing conclusions on whether signature requirements and ballot collection limits constitute a severe burden on the right to vote. Cf. *Democratic Executive Committee of Florida v. Lee*, 915 F.3d 1312, 1321 (11th Cir. 2019) (finding signature matching scheme—that mandated no uniform standards for matching signatures, no training for election officials, and did not ensure voters would be informed of a mismatch with adequate time to cure—imposed "at least a serious burden on the right to vote"); *Democratic Executive Committee of Florida v. Detzner*, 347 F. Supp. 3d 1017, 1030 (N.D. Fla. 2018) (finding disenfranchisement of thousands of voters based on a standardless determination of signature mismatches by laypeople is a substantial burden on the right to vote); *League of Women Voters of Ohio v. LaRose*, 489 F. Supp. 3d 719, 735-36 (S.D. Ohio 2020) (finding signature matching requirements impose "some burden on the right to vote," or a moderate burden); *Arizona Democratic Party v. Hobbs*, 18 F.4th 1179, 1181 (9th Cir. 2021) (holding that correcting a missing signature by election day is a minimal burden); *Richardson v. Texas Secretary of State*, 978 F.3d 220, 237 (5th Cir. 2020) (finding signature-verification requirements without

notice and an opportunity to cure "are even less burdensome than photo-ID requirements"); see *DSCC v. Simon*, 950 N.W.2d 280, 293 (Minn. 2020) (finding ballot collection and delivery limit not a severe burden on voting).

But when we return to Kansas law, we see that when our Supreme Court faced whether to adopt an undue burden standard in *Hodes*, the court recognized that the right to personal autonomy was not absolute. 309 Kan. at 661. The court strongly criticized and rejected the undue burden test and adopted strict scrutiny. The undue burden standard was difficult to understand and apply. The determination of what constituted an undue burden was subjective and varied from person to person. Thus, it lacked predictability concerning what regulations would be constitutional. And the court held the strict scrutiny test best protected fundamental rights. 309 Kan. at 665-69. The court stated the undue burden standard "lacks the rigor demanded by the Kansas Constitution" for protecting fundamental rights. 309 Kan. at 670. "This balancing test relieves the State of some of the burden of proof and from having to narrowly tailor an infringement to the interest it seeks to protect." 309 Kan. at 670.

Given the strong criticism in *Hodes*, we do not see our Supreme Court adopting a flexible balancing test that varies depending on how severe the court characterizes the burden. The *Anderson-Burdick* test is a federal test based on the federal Constitution for reviewing state election laws. Federal courts must deal with the concept of comity—respecting the integrity of two court systems. State courts do not have to deal with that issue. The Kansas constitutional provisions are unique. The right to vote is a fundamental right. Strict scrutiny applies here.

Under strict scrutiny, once the plaintiff has shown an infringement—regardless of degree—the state action is presumed unconstitutional. The burden then shifts to the State to establish a compelling interest and narrow tailoring of the law to serve the interest. *Hodes*, 309 Kan. at 669.

We are mindful that in the context of the review of election laws, there is a long recognized distinction made by Kansas courts between regulations and restrictions. Benign election regulations which are a mere exercise of police powers to regulate and preserve the purity of the election are usually upheld. But statutes that

restrict the constitutional right to vote are invariably void. *State v. Doane*, 98 Kan. 435, 440, 158 P. 38 (1916). The statutes we are dealing with are not mere regulations, such as setting the opening and closing time of the polls. The statutes we are reviewing are restrictions that must be examined closely.

But before we apply strict scrutiny, we must decide whether the government action impairs the constitutionally protected right to vote. As the *Hodes* court explained: "In some cases, it will be obvious that an action has such effect. Imprisonment, for example, obviously impairs the right to liberty. In other cases, the court may need to assess preliminarily whether the action only appears to contravene a protected right without creating any actual impairment." 309 Kan. at 672.

THE SIGNATURE MATCHING STATUTE IMPAIRS THE RIGHT TO VOTE

In interpreting the Kansas Constitution, Kansas courts read its wording with great care:

"'[T]he best and only safe rule for ascertaining the intention of the makers of any written law, is to abide by the language they have used; and this is especially true of written constitutions, for in preparing such instruments it is but reasonable to presume that every word has been carefully weighed, and that none are inserted, and none omitted without a design for so doing.' [Citation omitted.]" *State v. Albano*, 313 Kan. 638, 645, 487 P.3d 750 (2021).

When the words do not make the intent clear, courts look to the historical record. The state-centric focus of the analysis leaves room for variance or divergence between the rights guaranteed under the Kansas and United States Constitutions. *Albano*, 313 Kan. at 645.

We note that the right to vote is not absolute. The Kansas Constitution protects the right of *qualified* electors to vote. See Kan. Const. art. 5, § 1.

"The legislature shall provide by law for proper proofs of the right of suffrage." Kan. Const. art. 5, § 4.

Shortly after the Kansas Constitution was adopted, our Supreme Court interpreted this latter provision. The court stated, "Obviously, what was contemplated was the ascertaining beforehand by proper proof of the persons who should, on the day of

election, be entitled to vote, and any reasonable provision for making such ascertainment must be upheld." *State v. Butts*, 31 Kan. 537, 554, 2 P. 618 (1884).

The *Butts* court distinguished between simple "matters of proof" to find out who may vote—such as requiring that a party be registered, requiring a voter to go to a specific place to vote, and requiring proof by oath of the right to vote—and laws that "under the pretext of securing evidence of voters' qualifications . . . would cast so much burden as really to be imposing additional qualifications." 31 Kan. at 554. "The legislature cannot, by, in form, legislating concerning rules of evidence, in fact, overthrow constitutional provisions." 31 Kan. at 554-55. The court found that a registration law was permissible if ample facilities for registering were furnished, and the opportunities for registering were continued down to within a reasonable time of the election day. 31 Kan. at 554-55.

Elections at the time of the Wyandotte Constitutional Convention were "held under difficulty and each side accused the other of procuring votes from persons not entitled." *Lemons v. Noller*, 144 Kan. 813, 819, 63 P.2d 177 (1936). But our understanding of who may vote changed in subsequent years with amendments.

We also note that signature matching is not new. See *Sawyer v. Chapman*, 240 Kan. 409, 413, 729 P.2d 1220 (1986). But because the only purpose of statutes relating to the validity of signatures is to prevent fraud, an overly strict regulation can impair the right to vote. See *Cline v. Meis*, 21 Kan. App. 2d 622, 905 P.2d 1072 (1995) (excluding electors who could not write in cursive from a recall petition was improper).

The Legislature can require voters to establish their right to vote. But, as pled by Plaintiffs, whether an election official perceives a voter's signature as a mismatch is not in the voter's control. Lay election officials will erroneously determine voters' signatures are mismatched. Thus, the statute disenfranchises voters even after the voter provided "proper proofs." See Kan. Const. art. 5, § 4. The statute alone does not require training of election officials, contains no standard for determining what constitutes a signature match, and does not provide a standard for the opportunity to cure an error made when matching signatures. Plaintiffs have met their minimal burden to plead a claim that the signature

matching requirement impairs the constitutionally protected right to vote.

The district court here ruled there were no facts necessary to evaluate Plaintiffs' facial challenge. But it then conversely applied a fact-driven test to determine the questioned statutes were not a severe burden on the right to vote. This is akin to saying, "I will not consider your factual allegations but I will use my own facts to decide this motion to dismiss." In doing so, the district court relied on *Crawford*, 553 U.S. at 199-203, where the *Crawford* Court looked to facts to determine the severity of the burden of the voting restriction and affirmed the grant of summary judgment after discovery.

In *Crawford*, the Court considered both the statute's broad application to all of Indiana's voters, but also the burden imposed on specific categories of voters. The Court found the evidence lacking. As the Tenth Circuit explained:

"In sum, *Crawford* teaches that . . . while we are to evaluate 'the statute's broad application to all . . . voters' to determine the magnitude of the burden, *Crawford*, 553 U.S. at 202-03, 128 S. Ct. 1610 (plurality opinion of Stevens, J.), we may nevertheless specifically consider the 'limited number of persons' on whom '[t]he burdens that are relevant to the issue before us' will be 'somewhat heavier,' *id.* at 198-99, 128 S. Ct. 1610 (plurality opinion of Stevens, J.)." *Fish v. Schwab*, 957 F.3d 1105, 1127 (10th Cir.), *cert. denied* 141 S. Ct. 965 (2020).

When the district court applied the *Anderson-Burdick* test to the signature matching requirement, it found it important that under the statute, the election officials "must notify an advance ballot voter of a missing signature or signature mismatch and provide an opportunity to cure." The court held the signature matching requirement thus was not a severe burden on the right to vote and any burden was outweighed by the State's interest in the integrity of its elections.

Upon what facts in this record did the district court make this determination? Even though it rejected Plaintiffs' argument that this was a factual determination, *it was*. The court weighed the provisions and ruled that it was fair. This ruling was reached before any depositions, discovery, or motions for summary judgment. In its eagerness to use the *Anderson-Burdick* test, the court erred by making factual determinations with no evidence.

Plaintiffs claimed that the signature matching requirement burdens the right to vote because ballots are rejected erroneously. This provision burdens the whole electorate because signatures are wrongly mismatched for reasons we have already discussed above.

THE BALLOT COLLECTION RESTRICTION RESTRICTS THE RIGHT TO VOTE

The Plaintiffs make a similar argument concerning the ballot collection restriction. They contend it is an unreasonable infringement of the right to vote under the Kansas Constitution. Their petition contends that the ballot collection restriction will limit the ability of voters to cast their ballots, including many who may not be able to return them at all.

The argument is straightforward. Not all voters can make a trip to the polls, for various reasons. In the past, other people have assisted them in voting by helping them mark their ballot or by simply taking their marked ballot to the ballot box for them. The limit of 10 ballots means only 10 voters will be helped. What about any others? The restriction will prevent those votes from being cast and counted because those who can get to the polls are limited to 10. If a volunteer routinely picked up 30 ballots and now is limited to 10, who will take up the slack?

This statute is a limitation that prevents votes from being cast and counted. The district court in dealing with this said "the need may still be met" and perhaps other people could be found to collect 10 ballots each. But we see no facts that support the court's hope. It is clear that the court did not take as true the facts as pled in the petition as it was required to do when considering a motion to dismiss. See *KNEA*, 305 Kan. at 747; see also K.S.A. 2021 Supp. 60-212(b)(6).

Strict scrutiny must apply here as well. After all, *Hodes* held that when considering a law that is an infringement of fundamental rights, the strict scrutiny standard applies regardless of the degree of infringement of rights. 309 Kan. at 663.

The rule we follow

Whether a district court erred by granting a motion to dismiss for failure to state a claim is a question of law subject to unlimited review. *Jayhawk Racing Properties v. City of Topeka*, 313 Kan. 149, 154, 484 P.3d 250 (2021). An appellate court will view the well-pleaded facts in

a light most favorable to the plaintiff and assume as true those facts and any inferences reasonably drawn from them. If those facts and inferences state any claim upon which relief can be granted, then dismissal is improper. Dismissal is proper only when the allegations in the petition clearly show the plaintiff does not have a claim. *Kudlacik v. Johnny's Shawnee, Inc.*, 309 Kan. 788, 790, 440 P.3d 576 (2019).

Also, in considering how pleadings work in Kansas, our Supreme Court has advised that, "under Kansas' notice pleading, the petition is not intended to govern the entire course of the case. Rather the ultimate decision as to the legal issues and theories on which the case will be decided is the pretrial order." *Rector v. Tatham*, 287 Kan. 230, 232, 196 P.3d 364 (2008).

When we apply those standards to the district court's ruling, we conclude that the court erred.

Preventing voter fraud is a compelling state interest. See *Brnovich*, 141 S. Ct. at 2347. But our Supreme Court has also held there is a compelling state interest in increased participation in the election process from mail ballot voting. *Sawyer*, 240 Kan. at 415. The State must establish a compelling interest and narrow tailoring of the law to serve the interest. *Hodes*, 309 Kan. at 669. Courts have commented that states will have a problem with the latter part of its burden if there is no evidence mismatched signature ballots were submitted fraudulently. See *Florida Democratic Party v. Detzner*, No. 4:16CV607-MW/CAS, 2016 WL 6090943, at *7 (N.D. Fla. 2016) (unpublished opinion). And courts have commented that the State's interest in preserving the integrity of the election process is better served by ensuring that all nonfraudulent ballots timely submitted are counted. See *Democratic Executive Committee of Florida v. Lee*, 915 F.3d 1312, 1323 (11th Cir. 2019).

We therefore remand this matter to the district court to give the State the opportunity to show that these statutes can overcome strict scrutiny.

PLAINTIFFS CLAIM THE SIGNATURE MATCHING REQUIREMENT VIOLATES THE RIGHT TO DUE PROCESS

In their amended petition, Plaintiffs alleged the signature matching requirement violates the right to procedural due process

protected by section 18 of the Kansas Constitution Bill of Rights. They alleged due process requires uniform standards for matching signatures and additional procedures to safeguard the right to vote.

The district court ruled that there is no constitutional right to vote by mail and that state law providing for advance voting did not give rise to a liberty interest entitled to procedural due process protections.

Plaintiffs contend the district court erred in dismissing their due process claim under section 18 of the Kansas Constitution Bill of Rights and improperly concluded that there is no protected liberty interest in voting by mail. They argue the right to vote necessarily includes the right to have one's vote counted. And they argue that once a state offers an absentee voting scheme, the state has created a sufficient liberty interest in exercising the right to vote in such manner.

Defendants contend that Plaintiffs ignore a new regulation—K.A.R. 7-36-9—and that the right to vote does not implicate a liberty interest. Defendants look to federal law in search of such liberty interest. Plaintiffs respond that the regulation is inadequate.

"All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay." Kan. Const. Bill of Rights, § 18.

Kansas courts have long held that "remedy by due course of law" refers to due process. *State v. N.R.*, 314 Kan. 98, 113, 495 P.3d 16 (2021), *cert. denied* 142 S. Ct. 1678 (2022). Due process may refer to substantive due process or procedural due process. Procedural due process means notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Creecy v. Kansas Dept. of Revenue*, 310 Kan. 454, 462, 447 P.3d 959 (2019).

Historically, Kansas courts have analyzed section 18 of the Kansas Constitution Bill of Rights as coextensive with its federal counterpart. *State v. Boysaw*, 309 Kan. 526, 537-38, 439 P.3d 909 (2019). "In reviewing a procedural due process claim, the court first must determine whether a protected liberty or property interest is involved. If so, the court then must determine the nature and extent of the process which is due." *N.R.*, 314 Kan. at 113.

The right to procedural due process is not limited to fundamental rights; it may be applied to state-created "privileges." *Creecy*, 310 Kan. at 463 (holding person is entitled to due process

before driving license taken away). A liberty interest may arise from the Constitution itself or it may arise from an expectation or interest created by state law. *Wilkinson v. Austin*, 545 U.S. 209, 221, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005).

The scope of a claimed state-created liberty interest is determined by state law. *Montero v. Meyer*, 13 F.3d 1444, 1447 (10th Cir. 1994). In Kansas, "[t]he concept of 'liberty' is broad." *N.R.*, 314 Kan. at 113 (recognizing liberty interest includes protection of a person's good name).

The district court here held there was no constitutional right to vote by mail, relying on *McDonald v. Board of Election*, 394 U.S. 802, 807, 89 S. Ct. 1404, 22 L. Ed. 2d 739 (1969) (finding it was "not the right to vote that is at stake here but a claimed right to receive absentee ballots"). *McDonald* is a federal equal protection case from 1969 interpreting an Illinois law that made absentee balloting available only to distinct groups of people. It does not control Plaintiffs' claim that lawfully cast absentee votes under Kansas law cannot be rejected without due process.

The right at issue is not the right to vote by mail. A person cannot know beforehand that their mail-in ballot will be rejected for a signature mismatch by the elections office. A qualified voter that votes by mail for whatever reason in accordance with Kansas law has an expectation that their vote will be counted. The right at issue is really the fundamental right to have one's vote counted.

The right to vote is illusory if it does not include the right to have one's vote counted.

"It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote . . . and to have their votes counted . . . . '[T]he right to have one's vote counted is as open to protection . . . as the right to put a ballot in a box.'" *Reynolds v. Sims*, 377 U.S. 533, 554-55, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964).

But even if the right at issue were only the right to vote by mail, voting by mail is a state-created right that all Kansans have had for decades. If due process is required in Kansas before a person's driving license is revoked, then a qualified voter's mail-in ballot cannot be thrown out without due process.

The few federal cases that have struck down signature matching laws because of due process concerns support our view. "Having induced voters to vote by absentee ballot, the State must provide adequate process to ensure that voters' ballots are fairly considered and, if eligible, counted." *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217, 222 (D. N.H. 2018) (holding signature match law that did not give voters timely notice of ballot rejection, contained no functional standards on signature matching, and vested unreviewable discretion on an untrained moderator was facially unconstitutional); see *Frederick v. Lawson*, 481 F. Supp. 3d 774, 793 (S.D. Ind. 2020); *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018); *Zessar v. Helander*, No. 05 C 1917, 2006 WL 642646, at *6 (N.D. Ill. 2006) (unpublished opinion).

We are persuaded by the *Andino* court when it stated that, the contention that there is no liberty interest in the right to have one's vote counted "is contrary to a large body of case law, which recognizes that the franchise is a fundamental right and the cornerstone of a citizen's liberty." *League of Women Voters of South Carolina v. Andino*, 497 F. Supp. 3d 59, 77 (D.S.C. 2020), *appeal dismissed and remanded* 849 Fed. Appx. 39 (4th Cir. 2021).

The cases holding otherwise do not explain why voting deserves less protection than other state-created rights or constitutionally created liberty interests. The Fifth Circuit held that state-created liberty interests are limited to freedom from restraint, and that a constitutionally created fundamental right is different from a liberty interest. *Richardson v. Texas Secretary of State*, 978 F.3d 220, 230-32 (5th Cir. 2020); see also *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 479 (6th Cir. 2008) (holding fundamental rights for purposes of substantive due process are not liberty interests for purposes of procedural due process).

In Kansas, the right of a parent to the custody, care, and control of their child is considered a fundamental right and a liberty interest deserving of procedural due process. *In re. J.D.C.*, 284 Kan. 155, 166, 159 P.3d 974 (2007). Likewise, the fundamental right to vote can be considered a liberty interest for procedural due process analysis. Both rights are fundamental. Both rights are important.

The district court erred by ruling that the signature matching requirement did not implicate a liberty interest entitled to procedural due process.

But neither party has briefed the next question—the nature and extent of the process due.

Plaintiffs claimed that the signature matching requirement violates the right to procedural due process protected by section 18 of the Kansas Constitution Bill of Rights.

The new regulation was issued after the district court dismissed this case. We will not consider the regulation now. It would be unfair to the parties for us to consider its impact on these issues if they have not had the chance to brief the point. Additionally, it would be improper for us to take up the effect of the regulation since the district court did not have a chance to consider the matter. No doubt the impact of this new regulation will affect the procedural due process analysis on remand.

PLAINTIFFS MAKE AN EQUAL PROTECTION CLAIM BUT WE CANNOT REVIEW IT PROPERLY

Plaintiffs' petition alleged the signature matching requirement violates the equal protection provisions of sections 1 and 2 of the Kansas Constitution Bill of Rights. In their view, the statute "explicitly and arbitrarily endorses multiple, standardless processes for verifying signatures, placing voters across the state's 105 counties at differing risks of disenfranchisement." Different counties will have different procedures for matching signatures. There is no statutory definition of a "match." And the statute allows the county to choose between an electronic device or human inspection. Thus, a ballot that would be accepted in one county could be rejected in another county.

The district court grouped Plaintiffs' equal protection claim with their right to vote claim. The court then applied the *Anderson-Burdick* test and concluded the signature matching requirement was a reasonable, nondiscriminatory restriction that was outweighed by the State's compelling interest in the integrity of elections. We again point out that applying the *Anderson-Burdick* test was erroneous.

But Plaintiffs also contend it was error for the district court to merge the two issues and that the district court skirted its claim that the signature matching requirement violates the equal protection provisions of sections 1 and 2 of the Kansas Constitution Bill of Rights. They argue that the Constitution protects against differential treatment, particularly in the context of voting. Plaintiffs argue that the statute allows the 105 counties to institute different procedures for verifying signatures with no guidance, resulting in unequal treatment of voters across the state. Plaintiffs also allege voters who are elderly, disabled, in poor health, young, or nonnative English speakers are particularly likely to have their legitimate ballots rejected. They again argue strict scrutiny applies.

Defendants contend that Plaintiffs have disregarded a new regulation the Secretary adopted to provide consistent standards for implementing the signature matching requirement across the state. See K.A.R. 7-36-9. Defendants argue the signature matching statute is a sufficiently uniform standard. Discrepancies in how county election officials apply uniform standards that require human judgment are to be expected and are not constitutionally significant. They argue that a contrary ruling would "totally upend the county canvassing procedures."

In response, Plaintiffs argue that the new regulation was published mere days before their brief was due, is not part of the record, and is not properly before the court. They also argue the regulation provides "woefully insufficient" guidance.

"All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." Kan. Const. Bill of Rights, § 1. "All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit." Kan. Const. Bill of Rights, § 2.

Our Supreme Court has recently held:

"[T]he equal protection guarantees found in section 2 are coextensive with the equal protection guarantees afforded under the Fourteenth Amendment to the United States Constitution. . . . Kansas courts shall be guided by United States Supreme Court precedent interpreting and applying the equal protection guarantees of the Fourteenth Amendment." *Rivera v. Schwab*, 315 Kan. 877, 894, 512 P.3d 168 (2022).

"The guiding principle of equal protection analysis is that similarly situated individuals should be treated alike." *In re K.M.H.*, 285 Kan. 53, 73, 169 P.3d 1025 (2007). Thus, the question that must be answered here is whether this law treats similarly situated voters differently?

Equal protection challenges are evaluated in three steps. First, the court determines whether the legislation creates a classification resulting in different treatment of similarly situated individuals. Second, the court determines the appropriate level of scrutiny by examining the nature of the right affected by the classification. Third, the court applies that level of scrutiny to the legislation. *Village Villa v. Kansas Health Policy Authority*, 296 Kan. 315, Syl. ¶ 3, 291 P.3d 1056 (2013); *State v. Dixon*, 60 Kan. App. 2d 100, Syl. ¶ 8, 492 P.3d 455, *rev. denied* 314 Kan. 856 (2021). Strict scrutiny applies in cases involving suspect classifications such as race, and fundamental rights guaranteed by the Constitution. *Farley v. Engelken*, 241 Kan. 663, 669-70, 740 P.2d 1058 (1987); *In re T.N.Y.*, 51 Kan. App. 2d 956, 965, 360 P.3d 433 (2015). Voting is a fundamental right for purposes of equal protection. *Farley*, 241 Kan. at 669-70.

Our reading of the signature matching statute leads us to conclude that it does not directly treat similarly situated individuals differently because it applies to all mail-in ballots. Plaintiffs' argument is really based on the ruling in *Bush v. Gore*, 531 U.S. 98, 105-106, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000). There, the Supreme Court held the right to vote was fundamental and equal weight must be given to each vote:

> "The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." 531 U.S. at 104-05.

The Court held that a recount of ballots to determine the voters' intent violated the guarantee of equal protection because of "the absence of specific standards to ensure its equal application." 531 U.S. at 106. The Court stated the formulation of uniform rules to determine intent was "practicable" and "necessary." 531 U.S. at 106. The Court was concerned that the standards for accepting or

rejecting ballots would "vary not only from county to county but indeed within a single county from one recount team to another." 531 U.S. at 106. Compliance with the requirements of equal protection would require adopting "adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them." 531 U.S. at 110. But the Court stated that its analysis was "limited to the present circumstances." 531 U.S. at 109. It is unclear what level of scrutiny was applied.

If we apply the *Bush* reasoning to this case, Plaintiffs have adequately stated an equal protection claim because the signature matching statute contains no standards to determine what constitutes a signature match, and requires no training—ensuring that what constitutes a signature match will vary from county to county and even from one election official to another. Election officials will use varying methods to judge whether signatures are truly mismatched or merely natural variations in signatures.

But that conclusion does not end the matter. Defendants have pointed out that the new regulation adopted after the district court's ruling fixes all of these concerns. We say, again, that it would be unfair to the parties for us, on appeal, to interpret and apply this regulation from a record that lacks any information about this regulation. Nor is it proper for us to consider this issue without giving the parties a chance to brief the matter. Since we are remanding this case, the effect of the new regulation can be considered by the district court after allowing the parties to present evidence and arguments they think are sufficient for the court to resolve these questions.

DOES THE VOTE COLLECTION LIMIT VIOLATE FREEDOM OF SPEECH IN KANSAS?

Plaintiffs have alleged that they are exercising core political speech when they engage, encourage, register, educate, and assist voters, including by collecting and delivering completed advance ballots. They argue that the ballot collection restriction limits their core political speech and expressive conduct by diminishing the number of voters they can assist. They also alleged they will have to recruit more volunteers, stressing their limited resources. They

alleged there is no compelling state interest to justify this restriction and that the restriction is not narrowly tailored to that interest.

The district court ruled that the delivery of advance ballots to election officials is not expressive conduct and therefore the rational basis test applies. The court ruled the ballot collection restriction was justified by the State's interest in combating voter fraud and instilling public confidence in elections, stating that the government need not actually show that the fraud existed to justify measures to prevent it. The court further ruled that even if the ballot collection restriction implicated constitutionally protected speech or conduct, then the *Anderson-Burdick* test would apply rather than strict scrutiny.

Plaintiffs contend they stated a claim that the ballot collection restriction limits constitutionally protected speech because assisting voters to return ballots is expressive activity. They argue that ballot collectors necessarily advocate for democratic participation and the fact that they have other means to disseminate their ideas does not take their speech outside the bounds of constitutional protection. They argue that strict scrutiny applies because free speech is a fundamental right protected by section 11 of the Kansas Constitution Bill of Rights. And they argue that whether the ballot collection restriction is narrowly tailored to address a state interest is a factual question that could not be resolved on a motion to dismiss and that the district court improperly credited the State's factual allegations.

Defendants contend that this statute makes no impact on either speech or expressive conduct. They argue collecting and returning ballots of another voter does not communicate any particular message. They argue that Plaintiffs can still interact with all voters and provide them with advance ballot applications. They argue the restriction is needed to prevent ballot harvesting.

"The people have the right to assemble, in a peaceable manner, to consult for their common good, to instruct their representatives, and to petition the government, or any department thereof, for the redress of grievances." Kan. Const. Bill of Rights, § 3.

"The liberty of the press shall be inviolate; and all persons may freely speak, write or publish their sentiments on all subjects,

being responsible for the abuse of such rights." Kan. Const. Bill of Rights, § 11.

Freedom of speech is "among the most fundamental personal rights and liberties of the people." *U.S.D. No. 503 v. McKinney*, 236 Kan. 224, 234, 689 P.2d 860 (1984). The right is "'generally considered coextensive'" with that right protected under the First Amendment to the United States Constitution. It is not absolute. *Prager v. Kansas Dept. of Revenue*, 271 Kan. 1, 37, 20 P.3d 39 (2001); *State v. Russell*, 227 Kan. 897, 899, 610 P.2d 1122 (1980). The freedom of speech constitutional guarantee has "'its fullest and most urgent application'" to political speech. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 162, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014).

A review of Kansas precedent leads us to hold that strict scrutiny applies when a fundamental right is implicated. Strict scrutiny analysis requires consideration of whether the enactment serves some compelling state interest and is narrowly tailored to further that interest. *Hodes*, 309 Kan. at 663. "Where a statute restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *McKinney*, 236 Kan. at 235. But courts apply varying degrees of scrutiny depending on the nature of the infringement on free expression. *City of Wichita v. Trotter*, 58 Kan. App. 2d 781, 790, 475 P.3d 365 (2020), *rev. denied* 312 Kan. 890 (2021).

The United States Supreme Court has cautioned that free speech concerns sometimes intersect with a state's need to regulate elections. First Amendment protection is "'at its zenith'" when it comes to "'core political speech.'" *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 186-87, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999). But "'there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" 525 U.S. at 187. When a law burdens "core political speech" or "pure speech," it is subject to "exacting scrutiny." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 344-45, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995); *Meyer v. Grant*, 486 U.S. 414, 420, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988). But when the law merely regulates the mechanics of the electoral process, it

is subject to a less exacting scrutiny. *McIntyre*, 514 U.S. at 345-46; *Meyer*, 486 U.S. at 420.

"Exacting scrutiny" has been likened to strict scrutiny. See *McIntyre*, 514 U.S. at 346, n.10; *Buckley*, 525 U.S. at 215 (O'Connor, J., concurring). When a law burdens core political speech, the court upholds the law "only if it is narrowly tailored to serve an overriding state interest." *McIntyre*, 514 U.S. at 347. "Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—'[b]ecause First Amendment freedoms need breathing space to survive.'" *Americans for Prosperity Foundation v. Bonta*, 594 U.S. ___, 141 S. Ct. 2373, 2384, 210 L. Ed. 2d 716 (2021).

Several federal courts have concluded that ballot collection is not an expressive activity and therefore not subject to strict scrutiny for various reasons. Ballot collection does "not communicate any particular message." See, e.g., *DCCC v. Ziriax*, 487 F. Supp. 3d 1207, 1235 (N.D. Okla. 2020). Regardless of the ballot collector's intent, ballot collection is not reasonably perceived as a way to communicate a message; it is perceived as a way to facilitate voting. *Feldman v. Arizona Secretary of State's Office*, 843 F.3d 366, 392-93 (9th Cir. 2016). A voted ballot constitutes the voter's speech rather than the speech of the person delivering the ballot on their behalf. *Knox v. Brnovich*, 907 F.3d 1167, 1182 (9th Cir. 2018). A limit on the number of voted ballots that a person can collect for others governs the way voting occurs—not core political speech. *DSCC v. Simon*, 950 N.W.2d 280, 295 (Minn. 2020).

But other courts have been skeptical of an analytic approach that would separate an advocacy for voting from the collection of ballots or applications themselves. This approach allows the government to indirectly burden protected activity. "The defendants are not free to rewrite the way democracy has been practiced for decades." *Tennessee State Conference of N.A.A.C.P. v. Hargett*, 420 F. Supp. 3d 683, 699 (M.D. Tenn. 2019) (stating voter registration drives have historically involved both encouraging registration and physically transporting registration applications); see also *League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 728 (M.D. Tenn. 2019) (holding that the collection of applications is "'inextricably intertwined'" with the expressive and advocatory

aspects of a voter registration drive, and "it is impossible to burden one without, in effect, burdening the other").

The ballot collection restriction limits one-on-one communication between the ballot collector and voter. Plaintiff Crabtree alleged he communicates a message of civic participation and engagement when he collects ballots for others. The statute reduces the number of voters he can assist. And volunteer ballot collectors have been a part of how democracy in Kansas has been practiced. Collecting ballots and delivering those ballots to election officials is part of a larger advocacy for voting itself.

The ballots themselves, however, are the speech of the voter, not the ballot collector. After all, postal carriers who deliver hundreds of ballots to an election office are not involved in protected speech in either collecting those ballots or in delivering them. They are delivering the mail. Individuals who perform the same task are doing just that—carrying the mail. Therefore, regulation of the handling of those ballots is warranted. This claim does not survive Defendants' motion to dismiss.

Summary of our rulings

Statutory authority to bring this appeal exists under K.S.A. 2021 Supp. 60-2102(a)(3).

The Plaintiffs have standing to sue as they have sufficiently alleged injury and causation to overcome a motion to dismiss.

Because the right to vote is a fundamental right guaranteed under the Kansas Constitution, an act that infringes on that right must be strictly scrutinized to determine if it is enforceable.

Some federal courts have created a balancing test used by the district court in this case and it is not applicable to the questions concerning the Kansas Constitution.

The signature matching provision of this law does impair the right to vote, but due to the fact that the district court used the incorrect test, we remand this matter to the district court to give the State and the Defendants the opportunity to show that the statute can overcome strict scrutiny.

The ballot collection restriction of this law does impair the right to vote. We remand this matter to the district court to give the State and the Defendants the opportunity to show that the statute can overcome strict scrutiny.