No. 21-124510-S

IN THE
SUPREME COURT OF THE
STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

DARY JENE GREEN
Defendant-Appellant

BRIEF OF APPELLANT

Appeal from the District Court of Wyandotte County, Kansas
Honorable Jennifer Myers, Judge
District Court Case No. 19-CR-161

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Notice to Attorney General Pursuant to K.S.A. 75-764 (SB 334)

TABLE OF CONTENTS

NATURE OF THE CASE

A Wyandotte County jury convicted Dary Green of premeditated first-degree murder. Green represented himself throughout the entire proceedings below. Following that conviction, the district court sentenced him to life in prison. With that conviction and sentence, Green brings this direct appeal straight to this Court. Green's conviction for premeditated murder is unconstitutional.

Premeditated first-degree murder is unconstitutionally vague in regard to intentional second-degree murder. This vagueness problem began with the fact that the Legislature neglected to define "premeditation." That lack of a definition led to this "relatively unaccountable" Court defining "premeditation" so broadly that everyone who commits an intentional murder is also—and always—committing a premeditated murder. *United States v. Davis*, 588 U.S. ——, ——, 139 S. Ct. 2319, 2325, 204 L. Ed. 2d 757 (2019) (The quote of "relatively unaccountable" is attributable to this cited case.). Given that, the State arbitrarily decides "on an ad hoc and subjective basis" when to increase charges from an intentional murder to a premeditated murder. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) (The quote of "on an ad hoc and subjective basis" is attributable to this cited case.).

Let's be very clear about what this means: Based on the Legislature's failure to define "premeditation" along with this Court's caselaw, the State may always overcharge a defendant with premeditated murder for any intentional killing for any reason whatsoever, including personal predilection. Premeditated first-degree murder is facially unconstitutional for vagueness.

STATEMENT OF ISSUES

Issue I: **There was insufficient evidence of premeditation to support the conviction of first-degree murder.**

Issue II: **Premeditated first-degree murder is unconstitutionally vague in regard to intentional second-degree murder.**

Issue III: **The district court erred in not allowing Dary Green to admit the preliminary hearing testimony of Michael Williams at trial—a favorable and unavailable witness to the defense.**

Issue IV: **Green did not knowingly and intelligently waive his right to counsel for sentencing, a critical stage of criminal proceedings.**

STATEMENT OF FACTS

The State accused Dary Green of the shooting death of A.G.—hereinafter, referred to as the deceased. (R. I, 45.) The shooting occurred on February 12, 2019, at McCord Retail Liquor, a Wyandotte County liquor store frequented by Green. (R. XXVII, 88.) The pertinent events started in the morning. The day of the shooting, Green visited the liquor store around 10:00 to 10:30 a.m., but nothing out of the ordinary happened at that time. (R. XXVII, 94-95.)

Later that same day, around nearly 1:00 p.m., the owner of liquor store, Steven McCord, claimed that Green returned to his liquor store. (R. XXVII, 96-97.) Green supposedly arrived in his car with the deceased as his passenger. (R. XXVII, 96-97.) McCord never saw who shot the deceased. (R. XXVII, 123-24, 138.)

A single eyewitness, Michael Hollinshed, testified at trial that he saw Green shoot the deceased. (R. XXVII, 154-55.) This paragraph is based on Hollinshed's trial testimony. Hollinshed, a frequent customer of McCord's Retail Liquor, was walking to

the liquor store around the time of the shooting. (R. XXVII, 146.) As he approached the liquor store, Hollinshed saw the deceased pull up in a car with Green. (R. XXVII, 147.) The deceased then called Hollinshed over to the car. (R. XXVII, 147.) While heading towards the car, Hollinshed overheard Green and the deceased arguing over an unknown matter. (R. XXVII, 157-58.) Hollinshed instructed the deceased to get out of the car. (R. XXVII, 157-58.) The deceased complied, but it "took a minute" for her to get out. (R. XXVII, 158.) As the deceased was getting out, Hollinshed watched as Green pulled out a gun. (R. XXVII, 157-58, 161-62.) Hollinshed asked Green not to shoot. Green shot twice at the deceased, hitting her once. (R. XXVII, 157-58, 161-62, 403-04.)

On February 19, 2019, the State initially charged Green with intentional second-degree murder. (R. I, 45.) As criminal proceedings began, Green had and fired multiple different attorneys representing him. (R. I, 51, 58, 65, 79.) On October 3, 2019, prior to even the preliminary hearing, Green moved to represent himself. (R. I, 93.) At a hearing on the matter, the district court took Green through the pitfalls and consequences of representing himself. (R. XI, 2.) After performing a detailed colloquy with Green about why he could, but shouldn't, represent himself, the court determined that Green knowingly and intelligently waived his right to counsel. (R. XI, 3-39.) The court did also appoint standby counsel for Green. (R. XI, 39.) Still, from that point forward, Green represented himself all the way through the jury trial.

Before the preliminary hearing, the State notified the defense and the court that it intended to increase the initial charge of intentional second-degree murder to

premeditated first-degree murder. (R. I, 108.) The State gave no reason for why the need to increase the initial charge.

At the preliminary hearing, relevant to this appeal, Michael Williams testified that he was near McCord's Retail Liquor around the time of the shooting. (R. XXXII, 15.) Williams went on to testify that he heard a "guy and a young lady" arguing in a car. (R. XXXII, 15.) Williams further testified that Green shot the deceased; Williams knew this on the sole basis of voice recognition. (R. XXXII, 17.) Although Williams had never interacted with Green, Williams believed that Green was the shooter by matching up the male voice on the day of the shooting with overhearing Green's voice at the preliminary hearing. (R. XXXII, 16-17, 24-25.) Importantly, though, Williams made clear that he "could not see the driver," that he "did not see the driver's face," meaning that Williams did not actually see who shot the deceased. (R. XXXII, 41.) In addition to Hollinshed, Williams was the only other witness to the shooting. But Williams did not testify at the trial.

The remaining evidence at the preliminary hearing aligned with the above facts, and, at the end of the hearing, the State moved for Green to be bound over on the new and enhanced charge of premeditated first-degree murder. (R. XXXII, 86.) The court did as the State requested. (R. XXXII, 89.)

After the preliminary hearing, the State formally increased the initial charge to premeditated first-degree murder pursuant to K.S.A. 21-5402(a)(1). (R. I, 124.) Afterwards, Green filed numerous pro se motions that are irrelevant to this appeal.

Following many delays, mostly attributable to COVID-19, the jury trial commenced on August 2, 2021, with Green still representing himself. (R. XXVII, 1-3.)

The above facts, except Williams' preliminary hearing testimony, came into evidence at trial in much greater detail and through multiple witnesses, including law enforcement, repeating the same evidence over and over. As mentioned, however, Williams never testified at trial.

Green attempted to call Williams as a witness at trial but Williams was not available. Prior to trial, on July 12, 2021, Green did file a subpoena for Williams' trial appearance. (R. XXVII, 382-83.) But, on July 30, 2021, the process server's office filed a return indicating that it could not locate him. (R. XXVII, 382-83.) Along with Green's attempt to subpoena Williams, the State also attempted to subpoena Williams, but could not because he was somewhere in California as late as the Friday before the trial started the following Monday. (R. XXVII, 284-85.)

During trial, Green asked, more than once, to bring in Williams' preliminary hearing testimony. (R. XXVII, 283-89, 381-84.) The district court declined to do so. (R. XXVII, 381-84.) Green even proffered that Williams' trial testimony would—and his preliminary hearing testimony did—contain statements that Williams did not see him at the crime scene. (R. XXVII, 383-84.) After the court's denial and Green's proffer, Green stated that he didn't think it was fair that he couldn't bring in that preliminary hearing testimony. (R. XXVII, 388.) The district court took Green's statement of unfairness as an objection, overruling the objection while expressly stating that "your objection is noted." (R. XXVII, 388.)

In particular for its ruling on the preliminary hearing testimony, the court first implicitly held that Green could not enter into evidence Williams' preliminary hearing testimony because it was hearsay. (R. XXVII, 285-87, 381-84, 388.) The court further ruled that Green court not utilize the exception allowing for preliminary hearing testimony to be admitted when a witness is unavailable to testify. The court reasoned that Green had failed to put on evidence that Williams was unavailable and that he failed to pay for a preliminary hearing transcript before trial. (R. XXVII, 285-87, 381-84, 388.) But the court did seem willing to allow for the transcription of the preliminary hearing amid the trial if Green could pay for it. (R. XXVII, 285-87.)

Following resolution of that issue, the case proceeded to verdict. Although the jury received instruction on the lesser-included offense of intentional second-degree murder, it convicted Green of premeditated first-degree murder. (R. XXVII, 493.)

At a status hearing the day after the conviction, on August 5, 2021, the district court and the parties discussed a sentencing date. (R. XXIX, 7-9.) At that hearing, importantly, Green expressly invoked—and was granted—his right to counsel for sentencing. (R. XXIX, 7-8.) The court appointed standby counsel as Green's attorney for sentencing. (R. XXIX, 7-8.) Nevertheless, after that hearing but before sentencing, Green moved to dismiss counsel. (R. I, 245; XXX, 5-6.)

At sentencing on October 18, 2021, the district court allowed Green to represent himself without performing any inquiry into whether his most recent decision for self-representation was made knowingly and intelligently. (R. XXX, 2.) Sentencing simply

proceeded as if Green had represented himself all along. At the end, the court sentenced Green to life in prison without being eligible for parole for 50 years. (R. XXX, 37.)

Green appealed. (R. I, 251.)

ARGUMENTS AND AUTHORITIES

Issue I: There was insufficient evidence of premeditation to support the conviction of first-degree murder.

The testimony of the State's only eyewitness at trial, Hollinshed, was that Green and the deceased had an impulsive argument that led to the shooting. As a result, the testimony at trial, even in the light most favorable to the State, shows that there was no premeditation to support the conviction. This Court must reverse Green's conviction for premeditated first-degree murder and remand this matter to the district court with orders to resentence Green for intentional second-degree murder, a lesser offense given in this case.

Preservation

There is no requirement for a defendant to challenge the sufficiency of evidence before the district court to preserve the issue for appeal. *State v. Farmer*, 285 Kan. 541, Syl. ¶ 1, 175 P.3d 221 (2008). Thus, this issue is preserved for appeal.

Standard of Review

When defendants challenge the sufficiency of the evidence in a criminal case, an appellate court's standard of review is whether, after reviewing all trial evidence in a light most favorable to the prosecution, the court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt. Appellate courts do not

reweigh evidence or determine witness credibility. *State v. Fitzgerald*, 308 Kan. 659, 666, 423 P.3d 497 (2018).

Analysis

"Under the Due Process clause of the 14th Amendment, no person may be convicted of a crime unless every fact necessary to establish the crime with which he is charged is proven beyond a reasonable doubt." *State v. Switzer,* 244 Kan. 449, 450, 769 P.2d 645 (1989) (citing *In re Winship,* 397 U.S. 358, 368, 25 L. Ed. 2d 368, 90 S. Ct. 1068 [1970]). Anything short mandates reversal of the conviction. Here, there was insufficient evidence of premeditation mandating reversal of Green's conviction for premeditated first-degree murder.

This Court has consistently stated, "Premeditation is the process of thinking about a proposed killing before engaging in the homicidal conduct." *State v. Scott,* 271 Kan. 103, 108, 21 P.3d 516 (2001); see *State v. Hilyard,* 316 Kan. 326, 331, 515 P.3d 267 (2022) (stating the same standard). Further, "premeditation is a cognitive process which occurs at a moment temporally distinct from the subsequent act." *State v. Stanley,* 312 Kan. 557, 572, 478 P.3d 324 (2020).

Viewing the facts of this case in the light most favorable to the State shows no premeditation. There was a verbal argument between Green and the deceased. The evidence reveals that the argument didn't last long, less than a few minutes. We know this because when Hollinshed first heard the argument, he instructed the deceased to get out of the car. (R. XXVII, 157-58.) The deceased complied, but it "took a minute" for her to get out. (R. XXVII, 158.) Moreover, as the deceased exited the car, Hollinshed asked

Green not to shoot. Green shot twice at the deceased, hitting her once. (R. XXVII, 157-58, 161-62, 403-04.) The evidence indicates that this all happened quickly.

There is no evidence indicating that Green and the deceased were arguing before Hollinshed first heard the argument. There is no evidence whatsoever that Green for some reason always planned to kill the deceased. There is no direct evidence of Green's state of mind. From the trial evidence it follows that there was a spontaneous argument that led to a spontaneous shooting.

In the end, the shooting was done impulsively and without thinking it over beforehand. Viewed in the light most favorable to the state, no evidence supports an elemental finding of premeditation.

Without evidence to support premeditation, Green's conviction for first-degree murder cannot stand. Generally, when this Court finds insufficient evidence, the remedy is to vacate the conviction. *State v. Scott,* 285 Kan. 366, 372, 171 P.3d 639 (2007). However, "[w]here a defendant has been convicted of a greater offense but the evidence supports only a lesser included offense, the case must be remanded to resentence the defendant for conviction of the lesser included offense." *State v. Kingsley,* 252 Kan. 761, Syl. ¶ 3, 851 P.2d 370 (1993).

Here, there was insufficient evidence of premeditation, and intentional second-degree murder was a lesser-included offense in this case. Green does not assert that there was insufficient evidence of the other elements of premeditated first-degree murder. Consequently, the evidence at trial would support a conviction for the lesser-included offense of intentional second-degree murder. This Court must reverse Green's conviction

for first-degree murder and remand this matter to the district court with orders to convict and resentence Green for intentional second-degree murder.

Issue II: Premeditated first-degree murder is unconstitutionally vague in regard to intentional second-degree murder.

The Legislature's definition of the entire crime of premeditated first-degree murder is an impermissible delegation of basic policy matters to the judicial and, in turn, executive branches of government. Green presents a facial challenge to K.S.A. 21-5402(a)(1), asking this Court to invalidate it.

Green's argument in summary: The Legislature neglected to define "premeditation" as used for premeditated first-degree murder. By not providing a definition, the Legislature "impermissibly delegated its authority to write the laws" to this Court. *State v. Harris*, 311 Kan. 816, 822, 467 P.3d 504 (2020). That impermissible delegation is evident from the fact that the lack of a definition led to this "relatively unaccountable" Court defining "premeditation" so broadly that everyone who commits an intentional murder is also—and always—committing a premediated murder. *United States v. Davis*, 588 U.S. ——, ——, 139 S. Ct. 2319, 2325, 204 L. Ed. 2d 757 (2019). The Legislature's failure to define "premeditation," together with this Court's overly broad definition, fails to " 'provide explicit standards' for enforcement" of charging premediated versus intentional murder, " 'invit[ing] arbitrary power' " of all Kansas prosecutors. *Harris*, 311 Kan. at 822 (quoting *Sessions v. Dimaya*, 584 U.S. ——, ——, 138 S. Ct. 1204, 1223, 200 L. Ed. 2d 549 [2018] [Gorsuch, J., concurring]).

As it stands now, everyone who commits an intentional second-degree murder is also—and always—a violator of premeditated first-degree murder, so prosecutors are free to overcharge premeditated murder in every intentional murder case. Whenever a defendant is charged with intentional second-degree murder, it is solely because the prosecutor chose not to overcharge in that case. For the above reasons, prosecutors can arbitrarily pick and choose in every intentional murder case whether to overcharge premeditated first-degree murder for any reason at all, including personal predilection. This Court cannot let such arbitrariness stand. See *Harris*, 311 Kan. at 823 ("Whether or not a person is arrested, charged, and convicted for violating a law must depend more on objective and discernable legal rules than on the mere discretion, guesswork, or whim of government officials.").

To avoid any confusion on this issue, the main problem here is who defined "premeditation" so broadly—this Court and not the legislature.

Preservation

Although Green never made this argument below, he may raise it for the first time on appeal. As a general rule, appellate courts will not consider issues, even constitutional ones, raised for the first time on appeal. *State v. Godfrey*, 301 Kan. 1041, 1043, 350 P.3d 1068 (2015). There are well recognized exceptions, however: (1) The newly asserted theory involves only a question of law arising on admitted facts and is finally determinative of the case; (2) consideration of the theory is necessary to serve the ends of justice or to prevent denial of fundamental rights; and (3) the district court was right for the wrong reason. *State v. Phillips*, 299 Kan. 479, 493, 325 P.3d 1095 (2014).

The first and second exceptions apply here. For the first, the facts needed for this issue are a few, settled facts—namely, that Green was initially charged with intentional second-degree murder and then the State increased that charge to premediated first-degree murder for no apparent reason, and finally Green was convicted of premeditated murder. Plus, the facts are settled because the language, as well as implementation, of the relevant criminal statutes are undisputed. In addition, the outcome of this issue depends only on this Court's constitutional view of those statutes and, whatever the view, it will be finally determinative of this issue on appeal. See *State v. Hinnenkamp*, 57 Kan. App. 2d 1, 5, 446 P.3d 1103 (2019) (holding that, for these very reasons, an appellate court may consider a facial challenge for the first time on appeal pursuant to the first preservation exception).

For the second exception, at stake here is the fundamental right to due process, specifically the separation of powers between the branches of government. *Johnson v. United States*, 576 U.S. 591, 595-96, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015). Notably, this Court has reviewed a vagueness issue for the first time on appeal because "consideration of the theory is necessary to serve the ends of justice or to prevent the denial of fundamental rights." *State v. Jenkins*, 311 Kan. 39, 52, 455 P.3d 779 (2020).

Under either or both exceptions, and as in *Hinnenkamp* and *Jenkins*, this Court may review this issue at this time.

Standard of Review

This Court exercises unlimited review over questions of constitutional law involving vagueness challenges. *Harris*, 311 Kan. at 821. Likewise, to the extent this

argument calls for statutory interpretation, this Court's review is unlimited. *State v. Skolaut*, 286 Kan. 219, 227, 182 P.3d 1231 (2008). Appellate courts interpret a statute from only the words of the statute, giving common words their ordinary meanings. *State v. Barlow*, 303 Kan. 804, 813, 368 P.3d 331 (2016).

Analysis

There are two types of vagueness challenges. One is whether the statute fails to give ordinary people fair notice of the conduct it punishes, and the other is whether the statute is so standardless that it invites arbitrary enforcement. *Johnson*, 576 U.S. at 595. The first type of vagueness challenge is grounded in the Fourteenth Amendment to the United States Constitution. *Harris*, 311 Kan. at 821. The second type of vagueness challenge stems from the constitutional mandate requiring the separation of powers. Vague laws "undermine the Constitution's separation of powers and the democratic self-governance it aims to protect"; this is because, instead of the Legislature providing sufficiently defined laws, it codified vague laws that "hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide." *Davis*, 139 S. Ct. at 2325.

Green is not advancing the first type of vagueness challenge because this Court recently settled that issue. *State v. Stanley*, 312 Kan. 557, 567, 478 P.3d 324 (2020) (holding that first-degree premeditated murder is not vague because it gives fair notice of the conduct it punishes). As far as he can tell, though, this is the first time a challenge of

vagueness due to arbitrary enforcement is being raised for premeditated first-degree murder under K.S.A. 21-5402(a)(1).

Delving more deeply into the second type of vagueness challenge, "the law must provide explicit standards for those who apply them or it will amount to an impermissible delegation of basic policy matters by the legislative branch to policemen, judges, and juries for resolution on an ad hoc and subjective basis." *Harris*, 311 Kan. at 821 (internal quotations omitted); see also *State v. Ingham*, 308 Kan. 1466, 1483, 430 P.3d 931 (2018) (Stegall, J., concurring) ("Vague laws give police officers, prosecutors, judges, and juries the authority to decide what the law is on an ad hoc basis—all without the political accountability inherent in the legislative process."). Moreover, "the need to prevent 'arbitrary and discriminatory enforcement is heightened for criminal statutes because criminal violations result in the loss of personal liberty.' " *Harris*, 311 Kan. at 821 (quoting *State v. Richardson*, 289 Kan. 118, 125, 209 P.3d 696 [2009]).

With that overarching law in mind, let's now turn to the statute at issue. "Murder in the first degree is the killing of a human being committed: Intentionally, and with premeditation." K.S.A. 21-5402(a)(2). The Legislature neglected to define "premeditation," but this Court has defined it repeatedly. See, e.g., *State v. Warledo*, 286 Kan. 927, 949, 190 P.3d 937 (2008) ("[P]remeditation is 'the process of thinking about a proposed killing before engaging in the homicidal conduct,' but premeditation 'does not have to be present before a fight, quarrel, or struggle begins.' Further, premeditation is 'the time of reflection or deliberation. Premeditation does not necessarily mean that an act is planned, contrived, or schemed beforehand.' "); *State v. Jones*, 279 Kan. 395, 402,

109 P.3d 1158 (2005) ("We begin by observing that premeditation is the process of thinking about a proposed killing before engaging in the homicidal conduct. . . . Consequently, it means something more than the instantaneous, intentional act of taking another's life.").

PIK Crim. 4th 54.150(d) (2018 Supp.) provides the following definition of "premeditation": "Premeditation means to have thought the matter over beforehand, in other words, to have formed the design or intent to kill before the act. Although there is no specific time period required for premeditation, the concept of premeditation requires more than the instantaneous, intentional act of taking another's life." This Court has expressed its explicit approval of this definition. *State v. Uk*, 311 Kan. 393, Syl. ¶ 4, 461 P.3d 32 (2020) ("PIK Crim. 4th 54.150[d] [2018 Supp.] accurately defines premeditation and adequately distinguishes premeditated intentional conduct from nonpremeditated intentional conduct.").

To be clear, then, based on this Court's definition of premeditated first-degree murder, all it takes to commit it is to have thought about an intentional murder for a nanosecond before committing it. See *State v. Bernhardt*, 304 Kan. 460, 486, 372 P.3d 1161, 1179 (2016) (Johnson, J., dissenting) (stating that this Court's interpretation of "premeditation" meant that "premeditation [is] possible up to a nanosecond before [the] killing"). But this Court's definition has allowed the arbitrary charging, and therefore arbitrary enforcement, of premeditated murder between itself and intentional second-degree murder.

To begin, the only difference between premeditated first-degree murder and intentional second-degree murder is the element of premeditation. Compare K.S.A. 21-5402(a)(2) ("Murder in the first degree is the killing of a human being committed: Intentionally, and with premeditation."), with K.S.A. 21-5403(a)(1) ("Murder in the second degree is the killing of a human being committed: Intentionally.").

Given that single difference, and in light of this Court's definition of "premeditation," premeditated murder and intentional murder are indistinguishable *in real life*. In every real-life case (as opposed to an outlandish academic-hypothetical case) where intentional murder can be charged, the State can instead overcharge premeditated murder—for any reason whatsoever. This amounts to arbitrary enforcement between the two crimes.

Green will now explain why this Court's definition of requiring "premeditation" to be merely "something more than the instantaneous, intentional act of taking another's life" leads to arbitrary enforcement by the State. "By its very nature, premeditation 'is most often proved by circumstantial evidence.' " *State v. Aguirre*, 313 Kan. 189, 209, 485 P.3d 576 (2021) (quoting *State v. Banks*, 306 Kan. 854, 859, 397 P.3d 1195 [2017]). So in every intentional killing, the State can *allege* circumstantial evidence that the defendant thought the killing over beforehand. That alleged circumstantial evidence can always stem from the killing itself. Simply put, the State can always claim that the defendant thought the matter over beforehand simply because, as a matter of pure reality, actions take time.

In this case, for example, the State provided no evidence that Green pre-planned the alleged murder before he supposedly committed it. Rather, the State claimed that Green shot the deceased in his car in broad daylight out in public. That does not seem like it was pre-planned beforehand. Yet the State charged premeditated murder. Even more, the State also claimed that Green shot the deceased because of some argument they were having in real time. That would seem to be impulsive, not planned. Yet the State charged premeditated murder because, according to the State, Green thought the shooting over before he pulled the trigger.

If the State would have charged Green with intentional second-degree murder, no one would have given it a second thought; that is, most would likely agree he was charged correctly. For whatever reason, however, the State charged premeditated first-degree murder instead.

Green could conjure up endless hypotheticals of an intentional killing that appears to be more intentional second-degree murder than premeditated first-degree murder but could always be charged as premeditated murder. But if he did that, both this Court and the State would chide him for doing so. This is because courts frown upon hypotheticals for vagueness challenges. So instead of giving hypotheticals, Green asks this Court and the State if either can come up with a hypothetical—constrained by the realities of life, which includes circumstantial evidence—in which intentional second-degree murder could be charged but not premeditated first-degree murder?

Better than hypotheticals, Kansas appellate courts' own caselaw proves that every intentional murder could always be charged as premeditated murder. The following cases

are proof that the State can always frame certain evidence in a way to allow it to overcharge premediated murder in an intentional killing.

Here is the list of evidence the Kansas appellate courts have observed can show premeditation. An unprovoked attack can be evidence of premeditation. *State v. Hilyard,* 316 Kan. 326, 331-32, 515 P.3d 267 (2022); *State v. Dean,* 310 Kan. 848, 860-61, 450 P.3d 819 (2019). On the other side, this Court in *State v. Sprague,* 303 Kan. 418, 432, 362 P.3d 828, 840 (2015), found sufficient evidence of premeditation based on evidence of a provoked attack, that the defendant "confessed he struck Kandi when she attacked him and he then choked her to death." A killing in retaliation can be evidence of premeditation. *Dean,* 310 Kan. at 860-61. The use of a gun or any deadly weapon can be evidence of premeditation. *State v. Shields,* 315 Kan. 814, 828-29, 511 P.3d 931 (2022); *State v. Hurt,* No. 114,984, 2017 WL 2834282, at *3 (Kan. App. 2017) (unpublished opinion) (stating, "A deadly weapon can indicate a premeditation to kill.").[1]

Still more, actions during the altercation can be evidence of premeditation. *Warledo,* 286 Kan. at 950 (finding that breaks in the stomping of the victim were evidence of premeditation); *State v. Hillard,* 315 Kan. 732, 788, 511 P.3d 883 (2022) (finding evidence of torture can establish premeditation). Also, actions afterwards can be evidence of premeditation; while addressing a prosecutorial error argument, this Court in *State v. Carter,* 305 Kan. 139, 152-53, 380 P.3d 189 (2016), found that the lack of remorse can be evidence of premeditation.

[1] The unpublished opinion is attached in an appendix pursuant to Rule 7.04(g)(2)(C).

Still going, multiple shots or stab wounds can be evidence of premeditation. *State v. Blansett,* 309 Kan. 401, 417, 435 P.3d 1136 (2019) (finding that "[e]vidence of several stab wounds can be a factor supporting a finding of premeditation."). "[I]t is well settled 'that death by strangulation presents strong evidence of premeditation.' " *State v. Davis,* 306 Kan. 400, 410, 394 P.3d 817 (2017) (quoting *State v. Walker,* 304 Kan. 414, 446-47, 372 P.3d 1147 [2016]). Multiple blows can be evidence of premeditation. *State v. Rice,* 261 Kan. 567, 588, 932 P.2d 981 (1997) (finding sufficient evidence of premeditation as the defendant administered multiple blows in several locations over a span of time); *Warledo,* 286 Kan. at 944 (finding that breaks in the stomping of the victim were evidence of premeditation).

These cases show that every intentional murder is also premeditated murder under this Court's definition of "premeditation." But that call is not for this Court to make. That call is for the Legislature. Again, the main problem here is who defined "premeditation" so broadly—this Court and not the legislature.

Of course, no cite is even needed to state the obvious fact that this Court's job is to interpret the laws as written by the Legislature. But the Legislature cannot leave laws so open to interpretation that this Court can interpret them in such a way as to destroy the line between certain laws—those laws being crimes in this case. See *Harris*, 311 Kan. at 821; *Ingham*, 308 Kan. at 1483.

The Legislature mandated that we have intentional second-degree murder and premeditated first-degree murder. In doing so, the Legislature clearly intended for two different crimes under two different sets of circumstances. But then this Court made those

two crimes the same *in real life*. Which is to say, this Court's definition of "premeditation" allows prosecutors to overcharge premeditated first-degree murder in every intentional murder case. That result is not what the Legislature intended based on the plain fact that it enacted two separate crimes of intentional second-degree murder and premeditated first-degree murder—both crimes coming with huge differences in punishment.

Premeditated murder is an off-grid crime. It is life in prison, presumptively 50 years in prison before a chance at parole, with no good-time credit; the only departure option is a durational departure to 25 years in prison. K.S.A. 21-6620(c); K.S.A. 21-6623. On the other hand, intentional murder is an on-grid severity level one offense. For severity level one offenses, the prison sentence could be as low as 12.25 years, with the availability of good-time credits and the additional options of dispositional and durational departures. K.S.A. 21-5403(b)(1); K.S.A. 21-6804.

With such disparities of punishments hanging in the balance, this Court must not let the Legislature's failure to define "premeditation" (i.e., the failure to provide explicit and objective standards for how to enforce/charge premeditated murder), in conjunction with this Court's overly broad definition of "premeditation," lead to the State determining "on an ad hoc and subjective basis" who it believes has committed premeditated murder rather than only intentional murder. See *Harris*, 311 Kan. at 824. In effect here, "the Legislature has left it up to other actors [appellate judges and prosecutors] to give the law [premeditated murder vs. intentional murder] teeth through their enforcement decisions and actions." *Harris*, 311 Kan. at 823. Everyone who can be charged with intentional

second-degree murder may be charged instead with premeditated first-degree murder—if the prosecutor so chooses to overcharge for any reason that prosecutor can conjure up.

For these reasons, this Court must hold that K.S.A. 21-5402(a)(1) is unconstitutionally vague. This Court must reverse Green's conviction and remand for a new trial. Alternatively, this Court should reverse Green's conviction and remand with directions for conviction and sentencing on the lesser-included charge of intentional second-degree murder, since that lesser was provided below and the jury necessarily found all elements of intentional second-degree murder. See *State v. Kingsley,* 252 Kan. 761, Syl. ¶ 3, 851 P.2d 370 (1993).

Issue III: The district court erred in not allowing Dary Green to admit the preliminary hearing testimony of Michael Williams at trial—a favorable and unavailable witness to the defense.

Preliminary hearing transcripts are inadmissible hearsay evidence at trials. Under K.S.A. 60-460(c)(2)(B), however, the district court may admit preliminary hearing testimony in the same criminal case if the declarant is unavailable and the adverse party had the opportunity to cross-examine the unavailable witness.

Even though the State seemingly admitted that Michael Williams was unavailable at trial and even though the State had the opportunity to cross-examine him at the preliminary hearing, the district court declined to read into evidence Williams' preliminary hearing testimony. In that testimony, importantly, Williams testified that he did not see Green shoot the deceased. This is reversible error.

Preservation

K.S.A. 60-405 sets forth the conditions for appellate review of the erroneous exclusion of evidence. To preserve review, "the proponent of the [excluded] evidence either made known the substance of the evidence in a form and by a method approved by the judge, or indicated the substance of the expected evidence by questions indicating the desired answers." Green satisfied those requirements here.

During trial, Green asked, more than once, to bring in Williams' preliminary hearing testimony. (R. XXVII, 283-89, 381-84.) The district court declined to do so. (R. XXVII, 381-84.) Green even proffered that Williams' trial testimony would—and his preliminary hearing testimony did—contain statements that Williams did not see him at the crime scene. (R. XXVII, 383-84.) After the court's denial and Green's proffer, Green stated that he didn't think it was fair that he couldn't bring in that preliminary hearing testimony. (R. XXVII, 388.) The district court took Green's statement of unfairness as an objection, expressly stating that "your objection is noted." (R. XXVII, 388.)

The form and method for which Green wanted to bring in the prior testimony is expressly approved by K.S.A. 60-460(c)(2)(B), and Green even added for good measure what he thought the substance of Williams' trial testimony would be. Accordingly, Green has preserved this issue for appellate review.

Standard of Review

Generally speaking, the district court may exercise its sound discretion on whether proof regarding a witness' unavailability, required under K.S.A. 60-460(c)(2)(B), is sufficient. A trial court abuses its discretion when its decision (1) is arbitrary, fanciful, or

unreasonable; (2) is based on an error of law; or (3) is based on an error of fact. If the appellate argument focuses on an alleged error of law, as it does here, then the appellate court's review is de novo on whether the district court applied the correct legal standards when ruling on the exclusion of evidence. *State v. Page*, 303 Kan. 548, 555, 363 P.3d 391 (2015).

To the extent this argument calls for statutory interpretation, this Court's review is unlimited. *State v. Skolaut*, 286 Kan. 219, 227, 182 P.3d 1231 (2008). Appellate courts interpret a statute from only the words of the statute, giving common words their ordinary meanings. *State v. Barlow*, 303 Kan. 804, 813, 368 P.3d 331 (2016).

Analysis

To begin with the district court's ruling, it implicitly held that Green could not enter into evidence Williams' preliminary hearing testimony because it was hearsay; otherwise, the court would not have looked to the preliminary hearing hearsay exception under K.S.A. 60-460(c)(2)(B) to bring in the testimony. (R. XXVII, 285-87, 381-84, 388.) The court further ruled that Green could not utilize that exception because he had failed to put on evidence that Williams was unavailable and he failed to pay for a preliminary hearing transcript before trial. (R. XXVII, 285-87, 381-84, 388.) But the court did seem willing to allow the transcription of the preliminary hearing amid the trial if Green could pay for it. (R. XXVII, 285-87.)

Worth noting, on July 12, 2021, Green did file a subpoena for Williams' trial appearance; the trial began on August 2, 2021. (R. XXVII, 382-83.) But, on July 30, 2021, the process server's office filed a return indicating that it could not locate him. (R.

XXVII, 382-83.) On top of that, the State also attempted to subpoena Williams, but its investigator could not locate him because he was in California. (R. XXVII, 284-85.) The State learned of Williams' unavailability the week before trial. (R. XXVII, 285.)

Let's now turn to the legal analysis, with Green initially addressing the district court's ruling regarding unavailability.

All preliminary hearing testimony would unquestionably be considered hearsay at a trial. As stated, however, K.S.A. 60-460(c)(2)(B) is an exception to the rule. "Subject to the same limitations and objections as though the declarant were testifying in person: . . . (2) if the judge finds that the declarant is unavailable as a witness at the hearing, testimony given . . . in a preliminary hearing . . ., when: . . . (B) the issue is such that the adverse party on the former occasion had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered, but the provisions of this subsection shall not apply in criminal actions if it denies to the accused the right to meet the witness face to face." K.S.A. 60-460(c)(2)(B). "Unavailable as a witness" means, as relevant here, "absent from the place of hearing because the proponent of his or her statement does not know and with diligence has been unable to ascertain his or her whereabouts." K.S.A. 60-459(g)(5).

Before Williams could be declared unavailable and before Green could use the prior testimony of Williams, Green was required to show that Williams could not be produced at trial by the exercise of due diligence and good faith. *State v. Plunkett*, 261 Kan. 1024, 1034, 934 P.2d 113 (1997); see *State v. Keys*, 315 Kan. 690, 709, 510 P.3d

706 (2022). "The question of good faith effort turns on the totality of the facts and circumstances of the case." *State v. Flournoy*, 272 Kan. 784, 800, 36 P.3d 273 (2001).

In the past, this Court has said that evidence is required to establish unavailability. *State v. Brown*, 181 Kan. 375, 394-95, 312 P.2d 832 (1957). Green acknowledges that he did not submit evidence of unavailability. But he submits that this case presents a different question as to unavailability. Rather than focusing on evidence, the first question here is whether an admission in open court by the State that a witness is unavailable, coupled with Green's and the State's attempt to subpoena Williams, satisfied the unavailability requirement. It does.

First things first, neither K.S.A. 60-460(c)(2)(B) nor K.S.A. 60-459 mention anything about evidence. From that it should follow that unavailability can be proved in ways other than with evidence. But see *Brown*, 181 Kan. at 394-95. One of those other ways should be a concession. Why put on evidence when both parties agree on unavailability? Accordingly, Green submits that the district court erred by determining—under these circumstances, an apparent concession by the adverse party—that Green was required to put on evidence of Williams' unavailability.

Turning here to actual unavailability, as mentioned, Green's position is that the State conceded that Williams was unavailable for trial. According to the State in open court and on the record, it attempted to subpoena Williams but could not. (R. XXVII, 284-85.) The State learned of Williams' unavailability the Friday before the trial started that Monday. (R. XXVII, 285.) So if Williams was unavailable right before trial, then he would be unavailable throughout trial—given that he was somewhere in California. Thus,

Green established by way of concession from the State, in addition to his returned-as-unserved subpoena for Williams, that Williams was unavailable to testify at trial.

Next, Green exercised due diligence and good faith in attempting to find Williams. Green filed a subpoena for Williams' trial appearance but the process server's office filed a return indicating that it could not locate him. (R. XXVII, 382-83.) From the State, we know the process server's office probably could not locate Williams because Williams was somewhere in California as late as the Friday before the trial started that Monday. (R. XXVII, 284-85.)

For the above reasons, the district court erred in declining to find Williams unavailable to testify at trial.

Let's move on to the district court's remaining ruling that Green was required to pay for a preliminary hearing transcript before trial. Neither K.S.A. 60-460(c)(2)(B) nor K.S.A. 60-459 impose any type of time limit by their plain language. Indeed, this Court has allowed the State to move to enter preliminary hearing testimony in the middle of trial. *State v. Keys*, 315 Kan. 690, 706, 710, 510 P.3d 706 (2022) (The State moved for admission of prior testimony on the third day of trial; and this Court found "under the totality of circumstances" the State sufficiently proved unavailability.). As such, the district court erred inasmuch as it found Green could not move for the admission of prior testimony in the middle of trial.

Next, the district court erred in ruling that Green had to pay for the transcription of the transcripts. Neither K.S.A. 60-460(c)(2)(B) nor K.S.A. 60-459 impose any type of payment requirement. Plus, indigent defendants are entitled to transcripts when required

for an effective defense. "Two factors are used to determine whether a transcript is required (1) the necessity of the transcript for the defendant and (2) the availability of alternative devices." *State v. Ruebke*, 240 Kan. 493, 497, 731 P.2d 842, *cert. denied* 483 U.S. 1024, 107 S. Ct. 3272, 97 L. Ed. 2d 770 (1987).

In this case, the district court failed to assess whether Green could afford transcripts. The court just flat out stated that he had to pay for them. In addition, the court never considered the two *Ruebke* factors about whether Green, if he could not afford transcripts, was entitled to the preliminary hearing transcripts. As such, the district court erred by not conducting the proper analysis and by automatically forcing Green to pay for the transcript.

In the end, the district court erred with its overall refusal to allow Green to admit Williams' preliminary hearing testimony into evidence.

Green now turns to harmless error. "The erroneous exclusion of evidence is subject to review under the harmless error test of K.S.A. 60-261, which asks whether 'there is a reasonable probability that the error did or will affect the outcome of the trial in light of the entire record.' " *State v. Burnett*, 300 Kan. 419, 434, 329 P.3d 1169 (2014) (quoting *State v. Ward*, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 [2011]).

Williams' preliminary hearing testimony would have changed the outcome of the trial. At the preliminary hearing, Williams testified that he "could not see the driver," that he "did not see the driver's face," meaning that Williams did not see who shot the deceased. (R. XXXII, 41.) Had the jury heard this testimony indicating innocence, the jury would have returned a not guilty verdict as to premeditated first-degree murder.

This Court must reverse Green's conviction and remand for a new trial consistent with this issue.

Issue IV: Green did not knowingly and intelligently waive his right to counsel for sentencing, a critical stage of criminal proceedings.

The district court obtained one knowing and intelligent waiver of counsel from Green—up until sentencing. Once Green invoked his right to counsel after conviction—but prior to sentencing—the Sixth Amendment to the United States Constitution mandated that the appellate record affirmatively reflect that another waiver was done knowingly as well as intelligently. So the district court erred in reappointing counsel after conviction but then allowing Green to represent himself at sentencing without any type of oral colloquy or written waiver. When this error occurs, it amounts to structural error. As a result, this Court must vacate Green's sentence and remand for a new sentencing hearing.

Preservation

Green raised this issue below when he was permitted to go pro se before the preliminary hearing through conviction, (R. XI, 2), he then invoked and was granted his right to counsel after conviction but before sentencing, (R. XXIX, 7-8), and, after that, he decided and was allowed to go pro se for sentencing. (R. I, 245; XXX, 5-6.) In addition, Green need not lodge a specific objection to an inadequate waiver to raise this issue on appeal. See *State v. Bunyard*, 307 Kan. 463, 469-70, 410 P.3d 902 (2018). Green has thus preserved this issue for appeal.

Standard of Review

Appellate courts employ de novo review over whether the right to effective assistance of counsel and the related right to self-representation was honored. *Bunyard*, 307 Kan. at 470. The State holds the burden of showing that the waiver of counsel was knowingly and intelligently made based on the appellate record in front of the appellate court. *In re Habeas Corpus Application of Gilchrist*, 238 Kan. 202, 208, 708 P.2d 977 (1985). Appellate courts will not presume a constitutional waiver from a silent record. See *State v. Allen*, 28 Kan. App. 2d 784, 788, 20 P.3d 747 (2001); *State v. Daniels*, 2 Kan. App. 2d 603, 607, 586 P.2d 50 (1978). In the event this Court finds an unconstitutional waiver, it must reverse without regard to harmlessness as this error constitutes structural error. *Bunyard*, 307 Kan. at 471.

Analysis

The United States Supreme Court has held "that the Sixth Amendment, as made applicable to the states by the Fourteenth Amendment, guarantees that a defendant in a state criminal trial has an independent constitutional right to self-representation." *State v. Vann*, 280 Kan. 782, 793, 127 P.3d 307 (2006) (citing *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 [1975]). Defendants may exercise their right to self-representation only after a knowing and intelligent waiver of the right to counsel. *State v. Graham*, 273 Kan. 844, 850, 46 P.3d 1177 (2002). Courts possess a general presumption against waiver of the right to counsel, to ensure the right to counsel is fully honored, and a knowing and intelligent waiver consists of the defendant being

informed—on the record—of the dangers and disadvantages of self-representation. *Bunyard*, 307 Kan. at 470.

"The right to counsel applies at all 'critical stages' of the criminal process of an accused who faces incarceration." *State v. Jones*, 290 Kan. 373, 379, 228 P.3d 394 (2010). "Critical stages" include sentencing hearings. *State v. Pfannenstiel*, 302 Kan. 747, 758, 357 P.3d 877 (2015). So Green enjoyed the right to counsel at his sentencing hearing.

Kansas courts have developed a three-step framework to determine whether the waiver of counsel was knowing and intelligent. First, the district court must advise the defendant of the right to counsel, either retained or appointed, depending on which is appropriate. Second, the defendant must understand the consequences of the waiver. Third, the defendant must grasp the nature of the charges and proceedings, the range of punishment, and the facts necessary for a complete comprehension of the case. *State v. Buckland*, 245 Kan. 132, 138, 777 P.2d 745 (1989); *State v. Miller*, 44 Kan. App. 2d 438, 441, 237 P.3d 1254 (2010).

In addition to those three steps, as noted, the district court must also inform the defendant of the dangers and disadvantages of self-representation. *Jones*, 290 Kan. at 376; *Vann*, 280 Kan. 782, Syl. ¶ 3. This Court looks to the circumstances of each individual case when determining whether the waiver of counsel was knowing and intelligent. *State v. McCormick*, 37 Kan. App. 2d 828, Syl. ¶ 5, 159 P.3d 194 (2007).

Green acknowledges that he gave a knowing and intelligent waiver up until his conviction. But then there was a change in circumstances. He expressly asked for—and

was appointed—counsel to represent him at sentencing. (R. XXIX, 7-8.) After which, he moved to dismiss counsel prior to sentencing. (R. I, 245; XXX, 5-6.) Once represented by counsel, however, the district court was required to ensure that Green's choice to represent himself at sentencing was made knowingly and intelligently.

While a valid waiver of counsel need not be renewed in subsequent proceedings, intervening events that substantially change the circumstances existing at the time of the initial colloquy require a new colloquy. See *United States v. Hantzis*, 625 F.3d 575, 580-81 (9th Cir. 2010). "A competent election by the defendant to represent himself and to decline the assistance of counsel once made before the court carries forward through all further proceedings in that case *unless appointment of counsel for subsequent proceedings is expressly requested by the defendant*." (Emphasis added.) *Hantzis*, 625 F.3d at 581. To be clear, Green asserts that *Hantzis* stands for the proposition that courts must engage in some type of new pro-se colloquy after an intervening event, such as we have here with the reappointment of counsel. This is the result that follows because Green asking for counsel before sentencing was him withdrawing his waiver of counsel.

After the district court appointed counsel for sentencing, it failed to perform any inquiry whatsoever into whether Green was intelligently and knowingly waiving his right to counsel at sentencing—before allowing him to represent himself at sentencing. Green is not arguing that the court must necessarily go through the entire colloquy for pro-se representation at sentencing. In this case, for example, the self-representation colloquy would only need to be specific for sentencing. The colloquy could also be more of a reminder of the relevant portions of the initial colloquy. That said, Green emphasizes that

over two years had passed since the initial colloquy and sentencing, so even a reminder may have been insufficient under these circumstances.

In the end, the appointment of counsel for sentencing was an intervening event—a withdrawal of his initial waiver of counsel—that substantially changed the circumstances existing at the time of the initial colloquy. See *Hantzis*, 625 F.3d at 581. In other words, when Green invoked his right to counsel—and was appointed counsel—for sentencing, he enjoyed all the rights that come along with the Sixth Amendment appointment of counsel. These rights include the general presumption against waivers and the right to self-representation only after a knowing and intelligent waiver of the right to counsel. *Bunyard*, 307 Kan. at 470. Because the district court failed to honor these rights at sentencing, it erred in allowing Green to represent himself at sentencing. And this error is structural. *Jones*, 290 Kan. at 382 ("A violation of a Sixth Amendment right to counsel is subject to structural error analysis.").

This Court must vacate Green's sentence and remand for a new sentencing hearing with directions to reappoint counsel and to proceed accordingly, dependent on Green's choice to keep counsel or to proceed pro se.

CONCLUSION

For the aforementioned reasons, this Court must find in Green's favor. Depending on the issue, this Court must either reverse Green's conviction, or, alternatively, enter a conviction for intentional second-degree murder; vacate his sentence; and/or remand for a new trial or a new sentencing hearing.

Respectfully submitted,

/s/ James M. Latta

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APPENDIX

399 P.3d 285 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

STATE of Kansas, Appellee,

v.

Aquarius Terrell HURT, Appellant.

No. 114,984

Opinion filed June 30, 2017

Review Denied February 27, 2018

Appeal from Sedgwick District Court; ERIC R. YOST, Judge.

Attorneys and Law Firms

Carl F.A. Maughan, of Maughan Law Group LC, of Wichita, for appellant.

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

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

MEMORANDUM OPINION

Per Curiam:

***1** After a jury trial, Aquarius Terrell Hurt was convicted of attempted first-degree murder, aggravated battery, and criminal use of a weapon. On appeal, Hurt argues that the district court made several trial errors: (1) There was insufficient evidence to prove premeditation; (2) the district court erred in permitting evidence of gang affiliation; and (3) the district court erred in failing to instruct the jury regarding eyewitness identification. Finding no error, we affirm Hurt's conviction.

FACTS

On August 24, 2013, Chandria Young was at the house of her friend, Autumn Ashlock. The women invited Quentin Lawrence, Daijour Parker, and Dominic Gordon to Ashlock's house, where they listened to music and drank alcohol. Young and Gordon were in a relationship at that time. At some point in the evening, Ashlock drove the group to QuikTrip to buy cigars or cigarettes.

While at QuikTrip, Young saw Hurt, whom she knew, and talked to him. Gordon saw Young talking to Hurt and confronted Hurt. Gordon asked Hurt what "set" he was in, meaning what gang he was affiliated with. The exchange escalated into yelling, and ultimately Gordon punched Hurt in the face. Lawrence intervened, apologized to Hurt, shook his hand, and told him Gordon was drunk. Gordon and his group eventually went back to Ashlock's house.

Hurt returned to a birthday party hosted by Alaisha Wright, at which he had been earlier in the evening. Wright reported Hurt was yelling and making a scene at the party and said he was "going to go shoot this dude." Hurt called his brother, Jalen Jones, who was with a friend, Joshua Grier, to ask for a ride. Jones and Grier picked Hurt up in Grier's car, and Hurt told them that he had been punched in the face at QuikTrip. The three men drove to Young's house, but there were no lights on, so they left. Grier, who was in a relationship with Ashlock at the time, believed that Young and Ashlock were together, so they drove to Ashlock's house. When they arrived, Hurt told Grier and Jones that he thought he saw the person who hit him on the porch. Grier parked the car in front of the house and the three men got out.

Young, Ashlock, Lawrence, Parker, and Gordon were sitting on Ashlock's porch and smoking cigarettes when Grier's car pulled up outside. Ashlock walked down to meet Grier in the driveway and asked him what was going on. Hurt told everyone to come down to the street. Ashlock heard Hurt say he wanted to "handle" the QuikTrip incident. Grier asked who hit his brother.

Grier and Gordon squared off to fight in the middle of the street in front of Ashlock's house. At one point, Young stood between them and attempted to keep them from fighting. Parker and Lawrence were standing near the street, but neither got involved in the altercation between Grier and Gordon. Hurt and Jones were standing behind Grier's car. Jones testified that Gordon recognized him as "Scarface" and told the others to "shoot him down."

Shots were fired in rapid succession from the direction of Grier's car. Jones testified at trial that he was the only shooter

and that he used two guns. Ashlock testified that she saw Hurt and Jones both shooting. Young said that she saw two shooters behind Grier's car but could not identify who they were; but she stated that no one else—Grier, Gordon, Lawrence, Parker, Ashlock, and herself—had a gun. Neither Parker nor Lawrence saw the shooters, but they both testified that they did not have guns, nor did Grier or Gordon.

***2** Lawrence was struck by five gunshots: twice in the arm, and once each in the neck, back, and torso. Young and Parker tended to Lawrence as he lay in the street, using shirts to apply pressure to the wound in Lawrence's neck. A neighbor who heard the shooting called the police and rendered aid. Emergency personnel arrived, and Lawrence was taken to the hospital.

After leaving the scene of the shooting, Grier drove Hurt and Jones to meet their mother, Tenacious Sergeant, at her sister's house. Hurt and Jones were each holding a gun when they walked into the house. Jones said, "Mama, we are sorry," and Hurt told Sergeant that Gordon had punched him in the face, but neither son explained to her what happened. Sergeant took the guns from her sons, wrapped them in a shirt and a plastic bag, and hid them in a vacant garage down the street.

Hurt, Jones, and Grier then went to the house of Lillia Parker and Mikalia Smith, where they all showered and changed clothes. Sergeant subsequently arrived at Parker and Smith's house, and told them that if anybody asked, the three men had been there since 10 p.m.

Hurt was charged with attempted first-degree murder, aggravated battery, and criminal use of a weapon. A jury convicted Hurt as charged. Based on these convictions and his criminal history, Hurt was sentenced to 155 months in prison.

ANALYSIS

Premeditation

In his first argument on appeal, Hurt contends the evidence was insufficient to prove premeditation, which is an essential element to proving attempted first-degree murder. When the sufficiency of the evidence is challenged in a criminal case, the appellate court must consider all of the evidence in a light most favorable to the prosecution and then determine whether a rational jury could have found the defendant guilty beyond a reasonable doubt. *State v. Parker*, 282 Kan. 584, 597, 147 P.3d 115 (2006). This court does not reweigh the evidence, resolve evidentiary conflicts, or make witness credibility determinations, which would usurp the role of the jury. *State v. Frye*, 294 Kan. 364, 375, 277 P.3d 1091 (2012).

To prove Hurt committed the crime of attempted first-degree murder, the State was required to prove that (1) Hurt performed an overt act toward the commission of first-degree murder, which is defined as an intentional and premeditated killing; (2) he did so with the intent to commit first-degree murder; (3) he failed to complete the commission of the crime; and (4) the act occurred on or about August 25, 2013, in Sedgwick County, Kansas. See K.S.A. 2016 Supp. 21-5301; K.S.A. 2016 Supp. 21-5402; PIK Crim. 4th 53.010 (2012 Supp.).

Hurt contends that there is no evidence that he premeditated murder. While he acknowledges that he said he was going to *shoot* someone, Hurt contends he never said he was going to *kill* someone. Similarly, Hurt claims the evidence shows only that he fired a gun into a group of people, without evidence of what his "goal" was or whether he considered the "outcome" of the shooting. But such direct evidence is not necessary to prove intent. "Premeditation and deliberation may be inferred from the established circumstances of a case when the inference is reasonable." *State v. Lloyd*, 299 Kan. 620, Syl. ¶ 4, 325 P.3d 1122 (2014). "[C]ircumstantial evidence of intent is almost to be expected: 'Intent, a state of mind existing at the time an offense is committed, does not need to be and rarely can be directly proven' through direct evidence. [Citation omitted.]" *State v. Thach*, 305 Kan. 72, 82, 378 P.3d 522 (2016).

***3** "Premeditation does not necessarily mean an act is planned, contrived, or schemed beforehand; rather, premeditation indicates a time of reflection or deliberation." *Lloyd*, 299 Kan. 620, Syl. ¶ 4.

> "Factors to consider when determining whether the evidence gives rise to an inference of premeditation include: (a) the nature of the weapon used; (b) lack of provocation; (c) the defendant's conduct before and after the killing; (d) the defendant's threats and declarations before and during the occurrence; and (e) the dealing of lethal blows after the deceased was felled and rendered helpless." 299 Kan. 620, Syl. ¶ 5.

Here, the circumstantial evidence was more than sufficient to prove Hurt's intent. The incident was instigated when Gordon punched Hurt in the face at QuikTrip. Hurt went immediately to a party, where the host described Hurt as upset and said Hurt declared that he was going to "shoot some dude." Hurt called Jones and Grier to pick him up; in the car, Hurt told them that Gordon had punched him in the face. The three drove to Ashlock's house, where Hurt indicated he saw the person who had punched him on the porch. When Hurt exited the car, witnesses heard him tell everyone on the porch to come down to the street and he wanted to "handle" the QuikTrip incident. As Grier and Gordon were in the street squaring off to fight, Hurt and Jones fired their guns a total of 10 times toward the group; 5 bullets struck Lawrence. After the shooting, Hurt and Jones met up with Sergeant, their mother, where Hurt told her he had been punched in the face earlier in the night. Sergeant assisted her sons by hiding the guns. Hurt, Jones, and Grier then went to their friends' house and showered and changed clothes before being detained.

In addition to the facts set forth above, the evidence reflects Hurt made several statements before and after the incident that showed he was upset about being punched in the face and wanted to "handle" the situation and "shoot" someone. The shooting itself was a disproportionate response to being punched earlier in the evening. A deadly weapon can indicate a premeditation to kill. See *State v. Phillips*, 299 Kan. 479, 499, 325 P.3d 1095 (2014); *State v. Pabst*, 268 Kan. 501, 513, 996 P.2d 321 (2000). Finally, Hurt and Jones allowed their mother to hide evidence after the shooting. A rational factfinder could conclude from the facts presented, and the reasonable inferences drawn from those facts, that Hurt premeditated the murder attempt.

Hurt proposes several alternative inferences that can be drawn from the evidence. He first asserts his intent could have been simply to "fire his weapon in the direction of a bunch of people." Hurt notes that he was 17 years old and intoxicated, which he asserts "would tend to diminish the idea of premeditation" and "question the validity of any conclusion that the defendant specifically intended to kill." Hurt suggests that it was "more likely that he was angry, young, impulsive and intoxicated when he decided to fire a gun." But Hurt's challenges essentially ask this court to reweigh the evidence and draw a different conclusion than that reached by the jury. We decline to do so. See *Frye*, 294 Kan. at 375 (" 'It is the jury's function, not ours, to weigh the evidence and determine the credibility of witnesses.' ").

***4** Construing the evidence in the light most favorable to the State, we find sufficient evidence from which a reasonable factfinder could have concluded that Hurt deliberated and premeditated murder prior to the shooting. Thus, a rational factfinder could have found Hurt guilty beyond a reasonable doubt of attempted first-degree murder.

Gang affiliation

The State filed a pretrial motion to admit gang evidence, arguing it was relevant to explain Hurt's motive for an otherwise inexplicable act and to explain witness bias. The district court held a hearing on the motion immediately prior to voir dire. The State asserted that Hurt and Jones were members of the gang Gangster Disciples (GDs), and Lawrence, Parker, and Gordon were members of the gang Piru Bloods (Bloods). The State described an ongoing rivalry between the two gangs in Wichita since 2009, when a member of the GDs was murdered; the GDs believed a member of the Bloods was responsible. The State argued that gang evidence was necessary to explain the motive for "why just a simple punch at a QuikTrip would escalate to the level that it did where Quentin Lawrence is lying on the ground with five bullet holes in his body." Defense counsel responded in the following manner:

> "Well, Judge, obviously even with gang evidence the standard is, is it more probative than prejudicial. We think that gang evidence[,] generally speaking, especially with juries in Sedgwick County, Kansas, is almost always prejudicial. It is usually more prejudicial than probative. I understand that a certain amount of gang evidence regarding the various affiliations and all of that will probably come in as it goes to explain certain actions that happened. And I guess it could be used to, at least, in an argumentative way, to explain contradictions or desires on a witness's behalf to testify one way or another.
>
> "I guess my main concern is the extent that we will get into this feud that has been ongoing since 2009.... I don't know how much of that the State intends to get into with these witnesses or their expert. But I think that when we start talking about a feud as a basis for why an act happened, that we need to be more—we need to be careful about how much we get into that.... So I think we need to make sure there is a limit as to how far into it we can go."

Defense counsel concluded with concerns that the gang-related evidence would expand into other incidents between

the GDs and the Bloods that were less relevant. After fully hearing from the parties, the district judge stated that without the gang evidence, "it is almost like the jury is not going to have any idea what is really going on." The court ultimately granted the State's pretrial motion to admit gang evidence on grounds that the feud between the gangs stemming from the 2009 murder was "such an important part of what happened here." But the court placed a limitation on the parties by instructing them they could not introduce evidence of a second 2011 incident, which the court found to be less probative to the issues in the case. Defense counsel did not object further on the matter.

Evidence related to gang affiliation was offered through several witnesses during the trial. The State presented Detective Joseph Stearns as an expert on gang intelligence for the Midwest, to which Hurt did not object. Stearns explained the history of the rivalry between the GDs and the Bloods and applied his expertise to the observations he made while responding to the scene of the shooting in this case. In addition, both the State and defense questioned several fact witnesses about their gang affiliation or knowledge of the gang affiliations of the parties. Hurt never objected at trial to the admission of any gang-related questioning. And defense counsel voluntarily raised the issue of gang affiliation in opening statements, in closing arguments, and in examining the only defense witness, Jones. The defense used Jones' testimony to explain that he was shooting at members of the Bloods, whom he feared would shoot him first.

***5** Hurt argues the district court erred by allowing the parties to introduce evidence that Hurt and other witnesses at trial were affiliated with gangs. Hurt claims the evidence is not relevant and, even if it was, the gang affiliation evidence is more prejudicial than probative under K.S.A. 2016 Supp. 60-455. But the State contends Hurt did not preserve his argument for appeal because he did not lodge a specific or timely objection when the gang evidence was introduced at trial as required by statute. See K.S.A. 60-404 (statutory procedural bar to appealing evidentiary issue unless party makes specific and timely objection at trial that permits trial court opportunity to rule).

In *State v. King*, 288 Kan. 333, 204 P.3d 585 (2009), our Supreme Court put emphasis on the legislature's intent in enacting K.S.A. 60-404, which "dictates that evidentiary errors shall not be reviewed on appeal unless a party has lodged a *timely* and *specific* objection to the alleged error at trial." (Emphasis added.) 288 Kan. at 349. Although our Supreme Court acknowledged that it may have not strictly enforced the rule in the past, the court unequivocally stated in its opinion that "[f]rom today forward, in accordance with the plain language of K.S.A. 60-404, evidentiary claims ... must be preserved by way of a contemporaneous objection for those claims to be reviewed on appeal." 288 Kan. at 349.

The purpose of requiring a contemporaneous and specific objection to the introduction of evidence is to prevent the use of tainted evidence, thereby avoiding possible reversal while allowing the trial court to fulfill its intended role as gatekeeper of admissible evidence. 288 Kan. at 342, 349. Hurt did not contemporaneously object to any gang-related questioning introduced at trial by the State and, in fact, voluntarily raised the issue of gang affiliation throughout the trial proceedings. Given his failure to lodge a specific and contemporaneous objection, we find Hurt's claims of error regarding the introduction of gang affiliation evidence were not properly preserved for appeal.

In so finding, we acknowledge that Hurt's attorney expressed concern at the pretrial hearing about the district court granting the State's motion without limitation; *i.e.*, requiring the gang affiliation evidence to be relevant and to be more probative than prejudicial. Although the court ultimately granted the State's motion, the court apparently was persuaded by Hurt's concerns because the court limited the scope of gang-affiliation evidence that could be introduced. Hurt did not object to the court's ruling in this regard; in fact, the court arguably granted the only request made by the defense. And at trial, defense counsel introduced gang-related evidence within the court's limitation to explain the case to the jury. In its opening statement, defense counsel introduced Hurt and Gordon by explaining their gang affiliations: "The evidence will show that [Hurt] is associated with the Gangster Disciples, the GDs. [Gordon] is a member of the Bloods—the Piru Bloods." Defense counsel asked its only defense witness, Jones, if he was in a gang and whether his gang was "involved in any feuds or skirmishes with any other gang." In its closing argument, the defense connected the gang evidence to explain why Jones shot at the victim:

> "Is it a stretch to imagine that [Jones] believed the Bloods were after him, that they might have guns, as he suggested, that they might have a gun. That is what he thought. [Jones] testified that he believed that they were going to draw down based on what he saw, based on what he heard. Based on

what he heard, he believed it was [Gordon] that said if that is Scarface [Jones] shoot him down."

***6** As a preliminary matter, we find Hurt's challenge to the district court's pretrial order to be disingenuous given Hurt used the gang affiliation evidence to support his own theory of defense. But even if he had not used the challenged evidence to his own benefit, Hurt's pretrial challenge to the evidence has not been preserved for review on appeal because he failed to contemporaneously object when the evidence subsequently was introduced at trial. Given the underlying rationale for requiring a contemporaneous objection, "a pretrial objection by itself is not timely because the evidence may be different from that submitted at the pretrial hearing or the evidence may be viewed differently by the judge in the context of all of the evidence and argument heard at trial." *State v. Kelly*, 295 Kan. 587, 590, 285 P.3d 1026 (2012); see *State v. Nunn*, 244 Kan. 207, 213, 768 P.2d 268 (1989) (pretrial ruling is not sufficient because the "materiality of the proposed evidence may not become actually apparent until other evidence has been admitted"). For these reasons, a pretrial challenge to admission of evidence will not be deemed timely unless the challenging party renews the objection when the opposing party seeks to introduce it at trial or the court has granted the challenging party's request for a continuing objection. See *State v. Richard*, 300 Kan. 715, 720-21, 333 P.3d 179 (2014) (pretrial objection must be renewed at trial); *State v. Berriozabal*, 291 Kan. 568, 579-80, 243 P.3d 352 (2010) (pretrial challenge to admission of evidence insufficient to preserve objection for appellate review when party does not renew objection at trial or request continuing objection).

Hurt's pretrial objection did not meet the specificity requirement of K.S.A. 60-404 either. Although Hurt asserts in his appellate brief that the gang affiliation evidence simply was not relevant, the only argument Hurt asserted at the pretrial hearing was that the evidence was unduly prejudicial. "[A] defendant may not object to the introduction of evidence on one ground at trial, and then assert a different objection on appeal." *State v. Bryant*, 272 Kan. 1204, 1208, 38 P.3d 661 (2002). Moreover, Hurt asserted at the pretrial hearing that gang evidence is *generally* more prejudicial than probative, but did not specify how it was prejudicial in this case. *Richmond*, 289 Kan. at 429 ("[T]he trial court must be provided the specific objection so it may consider as fully as possible whether the evidence should be admitted and therefore reduce the chances of reversible error.").

Given his failure to lodge a specific and contemporaneous objection, we find Hurt's claims of error regarding gang affiliation was not properly preserved for appeal.

Jury instruction

In his final issue on appeal, Hurt argues the district court erred in failing to instruct the jury on eyewitness identification. Hurt acknowledges that he did not request the instruction or object to the court's failure to give the instruction at trial. As a result, this court's standard of review is whether the failure to give the instruction was clearly erroneous. K.S.A. 2016 Supp. 22-3414(3); see *State v. Duong*, 292 Kan. 824, 835, 257 P.3d 309 (2011). To find the failure to instruct clearly erroneous, this court must be "firmly convinced that there is a real possibility the jury would have rendered a different verdict if the trial error had not occurred." *State v. Mann*, 274 Kan. 670, 677, 56 P.3d 212 (2002).

In any criminal action in which eyewitness identification is a critical part of the prosecution's case and there is a serious question about the reliability of the identification, a cautionary instruction should be given advising the jury as to the factors to be considered in weighing the credibility of eyewitness identification testimony. *Mann*, 274 Kan. at 677-78; *State v. Saenz*, 271 Kan. 339, 353, 22 P.3d 151 (2001).

Hurt contends that unreliable eyewitness testimony of several witnesses identified him as a shooter. He claims that the witnesses observed him in poor light after drinking alcohol, under a heightened emotional state because of the fight, where their attention would have been drawn toward the fight and not the shooter, and in a situation in which events happened quickly. Hurt contends that the jury should have been instructed according to PIK 4th Crim. 51.110 (2013 Supp.), which provides:

> "The law places the burden upon the State to identify the defendant. The law does not require the defendant to prove (he) (she) has been wrongly identified. In weighing the reliability of eyewitness identification testimony, you should determine whether any of the following factors existed and, if so, the extent to which they would affect accuracy of identification by an eyewitness. Factors you may consider are:

*7 "1. The opportunity the witness had to observe. This includes any physical condition which could affect the ability of the witness to observe, the length of the time of observation, and any limitations on observation like an obstruction or poor lighting;

"2. The emotional state of the witness at the time including that which might be caused by the use of a weapon or a threat of violence;

"3. Whether the witness had observed the defendant(s) on earlier occasions;

"4. Whether a significant amount of time elapsed between the crime charged and any later identification;

"5. Whether the witness ever failed to identify the defendant(s) or made any inconsistent identification; and

"6. Whether there are any other circumstances that may have affected the accuracy of the eyewitness identification."

But the eyewitness identification cautionary instruction is not appropriate given the facts presented in this case. Strictly speaking, no witness provided any identification testimony in this case. Hurt does not deny that he was at the scene of the crime; testimony from several eyewitnesses, including Jones, confirms Hurt was present and standing near Grier's car at the time of the shooting. Hurt claims that witnesses provided identification testimony that he was a shooter, which is a critical issue in this case. But this eyewitness testimony about Hurt's actions on the night of the incident is not equivalent to identification testimony. See *Mann*, 274 Kan. at 679 ("The reliability of the identification and credibility of an eyewitness are not the same thing."); *State v. Shanklin*, No. 97,749, 2008 WL 4291469, at *3 (Kan. App. 2008) (unpublished opinion) (rejecting application of eyewitness identification instruction to eyewitness testimony in general and holding "there was no dispute that Shanklin was at the garage, so identification was not at issue"); *State v. Aldrich*, No. 92,364, 2006 WL 538267, at *4-5 (Kan. App. 2006) (unpublished opinion) (identification of perpetrator not an issue, so the differences in the various versions of what transpired might have raised at most an issue of witness credibility). There simply is no evidence to support the instruction Hurt now argues should have been provided to the jury.

And even if we were to look at the witness testimony, there is no reason to believe that it is unreliable. Evidence calling reliability into question is required. See *State v. Harris*, 266 Kan. 270, 278, 970 P.2d 519 (1998). Ashlock was the only witness who testified she saw Hurt shoot one of the guns. Based on the circumstances under which she identified Hurt as a shooter, we find there is no serious question of Ashlock's reliability. Ashlock saw Hurt earlier in the night at QuikTrip. Our Supreme Court has held that the eyewitness identification instruction "contemplate[s] an eyewitness who does not know the defendant personally." *Saenz*, 271 Kan. at 354 (holding that where witness had seen defendant early in the evening at the bar, witnesses' reliability was not questionable and district court was not required to give eyewitness instruction). Ashlock identified Hurt and Jones as the shooters based on a photo array at the police station on the same day as the incident. Finally, defense counsel fully cross-examined Ashlock regarding her observation of Hurt shooting the weapon, so the jury heard the circumstances Hurt now claims cause her testimony to be unreliable. The jurors were instructed that it was their role to determine the weight and credit of witness testimony. Accordingly, there is no real possibility that the requested instruction would have resulted in a different verdict. Hurt has not demonstrated that omission of the jury instruction was clear error.

*8 Affirmed.

All Citations

399 P.3d 285 (Table), 2017 WL 2834282

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CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing Brief of Appellant was served on the Wyandotte County District Attorney by emailing a copy to Mark A. Dupree, Sr., at DAWyCoefiling@wycokck.org; and by emailing a copy to the Kansas Attorney General at ksagappealsoffice@ag.ks.gov on the 12th day of April, 2023.

/s/ James M. Latta
James M. Latta, #27652