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 APPELLEE

Appeal from the District Court of Wyandotte County, Kansas
Honorable Jennifer Myers
District Court Case Number 2019CR0161

KAYLA ROEHLER, #26796
Deputy District Attorney
Wyandotte County District Attorney's Office
710 N. 7th Street – Suite 10
Kansas City, KS. 66101
(913) 573-2851
(913) 573-2948 (Fax)
Email address: DAWyCoefiling@wycokck.org

Attorney for Appellee

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STATEMENT OF THE ISSUES

I. THERE WAS SUFFICIENT EVIDENCE OF PREMEDITATION TO SUPPORT A CONVICTION FOR FIRST-DEGREE MURDER AND TO IDENTIFY THE DEFENDANT AS D.J. (COUNSEL'S ISSUE I; PRO SE ISSUE IV(B)).

II. PREMEDITATED FIRST-DEGREE MURDER IS NOT UNCONSTITUTIONALLY VAGUE IN REGARD TO INTENTIONAL SECOND-DEGREE MURDER.

III. THE DISTRICT COURT PROPERLY EXCLUDED THE PRELIMINARY HEARING TESTIMONY OF MICHAEL WILLIAMS AT TRIAL.

IV. THIS COURT SHOULD REMAND THE CASE ON THE SOLE ISSUE OF WHETHER THE DEFENDANT INTENDED TO PROCEED PRO SE AFTER HIS CONVICTION.

V. THE DEFENDANT WAS PROPERLY TAKEN INTO CUSTODY.

(PRO SE ISSUE I).

VI. THERE WAS NO PROSECUTORIAL ERROR. (PRO SE ISSUE II).

VII. THE STATEMENTS PROVIDED TO THE JURY WERE NOT FALSE AND DID NOT VIOLATE HIS RIGHT TO A FAIR TRIAL. (PRO SE ISSUE III & IV(A)).

VIII. THE DEFENDANT IS D.J. AND THE WITNESSES TESTIFIED AS SUCH. (PRO SE ISSUE IV).

STATEMENT OF FACTS

On February 12, 2019, officers with the Kansas City, Kansas Police Department responded to the area of 5th and Quindaro Boulevard in regard to a shooting call. (R.2, 2, Defendant's Exhibit A). When they arrived, they found Angela Gatlin on the ground with blood in the right side of her chest with a gunshot wound. (R.2, 2, Defendant's Exhibit A). She died from that gunshot wound. (R.2, 2, Defendant's Exhibit A).

The police started their investigation into Angela Gatlin's homicide. (R.2, 2, Defendant's Exhibit A). Detective Christian spoke with a witness named Morris Holinshed. (R.2, 2, Defendant's Exhibit A). Hollinshed stated that he witnessed the shooting, and the shooter was D.J. (R.2, 2, Defendant's Exhibit A). Hollinshed stated the victim called him over to talk with her and the Defendant. (R.2, 2, Defendant's Exhibit A). He told the detective that he was standing next to the passenger side of the defendant's Cadillac while the victim and the defendant were arguing. (R.2, 2, Defendant's Exhibit A). He said that the victim was claiming that the Defendant owed her money. (R.2, 2, Defendant's Exhibit A). The Defendant

kept telling the victim to get out of the car. (R.2, 2, Defendant's Exhibit A). He told the victim to get out of the car as he was just trying to keep the peace. (R.2, 2, Defendant's Exhibit A). The Defendant said, "Bitch get out of my car." (R.2, 2, Defendant's Exhibit A). As she was getting out and had both her feet on the ground, the Defendant shot her. (R.2, 2, Defendant's Exhibit A). Hollinshed took off running but heard the second shot. (R.2, 2, Defendant's Exhibit A). The Defendant then drove off. (R.2, 2, Defendant's Exhibit A). Hollinshed went into the liquor store to get help, but he didn't actually see the shooting because the victim was getting out of the car. (R.2, 2, Defendant's Exhibit A).

The detective collected video from the liquor store and reviewed it. (R.2, 2, Defendant's Exhibit A). The video showed what Hollinshed had described. The owner of the liquor store also identified the driver of the Cadillac as the Defendant, Dary Green. (R.2, 2, Defendant's Exhibit A). From the video, detectives were able to identify another potential witness as Michael Williams. (R.2, 2, Defendant's Exhibit A).

The following day, detectives interviewed Hollinshed again. (R.2, 2-3, Defendant's Exhibit A). He gave a consistent account of the events as his first statement. (R.2, 2-3, Defendant's Exhibit A). The detectives then went and interviewed Michael Williams. (R.2, 3, Defendant's Exhibit A). Williams told the detectives that he had forgotten his lighter and stopped by the liquor store to see if he could borrow one. (R.2, 3, Defendant's Exhibit A). He started to walk up to the Cadillac. (R.2, 3, Defendant's Exhibit A). He said there was a black male in the

driver seat, and a female in the passenger seat. (R.2, 3, Defendant's Exhibit A). He could hear the driver and passenger arguing. (R.2, 3, Defendant's Exhibit A). He thought it was just a martial spat since it was so close to Valentine's Day. (R.2, 3, Defendant's Exhibit A). He heard the male tell the female to get out of the vehicle several times. (R.2, 3, Defendant's Exhibit A). He then heard a "gun rack." (R.2, 3, Defendant's Exhibit A). He didn't see the gun, but had been in the Army and was familiar with the sound. (R.2, 3, Defendant's Exhibit A). He said that he started to go back to his car and saw the female getting out of the Cadillac. (R.2, 3, Defendant's Exhibit A). He then heard two shots and saw the female being shot. (R.2, 3, Defendant's Exhibit A). He told the detectives that the gun shots came from inside the vehicle. (R.2, 3, Defendant's Exhibit A). He tried to create space between his car and the Cadillac. (R.2, 3, Defendant's Exhibit A). He heard a couple more shots before the Cadillac drive off. (R.2, 3, Defendant's Exhibit A). He was going to follow but lost sight of the Cadillac. (R.2, 3, Defendant's Exhibit A). He did not stay to give a statement to the police because he was afraid of being late for work. (R.2, 3, Defendant's Exhibit A). However, he did call police after work to give a statement. (R.2, 3, Defendant's Exhibit A).

On February 14, 2019, Detective Burgtorf received a tip that the person responsible for the victim's homicide was Dary Green, the Defendant. (Defendant's Exhibit A). The tipster said that the Defendant was known to frequent the area of the homicide and was known to carry a gun. (Defendant's Exhibit A).

The next day, Detective Burgtorf received a call from an attorney.

(Defendant's Exhibit A). The attorney stated that his client, the Defendant, was fearful for his life. (Defendant's Exhibit A). His attorney stated that the Defendant was at the scene of the homicide and witnessed it. (Defendant's Exhibit A). His client said that a man named M.L. was the person who shot the victim. (Defendant's Exhibit A). His client was afraid because M.L. has money and ties to the area and could have him killed. (Defendant's Exhibit A). He indicated that his client would not come in to make a statement. (Defendant's Exhibit A).

On February 19, 2019, the State charged the Defendant with intentional murder in the second degree. After several attorney changes and a competency evaluation, the case was set for the Defendant's motion to represent himself. (R. 1, 1-13). On October 3, 2019, the Court heard the Defendant's motion to proceed pro se. (R. 1, 13). The Court advised him of the dangers and pitfalls of representing himself. (R. 11). The Court kept the prior attorney as stand-by counsel. (R. 11, 39). The case was then set for a preliminary hearing and suppression hearing. (R. 1, 13).

The State filed its notice of intent to amend the information on October 21, 2019, informing the Defendant that it intended to ask the Court to bind the Defendant over on premeditated first-degree murder. (R. 1, 13, 108).

The Defendant filed his first motion to suppress on September 26, 2019. (R. 1, 81). In that motion, he alleged that his rights under the Fourth Amendment were violated when officers from the Kansas City Police Department entered his home to arrest him and searched the home without a warrant or his consent. (R. 1, 81-87). He then filed a second motion to suppress raising the same claims on October 7,

2019. (R. 1, 102-06). He filed a third motion to suppress raising the same claims on November 12, 2019. (R. 1, 111-16). On November 18, 2019, the Defendant filed his first motion to dismiss alleging that there was no corroborating evidence to support the State's witnesses' statement that the Defendant was at the scene. (R. 1, 117-123).

On December 11, 2019, the matter proceeded to preliminary hearing and suppression hearing. (R. 1, 18). The State presented the testimony of Michael Williams and Morris Hollinshed. (R. 32, 11, 49). The State will summarize Williams' testimony because it is relevant to the third issue on appeal.

Williams testified that he was in the area of 5th and Quindaro on February 12, 2019, to drop off his son. (R. 32, 11-12). He said that he had just purchased a package of Black & Milds and could not find his lighter. (R. 32, 12). He stopped near to the funeral home to ask a gentleman who was smoking to borrow his lighter. (R. 32, 12). The man smoking was standing next to a newer dark colored Cadillac. (R. 32, 12). He walked up to the gentlemen and asked if he could borrow his lighter, and the gentleman proceeded to pull it out. (R. 32, 14). As he was walking, he noticed that there were two people arguing in the dark Cadillac. (R. 32, 14). The people in the car were a guy and a girl. (R. 32, 15). He thought they were just fighting about Valentine's Day and didn't really think much about it. (R. 32, 14). That changed when he heard a gun cock and heard a bullet enter the camber. (R. 32, 14). He explained that he had served in the Army and was familiar with that sound. (R. 32, 15). He testified that he heard the man in the car tell the woman to

get out, get out; she responded, "I'm getting out" and that is when the man started shooting. (R. 32, 16). He testified that he heard the Defendant's voice prior to his testimony, and that was the same voice telling the female to get out. (R. 32,17). He said after the shooting he tried to follow the vehicle to get the tag number. (R. 32, 19). When asked if he saw the driver of the Cadillac, Williams indicated that he had not, but heard his voice. (R. 32, 41).

The Court found probable cause to believe that the Defendant committed the crime of murder in the first degree. (R. 32, 86). The Court set the case for jury trial on April 3, 2020. (R.15). The Court then proceeded to take up the Defendant's motions to suppress. At the suppression hearing, the State presented evidence that three officers with the Kansas City Missouri were conducting a random check through REGIS for individuals with outstanding warrants. (R. 32, 95). Officer Riffle saw that there was a pickup order displayed for the Defendant. (R. 32, 95). He acknowledged that a pickup order is not an arrest warrant. (R. 32, 95). The officers went to the house and knocked on the door. (R. 32, 95). The Defendant's wife answered the door. (R. 32, 96). The officer asked if the Defendant was there. (R. 32, 96-97). She indicated that they were at his home and pointed up the stairs to the bedroom. (R 32, 97). The officer testified that the Defendant's wife invited them in the house. (R. 32, 97). They were talking through the storm door, and when they said they needed to talk to the Defendant, she opened the storm door to let them into the house. (R. 32, 97-98). They then entered the home and went upstairs to the bedroom. (R. 32, 98). When they went upstairs, they saw the Defendant digging in

a clothes pile. (R. 32, 98). They informed the Defendant that he was under arrest. (R. 32, 98).

The officer testified about the procedures regarding a pick-up order. (R. 32, 100). He testified that it is similar to a warrant and that an individual is placed into handcuffs and taken to the police station for questioning. (R. 32, 100). The officer described the difference between a pickup order and arrest warrant. (R. 32, 111). The State admitted the pickup order at State's Exhibit 2 for that hearing. (R. 32, 112). The Court inquired of the witness asking if State's Exhibit 2 was the probable cause pick-up order he had received. (R. 32, 118). The officer indicated that it was. (R. 32, 118). After the Defendant was taken to the Jackson County Detention Center, the officers returned to the Defendant's home and asked his wife for permission to search for some items. (R. 32, 104).

The Defendant's wife gave them consent to search the home and signed a written consent to search. (R. 32, 112; Preliminary Hearing/Motion Hearing State's Exhibit 3). The Defendant's wife had authority over all of the home because it was their marital home. (R. 32, 151-68). The Defendant's wife testified at the suppression hearing. (R. 32, 151-68). She testified that the home that was searched what her home and that she goes everywhere in the home, including the garage where the car is kept. (R. 32, 155).

She also testified that she was a prior law enforcement and was familiar with search and seizure law. (R. 32 (161-62). She testified that law enforcement may seizure property from a marital home with consent of a spouse who is present. (R.

32, 163).

Additionally, Officer Tommy Woods of the Kansas City, Missouri Police Department testified that the Defendant's wife read and signed a consent to search form for the home. (R. 32, 121; Preliminary Hearing/Motion Hearing State's Exhibit 3). He testified that he had a conversation with the Defendant's wife where she told him that she was prior law enforcement and was familiar with what consent was and what a search warrant was. (R. 32, 121, 129-30). Officer Joseph Melna was also present for the consent and testified that it appeared that the Defendant' wife had apparent authority over the contents of the home and was a co-occupant of the home. (R. 32,135-36).

After the preliminary hearing but prior to the Court's ruling, the Defendant filed another motion to suppress and dismiss. This time he alleged violations of the Fourth, Fifth, and Fourteenth Amendments. (R. 1, 160-63).

On January 9, 2020, the Court ruled on the Defendant' various motions. (R. 15). The Court started with the Defendant's motion to suppress based on an illegal arrest and the search that stemmed from that arrest. (R. 15, 4-6). The Court ruled that the Kansas City Missouri Police Department had probable cause to believe the Defendant had committed a crime and that the arrest was a valid arrest. (R. 15, 10). The Court then went on to rule on the motion to suppress for his person and the items located in his home. (R. 15, 10-11). The Court found that there was consent when the Defendant's wife allowed the officers to enter the home. (R. 15, 10-11, 12). The Court found that his wife knew she was consenting because she was a law

enforcement officer and "[t]here is not a law enforcement officer out there who doesn't understand that consent is an exception to the search warrant requirement." (R. 15, 10-11). Finally, the Court ruled on the motion to dismiss based on a warrantless arrest. (R. 15, 28-34). The Court found that there was probable cause for the officers to arrest him; therefore, there was no basis for to dismiss the case. (R. 15, 28-34).

On August 2, 2021, the case went to jury trial. (R. 27). The State presented the testimony of various witnesses including Hollinshed. (R. 27). Hollinshed testified that he was trying to get the victim out of the car because she and the Defendant were bickering. (R. 27, 157-58). Hollinshed told the victim to get out of the car because he had a gut feeling something bad was going to happen. (R. 27, 158). He told the jury that, during the bickering, the Defendant pulled out a gun. (R. 27, 158-59). He told the jury that he did not point the gun at the victim right away, because Hollinshed asked the Defendant to not point it at her. (R. 27, 161). Sometime after pulling it out, Defendant aimed the gun at the victim and fired. (R. 27, 161-62). He missed the first time he fired and pulled the trigger a second time. (R. 27, 162). This time he hit the victim in the back. (R. 27, 162, 165).

The Defendant moved for the admission of the arrest affidavit, Defendant's Exhibit A, and presented the testimony of three witnesses. (R. 27, 2-3). In the admitted Defendant's Exhibit A, Hollinshed stated that the Defendant kept telling the victim to get out of his car. (Defendant's Exhibit A). That he "saw [the Defendant] take out a gun. The gun was silver on the top and black on the bottom.

Hollinshed racked the gun slide back chambering a bullet and said, 'Bitch get out of my car.'" (Defendant's Exhibit A). Detective Burgtorf testified that there was a typographical error on Defendant's Exhibit A, and the sentence that stated that "Hollinshed racked the gun slide back chambering a bullet," should have read "[The Defendant] racked the gun slide back chambering a bullet." (R. 27, 374-75).

Defendant's Exhibit A also contained the statements of Michael Williams. (Defendant's Exhibit A). In Defendant's Exhibit A, Williams stated he did hear the male asking the female to get out of the vehicle several times. (Defendant's Exhibit A). He heard a gun rack and a bullet enter the chamber. (Defendant's Exhibit A). He never saw a gun but said that he spent time in the Army and knows what it sounds like. (Defendant's Exhibit A). He started to walk back to his vehicle, and the female was getting out of the Cadillac. (Defendant's Exhibit A). He heard 2 shots and saw the female was being shot. (Defendant's Exhibit A). Williams was never served with a subpoena and did not testify at trial. (R. 27, 128, 283-84).

The jury found the Defendant guilty of premediated first-degree murder. (R. 27, 493). The following day, the district court held a quick status conference to inform the Defendant of a few post-trial issues. (R. 29). The Defendant stated that he did not want to continue representing himself for his post-trial motions. (R. 29, 2). He then stated that he didn't want his attorney's help with the appeal and that he thought the judge was talking about the appeal. (R. 29, 2-5). Then, at the end of the hearing, the Court asked if the Defendant wanted the help of his stand-by attorney to help with the post-trial motions. (R. 29, 7-8). He stated "[t]hat would

be fine. That would be fine. I don't have anything against Mr. Spies." (R. 29, 8).

On October 18, 2021, the case came for sentencing. (R. 30). For reasons that did not make into the record, the Defendant proceeded pro se.[1] (R. 30). The Defendant did not file any post-trial motions. (R. 30). The Defendant made oral objections to the PSI; however, it did not affect his criminal history score for an off-grid crime. (R. 30, 10-13). The Defendant was sentenced to life in prison and eligible for parole after 50 years. (R. 30, 37). After being informed of his right to appeal, he told the trial court that he did not wish to represent himself on the appeal. (R. 30, 37-38). He asked for the court to appoint him an attorney. (R. 30, 38).

The Defendant timely appeals. (R. 1, 251).

ARGUMENTS AND AUTHORITIES

I. THERE WAS SUFFICIENT EVIDENCE OF PREMEDITATION TO SUPPORT A CONVICTION FOR FIRST-DEGREE MURDER AND TO IDENTIFY THE DEFENDANT AS D.J. (COUNSEL'S ISSUE I; PRO SE ISSUE IV(B)).

Standard of Review

When the sufficiency of the evidence is challenged in a criminal case, a reviewing court views the evidence in the light most favorable to the State to determine whether a rational factfinder could have found the defendant guilty

[1] This issue was not briefed below, therefore, the record on appeal is a little lacking about the Defendant's desire to represent himself on post-trial motion. The State submits the following in support of remand for an evidentiary hearing before determining if his Sixth Amendment right to counsel was violated. On August 10, 2021, standby counsel informed the Court and the State that the Defendant refused to come out of his cell to meet with counsel about post-trial motions. Counsel asked the jail staff to inform the Defendant he was there to discuss post-trial motions. They returned stating that he would not meet with standby counsel.

beyond a reasonable doubt. *State v. Frantz*, 521 P.3d 1113, 1138, 2022 Kan. LEXIS 124, No. 123,096 (2022). The Court does not reweigh evidence, resolve conflicts in the evidence, or pass on the credibility of witnesses. *Id.* Furthermore, there is no distinction between direct and circumstantial evidence in terms of probative value. *State v. Aguirre*, 313 Kan. 189, 209, 485 P.3d 576 (2021). A verdict may be supported by circumstantial evidence if such evidence provides a basis for a reasonable inference by the fact finder regarding the fact in issue. *State v. Logsdon*, 304 Kan. 3, 25, 371 P.3d 836 (2016).

Arguments and Authorities

The Defendant claims that there was insufficient evidence at trial to convict him of premeditated, first-degree murder. He claims the Defendant had an impulsive argument with the victim that led to the shooting. However, he neglects to reflect on the witness's testimony of his own exhibit accurately. As explained below, there was in fact sufficient evidence to support premeditation.

"Premeditation means to have thought over the matter beforehand, in other words, to have formed the design or intent to kill before the act." *State v. Scaife*, 286 Kan. 614, Syl. ¶ 1, 186 P.3d 755 (2008). Premeditation can occur at any time during a violent episode that ultimately causes death. *State v. Appleby*, 289 Kan. 1017, 1059-60, 221 P.3 525 (2009). A premeditated act is not necessarily one that is "planned, contrived, or schemed beforehand; rather, premedication indicated a time of reflection and deliberation." *State v. Qualls*, 297 Kan. 61, 66, 298 P.3d 311 (2013). A defendant's premeditation can be inferred by the circumstances, and in

fact, direct evidence of premeditation is rare. *Id.* at 66. Several facts can give rise to an inference of premeditation: (1) the nature of the weapon used; (2) a lack of provocation; (3) the defendant's conduct before and after the incident; (4) the defendant's threats and declarations before and during the incident; and (5) whether the defendant dealt lethal blows after the victim was helpless. *Qualls*, 297 Kan. at 66-67. The State does not have to prove each factor in order to establish premeditation; in some cases, proving the presence of just one factor may be sufficient.

Here, there was sufficient evidence of premeditation. While Hollinshed could not testify as to what was going on in the Defendant's mind, his testimony supported a conclusion that the Defendant thought about the act of killing prior to shooting his victim based on his observations. Hollinshed testified that the Defendant was trying to get the victim out of the car because she and the Defendant were bickering. (R. 27, 157-58). Hollinshed was telling the victim to get out of the car because he had a gut feeling something bad was going to happen. (R. 27, 158). He told the jury that, during the bickering, the Defendant pulled out a gun. (R. 27, 158-59). He told the jury that the Defendant did not point the gun at the victim right away because Hollinshed asked the Defendant not to point it at her. (R. 27, 161). Sometime after pulling it out, the Defendant aimed the gun at the victim and fired. (R. 27, 161-62). He missed the first time he fired and pulled the trigger a second time. (R. 27, 162). This time, he hit the victim in the back. (R. 27, 162, 165).

Further, Defendant's Exhibit A supports that there was sufficient time for the Defendant to think about the killing before he acted. In Defendant's Exhibit A, Hollinshed stated that the Defendant kept telling the victim to get out of his car. (Defendant's Exhibit A). That he "saw [the Defendant] take out a gun. The gun was silver on the top and black on the bottom. [Defendant] racked the gun slide back chambering a bullet and said, 'Bitch get out of my car.'" (Defendant's Exhibit A); (R. 27, 374-75).

Additionally, in Defendant's Exhibit A, there was evidence before the jury from Michael Williams. In Defendant's Exhibit A, Williams stated he did hear the "male asking the female to get out several times. [He] heard a gun rack. He never saw a gun but said that he spent time in the Army and knows what it sounds like. [He] started to walk back to his vehicle and the female was getting out of the Cadi. [He] heard 2 shots and saw the female was being shot." (Defendant's Exhibit A).

It is clear, considering the factor in *Qualls*, that the victim in this case was killed with premeditation. According to the testimony of Hollinshed and the statements in Defense Exhibit A, there was no provocation during this homicide. The Defendant pulled out a gun. (R. 27, 161). He did not already have the gun out at the beginning of the verbal argument. (R. 27, 161). After he pulled the gun out, he was told to not point it at the victim. (R. 27, 161). He did not fire the gun and immediately shoot the victim. (R. 27, 161). The Defendant's gun was not cocked, because there was evidence before the jury that he had to chamber a round or rack a round. (R. 27, 161-62, Defense Exhibit A). This is all evidence of his

premeditation. All of this was presented to the jury; therefore, there was sufficient evidence for the jury to determine that the Defendant had thought about his action of killing before he killed the victim, thereby committing premeditated murder.

In his supplemental brief, the Defendant argues that there was insufficient evidence for a jury to find that the was D.J. The Defendant argues there is insufficient evidence to support that he was the one that shot and killed the victim. However, the record shows otherwise. Hollinshed testified that the Defendant was the one that shot the victim. (R. 27, 154). Hollinshed was watching the video of the shooting, and pointed to the Defendant saying, "he shot her." (R. 27, 154-55). He testified that he knew the Defendant as D.J. (R. 27, 155). On cross examination, Hollinshed stated "this is what I'm saying, you fired that gun twice. The first shot hit that wall. The second shot hit her. I saw that." (R. 27, 164). This is enough to a rational factfinder to find the Defendant guilty of murder in the first-degree, when viewing the evidence in the light most favorable to the State. *State v. Beach*, 275 Kan. 603, Syl. ¶ 2, 67, P.3d 121 (2003). There was sufficient evidence for a rational factfinder to find beyond a reasonable doubt that the Defendant was D.J.

II. PREMEDITATED FIRST-DEGREE MURDER IS NOT UNCONSTITUTIONALLY VAGUE IN REGARD TO INTENTIONAL SECOND-DEGREE MURDER.

Standard of Review

Appellate courts exercise unlimited review over challenges to the constitutionality of a statute. *State v. Harris*, 311 Kan. 816, 821, 467 P.3d 504 (2020). The appellate court presumes a statute is constitutional and resolves all

doubts in favor of a statute's validity. *State v. Jenkins*, 311 Kan. 39, 53, 455 P.3d 779 (2020). The party challenging a statute as vague bears the burden of overcoming the presumption of constitutionality. *Id.* at 53. A statute is not unconstitutionally vague "'simply because difficulty is found in determining whether certain marginal offenses fall within [its] language.'" *Hearn v. City of Overland Park*, 244 Kan. 638, 641, 772 P.2d 758 (1989). If there is any reasonable way to construe a statute as constitutionally valid, this Court has both the authority and duty to engage in such a construction. *State v. Seward*, 296 Kan. 979, 981, 297 P.3d 272 (2013).

Arguments and Authorities

The Defendant asks this Court to reach the issue for the first time on appeal. Generally, an issue was not raised before for the district court cannot be raised for the first time on appeal. *See State v. Kelly*, 298 Kan. 965, 971, 318 P.3d 987 (2014). This rule includes constitutional claims asserted for the first time on appeal. *State v. Daniel*, 307 Kan. 428, 430, 410 P.3d 877 (2018). The Defendant asked this Court to utilize one of three exceptions to the preservation rule and reach the merits of his claim for the first time on appeal. However, this Court has the discretion to decline to address an issue raised for the first time on appeal even if an exception is met. *State v. Gray*, 311 Kan. 164, 171, 459 P.3d 165 (2020).

The Defendant argues that the statute on premediated first-degree murder is unconstitutionally vague because it provides arbitrary enforcement. He does not make an as-applied challenge to the statute, only a facial challenge. Brief of

Appellant, 10. Facial constitutional challenges should be disfavored. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450-51, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008) (noting that facial challenges are disfavored because they rest on speculation, run contrary to the fundamental principle of judicial restraint, and threaten to short-circuit the democratic process). To succeed on his facial challenge, the defendant would have to show that there are no set of circumstances where the statute would be valid. *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). The fact that a challenged statute may "operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid," since courts have not recognized an "overbreadth" doctrine outside of the very limited context of First Amendment challenges. *State v. Jones*, 313 Kan. 917, 932, 492 P.3d 433 (2021) (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)).

The Defendant argues that every prosecutor could charge first-degree murder in every instance of an intentional second-degree murder because the definition of premeditation is overboard and unworkable. He claims that every person "who commits an intentional second-degree murder is also – and always – a violator of premeditated first-degree murder." Brief of Appellant, 11. However, this is not the case. The defendant must also have premediated the intentional murder.

The real issue the Defendant is raising is an issue of prosecutorial discretion. The Kansas Supreme Court agreed with Judge Atcheson when he said, "the State

functionally has unbridled control over what to charge against a given defendant – that's the essence of prosecutorial discretion . . . Whatever the reason, the call belongs to the State." *State v. Broxton*, 311 Kan. 357, 363, 461 P.3d 54 (2020) (quoting *State v. Broxton*, 2017 Kan. App. Unpub. LEXIS 949, *34, No. 114,675, at *12 (unpublished opinion) (Atcheson, J., concurring)). He raises an arbitrary enforcement claim in an effort to remove prosecutorial discretion from charging decisions. He takes umbrage with the State amending the information to premeditated first-degree murder, as what he claims is no apparent reason. That is why there is prosecutorial discretion, there are things known to the prosecutor that would support the amending of charges, or the lessening of charges, or dismissal. Prosecutorial discretion does not equate to arbitrary enforcement.

A statute is unconstitutionally vague if it fails to give adequate warning of the proscribed conduct, that is to say, that it "'fails to provide a person of ordinary intelligence fair notice of what is prohibited.'" *State v. McCune*, 299 Kan. 1216, 1235, 330 P.3d 1107 (2014) (quoting *United States v. Williams*, 553 U.S. 285, 304, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2009)). A statute is also unconstitutionally vague if it fails to protect against arbitrary enforcement. *Steffes v. City of Lawrence*, 284 Kan. 380, 389, 160 P.3d 843 (2007). "At its heart the test for vagueness is a commonsense determination of fundamental fairness." *State v. Kirby*, 222 Kan. 1, 4, 563 P.2d 408 (1977). The problem with the second type of unconstitutionally vague statutes is that they invite arbitrary enforcement by creating "a world in which

'almost anyone can be arrested for something.'" *State v. Harris*, 311 Kan. 816, 821, 467 P.3d 504 (2020).

This Court and the United States Supreme Court have emphasized, however, that the Constitution does not require "impossible standards," but rather statutory language that "'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices,'" and no more. *Hearn v. City of Overland Park*, 244 Kan. 638, 640-41, 772 P.2d 758 (1989) (quoting *United States v. Petrillo*, 332 U.S. 1, 7-8, 67 S. Ct. 1538, 91 L. Ed. 1877 (1947)). An unconstitutionally vague law invites arbitrary enforcement in this sense if it "leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case…." *Beckles v. United States*, 580 U.S. 256, 266, 137 S. Ct. 886, 894, 197 L. Ed. 2d 145 (2017).

Premeditation has been defined for over 20 years. *See State v. Groschang*, 272 Kan. 652, 668, 36 P.3d 231 (2001). This Court recently upheld a different vagueness challenge in *State v. Stanley*, 312 Kan. 557, 565-74, 478 P.3d 324 (2020). There is no question that "legally fixed standards" exist defining premeditation. The statute is not vague.

The Defendant's argument was raised in a 1507 context *Mays v. State*, No. 113,456, 2019 Kan. App. Unpub. LEXIS 277 (Kan. App. 2019) (unpublished opinion). Mays argued that his attorney was ineffective for not raising a claim that the first-degree murder statute was unconstitutional because it did not provide a

definition of premeditation. *Id.* He argued that the failure to provide a definition of premeditation made the statue was "so vague that it fail[ed] to give ordinary people fair notice of the conduct it punishes and invites arbitrary enforcement." *Id.* The court rejected his claim:

> Here, Mays was convicted of premeditated murder under K.S.A. 21-3401. At trial, the jury was instructed that "[p]remediation means to have thought the matter over beforehand," as set forth in PIK Crim. 3d 56.04(b). As the State points out in its brief, the Kansas Supreme Court has rejected challenges to K.S.A. 21-3401 that are similar to the one asserted by Mays. See *State v. Groschang*, 272 Kan. 652, 668, 36 P.3d 231 (2001). Furthermore, our Supreme Court "has approved the PIK definition of premeditation in a series of cases." *State v. Lawrence*, 281 Kan. 1081, 1090-91, 135 P.3d 1211 (2006) (citing *State v. Martis*, 277 Kan. 267, 302, 83 P.3d 1216 [2004*]); State v. Hebert*, 277 Kan. 61, 89, 82 P.3d 470 (2004); *State v. Pabst*, 273 Kan. 658, 661-63, 44 P.3d 1230 (2002); *State v. Jamison*, 269 Kan. 564, 573, 7 P.3d 1204 (2000).

2019 Kan. App. Unpub. LEXIS 277 at *13.

Premeditation has a well-settled meaning in law that provides the minimum standard of conduct a prosecutor looks at to decide if the case should proceed a premeditated first-degree murder or as intentional second-degree murder. Therefore, this Court should find that the definition of premeditation is not vague, and not an improper delegation of power, because the definition provides a minimum standard for prosecutors to apply.

III. THE DISTRICT COURT PROPERLY EXCLUDED THE PRELIMINARY HEARING TESTIMONY OF MICHAEL WILLIAMS AT TRIAL.

Standard of Review

Whether proof regarding a witness's unavailability is sufficient is a question within the trial court's discretion. *State v. Mims*, 222 Kan. 335, 338, 564 P.2d 531 (1977). A trial court abuses its discretion when the act complained of "(1) is arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3) is based on error of fact." *State v. Morrison*, 302 Kan. 804, 359 P.3d 60 (2015).

Arguments and Authorities

The Defendant argues to this Court that he was not required to present any evidence that his witness was not available to testify at trial. But the Defendant is required to follow the same rules and law as the State. He failed to establish for the district court his efforts in securing the witness, one of the many pitfalls of representation oneself at trial. (R. 11, 9, 19). He was specifically told by the Court when asked to represent himself that "the rules of law are highly technical and will not be set aside in view of your status. You may waive Constitutional, statutory, and common law rights unknowingly. If the defendant is in custody, like you are, it is difficult for you to locate witnesses, interview them, prepare subpoenas, and have them served. So those are the issues that I want to make sure that you understand before you decide to waive your right to an attorney." (R. 11, 19). He now asks this Court to give him a different standard and test to apply in his case.

He asks this Court to relieve him of the duty to present evidence of the unavailability of a witness.

To establish a witness is unavailable under K.S.A. 60-459, the party moving for the admission of the witness's prior testimony *must show* it acted in good faith and made a diligent effort to find the witness and serve the witness with a subpoena or otherwise secured the witness' attendance at trial. *See State v. Plunkett*, 261 Kan. 1024, 1034, 934 P.2d 113 (1997) (emphasis added). K.S.A. 60-459(g) provides: "unavailable as a witness includes situations where the witness is. . . (5) 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." A district court must assess the sufficiency of the proponent's efforts based on all the circumstances. *State v. Flournoy*, 272 Kan. 784, 800, 36 P.3d 273 (2001).

It is only after the proponent of the testimony proved they made diligent efforts that a witness may be deemed unavailable. *See State v. Mims*, 222 Kan. 335,338, 564 P.2d 531 (1977). This requires the presentation of evidence on the part of the Defendant.

In *State v. Brown*, 181 Kan. 375, 394-95, 312 P.2d 832 (1957), this Court laid out the requirements necessary to establish that a witness is unavailable:

> Statements of counsel, however, are not evidence any more than are the opening statements of counsel in the presentation of a case before a jury or to the court. The foundation, which the law contemplates, is a foundation in evidence. It is proof that is required. Proof that due diligence has been exercised and that the testimony of the witness is not available. A proper foundation for the

> introduction of testimony of the character now under consideration required that the assistant county attorney and deputy sheriff, as well as the other necessary witnesses, testify under oath with respect to the facts relied upon as the foundation, giving the defendant full opportunity to cross examine. In addition, documentary evidence relied upon for the foundation should be properly introduced into evidence.

Proceeding to trial pro se has many pitfalls, including challenges contacting witnesses. (R. 11, 9, 19). This issue is a classic example of that pitfall. The Defendant was required to show his efforts in locating the proposed witness, and what efforts had been made in locating that witness. However, because he chose to be his own attorney, he did not know the rules regarding this and, therefore, could not meet his burden. He now asks this Court to rewrite its well-established rules.

But the district court properly informed the Defendant that he needed to have somebody testify that the witness is unavailable and to the efforts made to secure his presence. (R. 27, 286). The Court informed the Defendant that it did not believe he was ready to make the motion, and if he was, there was not enough evidence for the Court to find the witness unavailable. (R. 27, 286-87). He still had another day to present a witness to testify about his reasonable efforts to serve the witness. (R. 27, 286). However, he chose to not present the testimony of the process server about the reasonable efforts to get the witness served. (R. 27, 286-89, 382-83).

The Defendant could not establish for the trial court the location of Williams, or what efforts his process server took to serve Williams. The only evidence in the record is that a subpoena was issued for Williams. (R. 1, 33). There is no actual

evidence as to what happened with the subpoena, just the proffered statements of stand-by counsel. (R. 27, 382-83). The district court had no evidence before it to make any findings about the reasonable efforts to serve the witness. The district court properly denied the Defendant's motion to admit Michael Williams' preliminary hearing testimony.

If this Court finds that the Defendant met his burden showing it was error to exclude Williams' preliminary hearing transcript, then that error was harmless based on the entire record. If an error relates to the application of a rule of evidence or procedure and not to a complete denial of a defense, the harmless error standard of K.S.A. 60-261 and K.S.A. 60-2105 applies, rather than the constitutional harmless error standard of *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705, *reh. denied* 386 U.S. 987, 87 S. Ct. 1283, 18 L. Ed. 2d 241 (1967). A constitutional error is harmless if the State can show "beyond 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 probability that the error contributed to the verdict." *State v. Ward*, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 (2011). The factors an appellate court can use in reviewing the erroneous exclusion of evidence for harmless error include: "the importance of the witness' testimony, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and the overall strength of the case." *State v. Ultreras*, 296 Kan. 828, 858-59, 295 P.3d 1020 (2013).

Based on the entire record, there is no reasonable probability that any error in excluding Williams' testimony would have contributed to the jury's verdict. Here, the Defendant admitted Defendant's Exhibit A which contained Williams' statement to police. In the summarized statement in Defendant's Exhibit A contained:

> On 1 February 2019, Det Burgtorf and Det Sutton took a taped statement of Michael Williams who said that he had witnessed the shooting be McCord's liquor store. Williams said that he was on his way to work when he realized he had forgotten his lighter. He stopped to get a light for his cigarette from a guy standing next to a real nice black Cadi. Williams felt like it was safe to get a light from that guy since the guy driving the nice Cadi felt safe enough to talk with him in the area. Williams mentioned to the guy standing outside to see if he had a light and he shook his head yes. Williams walked up to the Cadi. There was a black male in the driver's seat and a black female in the passenger seat. They were arguing. Williams thought the couple were just having a marital argument given Valentine's Day was only a few days away and he wasn't trying to get in their business. He did hear the male asking the female to get out of the vehicle several times. Williams started to walk back to his vehicle and the female was getting out of the Cadi. Williams heard 2 shots and saw the female was being shot. The shots had to come from the inside of the vehicle. Williams started backing his vehicle up to get space between him and the black Cadi. Williams heard two more shots and saw they were hitting the wall of the funeral home. The black cadi pulled off and sped away. Williams tried to follow but he was trying to keep some space and lost sight of him. Williams didn't stay because he was afraid of being late to work and losing his job. Williams called as soon as he got home from work so he could give a statement. (Defendant's Exhibit A).

While the preliminary hearing transcript would have established that

Williams never saw the Defendant at the scene of the crime, it would have also have established that Williams had heard the Defendant to tell the victim to get out of the vehicle before the shooting. (R. 32, 17, 25). Williams exact statement on cross examination was "I know your voice. I heard your voice. I don't know your face. I heard you talking and I heard you when you raised your voice." (R. 32, 25). He testified later on cross-examination that he did not see the driver he only heard the driver's voice. (R. 32, 41). There is no reasonable probability that the outcome of the trial would have been different if William's preliminary hearing transcript had been admitted.

IV. THIS COURT SHOULD REMAND THE CASE ON THE SOLE ISSUE OF WHETHER THE DEFENDANT INTENDED TO PROCEED PRO SE AFTER HIS CONVICTION.

Standard of Review

The right to assistance of counsel and the related right to self-representation are legal questions subject to de novo review. *State v. Bunyard*, 307 Kan. 463, 470, 410 P.3d 902 (2018).

Arguments and Authorities

The Defendant acknowledges that he gave a knowing and intelligent waiver of counsel. The question for this Court is whether he re-asserted his right to counsel; and if a new colloquy is needed if the Defendant requests standby counsel be silenced.

The right to counsel and the right to self-representation present a potential tension, requiring district courts to indulge "every reasonable presumption against

waiver" of the right to counsel. *State v. Bunyard*, 307 Kan. 463, 470, 410 P.3d 902 (2018). However, "[w]hether a lawyer could better represent a defendant . . . is not the question for the court to decide." *Id.* at 470-71. And a violation of the right to self-representation is structural error, not amenable to a harmless error analysis. *Id.* at 471.

A waiver of counsel need not be renewed at each stage of the proceeding. Once a valid waiver has been made, it is valid until there is an "'intervening event[that] substantially change[s] the circumstances' existing at the time of the waiver to the extent that 'the defendant can no longer be considered to have knowingly and intelligently waived the right to counsel.'" *State v. Turner*, 2016 Kan. App. Unpub. LEXIS 774, 379 P.3d 1152, No. 114,378, * 7 (Kan. Ct. App. 2016) (unpublished opinion) (quoting *United State v. Hantzis*, 625 F.3d 575, 580-81 (9th Cir. 2010)).

The Court in Hantzis stated:

> 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 or there are circumstances which suggest that the waiver was limited to a particular stage of the proceedings. *Id.*

Several other federal courts have made the same finding. *See* United *States v. McBride*, 362 F.3d 360, 367 (6th Cir. 2004); *United States v. Unger*, 915 F.2d 759, 762 (1st Cir. 1990); *United States v. Fazzini*, 871 F.2d 635, 643 (7th Cir. 1989); *Arnold v. United States*, 414 F.2d 1056, 1059 (9th Cir. 1969); *Davis v. United*

States, 226 F.2d 834, 840 (8th Cir. 1955).

The Defendant argues that a new colloquy is necessary if there is an intervening event. Here, Defense counsel stated that he would do the post-trial motions, but it appears between the status hearing and sentencing that the Defendant wished to continue as his own attorney. *Compare* (R. 29) *with* (R. 30).[2] The State would ask the Court to remand for additional fact finding as to what happened between standby counsel and the Defendant prior to sentencing. It may be that the Defendant expressed that he no longer wished the help of his counsel. *See McKaskle v. Wiggins*, 465 U.S. 168, 465 U.S. 168, 104 S. Ct. 944 (1984) ("[o]nce a pro se defendant invites or agrees to any substantial participation by counsel, subsequent appearances by counsel must be presumed to be with the defendant's acquiescence, at least until the defendant expressly and unambiguously renews his request that standby counsel be silenced."). If the facts are that the Defendant unambiguously renewed his request for standby counsel to be silenced, then the inquiry is over. If not, then a new sentencing hearing would be required.

V. THE DEFENDANT WAS PROPERLY TAKEN INTO CUSTODY. (PRO SE ISSUE I).

The Defendant's brief does not explain whether the issue is that the district court erred in denying his motion to dismiss or whether the district court erred in

[2] Trial counsel for the State will inform this Court that there was discussion prior to going on the record that the Defendant no longer wished to have the help of his attorney. On August 10, 2021, standby counsel informed the Court and the State that the Defendant refused to come out of his cell to meet with counsel about post-trial motions. Counsel asked the jail staff to inform the Defendant he was there to discuss post-trial motions. They returned stating that he would not meet with his attorney. For unknown reasons, this information was not discussed on the record to which this Court is confined.

denying his motion to suppress based on an illegal arrest. It appears his argument is that the district court erred in denying his motion to dismiss for an illegal arrest. As such, the State will focus its response on that issue.

Standard of Review

Whether a criminal complaint should be dismissed as a result of an illegal arrest is a matter within the discretion of the district court upon a showing of extremely compelling circumstances. *See State v. Miller*, 257 Kan 844, 854, 896 P.2d 1069 (1995).

Arguments and Authorities

The Defendant asks this Court to reverse his convictions due to a warrantless arrest. However, an officer can arrest a person without a warrant if the officer has probable cause to believe the person has committed a felony. K.S.A. 22-2401(c)(1). *See State v. Aikins*, 261 Kan. 346, 355, 932 P.2d 408 (1997). "Probable cause is the reasonable belief that a specific crime has been committed and that the defendant committed the crime. It does not require evidence of each element of the crime or evidence to the degree necessary to prove guilt beyond a reasonable doubt." *Id.*

In *State v. Williams*, 1998 Kan. App. Unpub. LEXIS 1171, No. 78,857 (Kan. App. 1998) (unpublished opinion), officers were informed that Williams was suspected of an aggravated battery and a pick-up order had been issued for him. *Id.* at *2-3. The Court of Appeals affirmed the district court's denial of the motion to dismiss because the officer had knowledge that Williams was suspected of committing an aggravated battery, and the officer had probable cause to believe

Williams committed the felony. *Id* at *3.

Here, officers with the Kansas City Missouri were conducting a random check through REGIS for individuals with outstanding warrants. (R. 32, 95). Officer Riffle saw that there was a pickup order displayed for the Defendant. (R. 32, 95). He acknowledged that a pickup order is not an arrest warrant. (R. 32, 95). The officers went to the house and knocked on the door. (R. 32, 95). The Defendant's wife answered the door. (R. 32, 96). The officer asked if the Defendant was there. (R. 32, 96-97). The officer testified that the Defendant's wife invited them in the house. (R. 32, 97). They were talking through the storm door, and when they said they needed to talk to the Defendant, she opened the storm door to let them into the house. (R. 32, 97-98). They then entered the home and went upstairs to the bedroom. (R. 32, 98). They went upstairs and saw the Defendant digging in a clothes pile. (R. 32, 98). They informed the Defendant that he was under arrest. (R. 32, 98).

The officers testified about the procedures regarding a pick-up order. (R. 32, 100). One testified that it is similar to a warrant and that an individual is placed into handcuffs and taken to the police station for questioning. (R. 32, 100). The officer described the difference between a pickup order and arrest warrant. (R. 32, 111). The State admitted the pickup order at State's Exhibit 2 for that hearing. (R. 32, 112). The Court inquired of the witness if State's Exhibit 2 was the probable cause pick-up order he had received. (R. 32, 118). The officer indicated that it was. (R. 32, 118).

The Defendant's case is identical to that of *State v. Williams*, 1998 Kan. App. Unpub. LEXIS 1171, No. 78,857 (Kan. App. 1998) (unpublished opinion). Here, the Kansas City, Kansas Police Department issued a pick-up order for the Defendant which contained the same probable cause statement for his arrest. *Compare* (R. 32, Defendant's Exhibit 2) *with* (R. 2, 2-4). Because the officers effectuating the pick-up order had probable cause to believe the Defendant committed a felony, i.e. murder, they were able to take him into custody. After hearing the officers' testimony, and reviewing the probable cause pick-up order, the Court found that there was probable cause for the officers to arrest him; therefore, there was no basis for to dismiss the case. (R. 15, 28-34). The Defendant's arrest was not illegal, and dismissal is not warranted.

Additionally, it appears that the Defendant argues the Court erred in admitted evidence seized without a warrant from his home. The Defendant did not object to the admission of the clothing and ammunition found at his home during the trial; therefore, the admissibility of those two items have not been preserved for this Court to review. (R. 27, 248, 293). "When a trial court has denied a motion to suppress, the moving party most object to the introduction of that evidence at the time it was offered at trial to preserve the issue for appeal." *State v. Hernandez*, 294 Kan. 200, 212, 273 P.3d 774 (2012). The Defendant failed to object to the admission of these items at trial and has failed to preserve this issue for review.

The Defendant did object at trial to the admission of photographs taken of his vehicle that was seized from the garage. The State will focus its response on

whether the vehicle was properly seized. Prior to trial, the Defendant filed a motion to suppress evidence based on an illegal arrest and on the grounds the items were taken without his consent or warrant. (R. 1, 81-87, 10206, 111-16). The Court heard testimony from the officers that conducted the search and seizure. (R. 32, 95-113).

The Defendant's first argument was they were taken after an illegal arrest. However, as previously explained, the Defendant was not illegally arrested. Because he was not illegally arrested, that cannot be a basis to suppress. His next argument was that the items were taken without a warrant and without his consent. The State agrees there was no search warrant for his home. That's because the officers had valid consent to search and seize the items based on consent by the Defendant's wife. (R. 32, 112; Preliminary Hearing/Motion Hearing State's Exhibit 3).

A warrantless search may be justified by consent from a third party who possessed common authority over other sufficient relationship to the premises or effects sought to be inspected." *United State v. Matlock*, 415 U.S. 164, 171, 39 L. Ed. 2d 242, 94 S. Ct. 988 (1974). Under the apparent authority rule, a consent to search is valid when the facts available to the officer would warrant a person of reasonable caution to believe that the consenting party had authority over the premises to be searched. *Illinois v. Rodriguez*, 497 U.S. 177, 188-89, 111 L. Ed. 2d 148, 110 S. Ct. 2793 (1990). This standard was adopted by this Court in *State v. Raley*, 16 Kan. App. 2d 589, 591, 87 P.2d 78 (1992). Here, the Defendant's wife had authority over all of the home because it was their marital home. (R. 32, 151-

68).

The Defendant's wife testified at the suppression hearing. (R. 32, 151-68). She testified that the home that was searched what her home and that she goes everywhere in the home, including into the garage where the car is kept. (R. 32, 155). He testified that she was previously law enforcement and was familiar with search and seizure law. (R. 32 (161-62). She testified that law enforcement may seizure property from a marital home with consent of a spouse who is present. (R. 32, 163). Additionally, Officer Tommy Woods testified that the Defendant's wife read and signed a consent to search form for the home. (R. 32, 121; Preliminary Hearing/Motion Hearing State's Exhibit 3). He testified that he had a conversation with the Defendant's wife where she told him that she was previously law enforcement and was familiar with what consent was and what a search warrant was. (R. 32, 121,129-30). Officer Joseph Melna was also present for the consent and testified that it appeared that the Defendant' wife had apparent authority over the contents of the home and was a co-occupant of the home. (R. 32,135-36). Based on all the testimony presented to the trial court, it was clear that officers believed that the Defendant's wife had authority to consent to the search. The Court found that his wife knew she was consenting because she had been a law enforcement officer and "[t]here is not a law enforcement officer out there who doesn't understand that consent is an exception to the search warrant requirement." (R. 15, 10-11). The trial court properly determined that the Defendant' wife had authority to consent, and her consent was valid. The Court should find that the

evidence was properly seized.

However, if this Court finds that his arrest was unlawful and his property was unlawfully seized, any error would have been harmless. The erroneous admission of evidence is subject to review under a harmless error analysis. *State v. Longstaff*, 296 Kan. 884, 89, 299 P.3d 268 (2013). A constitutional error is harmless if the State can show "beyond 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 probability that the error contributed to the verdict." *State v. Ward*, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 (2011).

The evidence that was seized from the home was a box of .40 caliber ammunition; clothing; and the Defendant's vehicle. Without this evidence at trial, the case against the was strong. There was video evidence establishing the Defendant's car at the scene of the homicide, there was an eyewitness saying the Defendant did it, and there was the Defendant's own exhibit that put him at the scene of the shooting. (R. 27, 165, Trial Exhibits 14-17, Defendant's Exhibit A). There were videos admitted at trial (Trial Exhibits 14-17). Once showed the exit his vehicle and walk into the liquor store to make a purchase, this occurred prior to the homicide. (Trial Exhibits 15). At trial the owner of the liquor store identified the Defendant and his vehicle in Trial Exhibit 15. (R. 27, 93). In Trial Exhibit 17, the video of the homicide, the Defendant and his vehicle were identified by both Hollinshed and the owner of the liquor store. (R. 27, 96-97, 155-56).

There is no reasonable probability that that if the evidence was illegally

obtained, that it had any effect on the verdict, especially when the Defendant put before the jury that he was at the homicide when it occurred. (Defendant's Exhibit A).

VI. THERE WAS NO PROSECUTORIAL ERROR. (PRO SE ISSUE II).

The Defendant claims that prosecutor committed misconduct in closing and throughout the trial. It appears from his brief the specific issue the Defendant has is with how the prosecutor described the location of the wound to the jury.

Standard of Review

A claim of prosecutorial error is governed by *State v. Sherman*, 305 Kan. 88, 378 P.3d 1060 (2016). In *Sherman*, the Kansas Supreme Court recited the standard of review as a two-step process in which an appellate court must first decide whether a prosecutorial act complained of falls outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial. *Id.* at 109. If that error is found, "the appellate court must next determine whether [it] prejudiced the defendant's due process rights to a fair trial." *Id.* And to do that, the court uses the constitutional harmlessness inquiry from *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Prosecutorial error is harmless if the State proves beyond a reasonable doubt the error will not or did not affect the trial's outcome in light of the entire record, *i.e.*, when there is no reasonable possibility, the error contributed to the verdict. *State v. Sherman*, 305 Kan. 88, 109 378 P.3d

1060 (2016).

Arguments and Authorities

The Defendant claims that the prosecutor committed error by misstating the evidence throughout the trial that the victim was shot in the back. He claims these statements were not supported by the evidence. However, the record shows that the statements of the prosecutor were supported by the evidence. During trial, the Defendant asked Hollinshed about the shooting. The Defendant asked Hollinshed where the witness got shot on her body. (R. 27, 165). Hollinshed testified that it was in the back. (R. 27, 165).

Detective Sutton of the Kansas City, Kansas Police Department observed the autopsy of the victim and testified about those observations. He testified that there was an entrance wound towards her back, not her front. (R. 27, 231).

The Defendant argues that there was no testimony presented to support the prosecutor's claim that the victim was shot in the back. Detective Burgtorf testified that to cause the injuries to the victim that the Defendant caused, he would have to have aimed at her back. (R. 27, 408). The autopsy report showed that lethal bullet entered the back of her arm traveled out of her arm and entered her flank. (State's Exhibit 1). This was a shot to her back, and the bullet entered her back. (State's Exhibit 1 & State's Exhibit 4, R. 27, 408). Defective Burgtorf testified that the injury fatal entrance wound was at the back kidney area. (R. 27 408).

When a prosecutor's statements are based on admitted evidence, the first prong of the prosecutorial error fails. *See State v. Blevins*, 313 Kan. 413, 438, 485

P.3d 1175 (2021) (citing *State v. Wilson*, 309 Kan. 67, 78, 431 P.3d 841 (2018)). Because all the prosecutor's statements were supported by admitted evidence in at trial, the prosecutor did not commit error, therefore reversal is no warranted.

Additionally, the Defendant also takes the prosecutor's statements out of context. Prosecutors have wide latitude in crafting their closing arguments. *See State v. Tahah*, 302 Kan. 783, 87, 358 P.3d 819 (2015). In determine whether a particular statement falls outside of the wide latitude given to prosecutors, the court considers the context in which the statement was made, rather than analyzing the statement in isolation. *State v. Thomas*, 307 Kan. 733, 744, 415 P.3d 430 (2018). The actual statement made to the jury was, "Angie was shot in the back. She was shot in the lower back. Some people may say it's the side. Some when we were talking about it as the kidney area, toward the back side of Angie versus the front side of Angie." (R. 27, 468). The prosecutor also stated to the jury "[y]ou're gonna have the autopsy photo of Angie. Use your common sense. If getting shot in the kidney areas is your back or your side, whatever you want to call it, it's not the front. She didn't - - she didn't see it coming." (R. 27, 488). Here, the Defendant takes the claimed error out of context. The prosecutor's statement of about the injury was supported by the evidence. (State's Exhibit 1 & State's Exhibit 4, R. 27, 408).

If this Court finds the prosecutors statements about the injury to the victim were erroneous, it should find that the statements were harmless considering all the evidence presented to the jury. Prosecutorial error is harmless if the State proves beyond a reasonable doubt the error will not or did not affect the trial's outcome in

light of the entire record, *i.e.*, when there is no reasonable possibility the error contributed to the verdict. *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016). Appellate courts often weigh jury instructions when considering whether any prosecutorial error is harmless. *State v. Brown*, 316 Kan. 154, 170, 513 P.3d 1207 (2022). This is because it is presumed that the jurors follow the instruction given to them by the court. *Id.* Here, the prosecutor specifically told the jury to disregard any statement of counsel that was not supported by the evidence. (R. 27, 490).

Further, the jury had the autopsy photos and could tell for themselves if she was shot in the side or the back, and if a reasonable person could use the two terms interchangeably based on the victim's wounds. Even if there was a misstatement, it would not have affected the verdict.

Also, the evidence the Defendant committed this crime was strong. There was video evidence establishing the Defendant's car at the scene of the homicide, there was an eyewitness saying the Defendant did it, and there was the Defendant's own exhibit that put him at the scene of the shooting. (R. 27, 165, Trial Exhibits 14-17, Defendant's Exhibit A).

VII. THE STATEMENTS PROVIDED TO THE JURY WERE NOT FALSE AND DID NOT VIOLATE HIS RIGHT TO A FAIR TRIAL. (PRO SE ISSUE III & IV(A)).

The Defendant argues that he was denied a fair trial when Hollinshed testified that the Defendant shot the victim in the back, when Hollinshed identified the Defendant as D.J., and when Hollinshed testified that the Defendant possessed a 40-

caliber handgun and believed it to be the murder weapon. However, the Defendant fails to preserve these issues for this Court to review. "Evidentiary errors *shall not be reviewed on appeal* unless a party has lodged a timely and specific objection to the alleged error at trial." *State v. King*, 288 Kan. 333, 349, 204 P.3d 585 (2009). The Defendant failed to make a timely and specific objection to Hollinshed's testimony that the Defendant was D.J. (R. 27, 157). The Defendant failed to lodge a timely and specific objection to Hollinshed's testimony that the victim was shot with a 40-caliber handgun and that he believed that it was the same handgun the Defendant had shown him two weeks prior. (R. 27, 159-161). For this reason, this Court should decline to review these claims of error. However, if this Court were to review the claimed errors, it should find that there no errors warranting reversal.

Standard of Review

The admissibility of evidence at trial lies in the sound discretion of the trial court. *See State v. Sims*, 265 Kan. 166, 175, 960 P.2d 1271 (1998). Judicial discretion is abused if judicial action (1) is arbitrary, fanciful, or unreasonable, *i.e.,* if no reasonable person would have taken the view adopted by the trial court; (2) is based on an error of law, *i.e.,* if the discretion is guided by an erroneous legal conclusion; or (3) is based on an error of fact, *i.e.,* if substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based. *State v. Gonzalez,* 290 Kan. 747, 755-56, 234 P.3d 1 (2010).

Arguments and Authorities

If this Court finds all of these claims of error are properly before it, it should find that there is no reversable error.

A. The Defendant invited the error he claims with regards to Hollinshed's testimony.

It is fundamental that a party who invites and leads a court into error will not be heard on appeal to complain of that action. *State v. Parks*, 308 Kan. 39, 42-43, 417 P.3d 1070 (2018) ("Generally, a defendant cannot complain about a claimed error that was invited."). The Defendant was the one that was asking about where the victim was shot. (R. 27, 164-67). He was attempted to impeach Hollinshed and was asking him about where the victim was shot. (R. 27, 164-67). He was the first to ask Hollinshed about this. (R. 27, 145-62). The first time there was testimony from Hollinshed about the victim being shot in the back was when the Defendant asked "What part of her body did you see her get shot? Was it in her back like you testified at the last preliminary hearing?" (R. 27, 165). Hollinshed said, "Yeah, you shot her in the back." (R. 27, 165). There was no objection to this testimony nor a motion to strike. (R. 27, 165). The Defendant tried to impeach him again asking, "do you not remember that you said she was shot two times in her back?" (R. 27, 165). Hollinshed stated, "you said two times in the back. I said one hit the wall and the second hit her." (R. 27, 165).

If there was any error in Hollinshed testifying that the victim was shot in the back, it was harmless in light of the entire record. The wrongful admission or

exclusion of evidence typically creates a nonconstitutional error. *See State v. Broxton*, 311 Kan. 357, 366, 461 P.3d 54 (2020) (erroneous exclusion of evidence); *State v. Torres*, 294 Kan. 135, 143-44, 273 P.3d 729 (2012) (erroneous admission of evidence). The party benefiting from the error must show there was no reasonable probability the wrongfully admitted evidence affected the outcome of the trial as a whole. *See State v. Broxton*, 311 Kan. 357, 366, 461 P.3d 54 (2020). The evidence the Defendant committed this crime was strong. There was video evidence establishing the Defendant's car at the scene of the homicide, there was an eyewitness saying the Defendant did it, and there was the Defendant's own exhibit that put him at the scene of the shooting; additionally the pictures, testimony and autopsy report support a conclusion that the victim was shot in the back. And even if they don't, the jury would rely on that evidence over any possible discrepancy between the back and the side of the victim.

B. The Defendant is D.J.

The Defendant is D.J.; therefore, there was no misstatement by Hollinshed. (R. 27, 155, 157). The Defendant does not make any more argument about this issue. An issue not briefed by an appellant is deemed waived or abandoned. *State v. Martin*, 285 Kan. 994, 998, 179 P.3d 457 (2008). This Court should find that the Defendant has failed to brief the issue for this Court to review.

However, if this Court finds that the issue is not abandoned and properly briefed, this Court should find that Hollinshed properly identified the Defendant as D.J. (R. 27, 155. 157). The Defendant argues that no one identified him as either

D.J. Morris Hollinshed testified that he recognized the Defendant, and would call him "J.D." (R. 27, 155). The State asked a clarifying question on whether he knew the Defendant as J.D. or D.J., and Hollinshed said D.J. (R. 27, 155). The Defendant did not make a timely objection, nor a legal objection. (R. 27, 155). His objection was:

> Your Honor, I object. She's giving him - - she's telling him what to say.
>
> ...
>
> He - -he - - he - - he can answer for himself. She's telling him what to - - J.D. and D.J. and all that kind of J.J. (R. 27, 155).

The Court ruled that he had not made a timely objection. (R. 27, 155). Then after a few questions, Hollinshed pointed to the Defendant and called him D.J. and said that was Dary Green. (R. 27, 157).

"Evidentiary errors *shall not be reviewed on appeal* unless a party has lodged a timely and specific objection to the alleged error at trial." *State v. King*, 288 Kan. 333, 349, 204 P.3d 585 (2009). The Defendant failed to make a timely objection to Hollinshed identifying him as D.J.; therefore, this Court should decline to reach that issue. If this Court finds that the objection was timely, this Court should find that the question and answer were proper. The Defendant did not make a legal objection, at best his objection could be construed as leading. The asking of a leading question does not bar the admission of the evidence in and of itself. It would have just signaled to the prosecutor to rephrase the question in a different manner to get the

same evidence admitted. As such, any error would have been harmless. However, the Defendant failed to ask to have this testimony stricken; therefore, the Court could not have abused its discretion in allowing Hollinshed to testify that the Defendant was D.J.

If this Court finds that the trial court abused its discretion in the admission of Hollinshed's identification of the Defendant as D.J., it would be harmless in light of the record as a whole. The wrongful admission or exclusion of evidence typically creates a nonconstitutional error. *See State v. Broxton*, 311 Kan. 357, 366, 461 P.3d 54 (2020) (erroneous exclusion of evidence); *State v. Torres*, 294 Kan. 135, 143-44, 273 P.3d 729 (2012) (erroneous admission of evidence). The party benefiting from the error has to show there was no reasonable probability the wrongfully admitted evidence affected the outcome of the trial as a whole. *See State v. Broxton*, 311 Kan. 357, 366, 461 P.3d 54 (2020). Here, even if the Court would have prevented Hollinshed from saying the Defendant was D.J., he would have still been able to point at the Defendant and identify him as the killer of Gatlin. Therefore, the outcome of the trial would not have been affected because the witness would still identify the Defendant as the shooter. If this Court finds that the trial court abused its discretion in the admission of Hollinshed's identification of the Defendant as D.J., it would be harmless in light of the record as a whole.

C. Hollinshed had personal knowledge of the Defendant's firearm.

The Defendant argues that the testimony about the 40-caliber was a misrepresentation and outside the scope of evidence. However, this is incorrect.

All relevant evidence is admissible. K.S.A. 60-407(f). Here, the belief by the Detective was that the victim was shot with a 40-caliber firearm. (R. 27). They did not recover the weapon used, but 40-caliber ammunition was located in the Defendant's home. (R. 27, 249). Hollinshed testified that the Defendant owned a 40-caliber firearm. (R. 27, 159-161). The Defendant had shown it to him two weeks prior to the murder and told him it was a 40-caliber firearm. (R. 27, 159-161). Hollinshed testified that the firearm the Defendant pulled out shortly before shooting the victim looked exactly like the one the Defendant showed him two weeks prior. (R. 27, 159-161).

Even if error could be found, the wrongful admission or exclusion of evidence typically creates a nonconstitutional error. *See State v. Broxton*, 311 Kan. 357, 366, 461 P.3d 54 (2020) (erroneous exclusion of evidence); *State v. Torres*, 294 Kan. 135, 143-44, 273 P.3d 729 (2012) (erroneous admission of evidence). The party benefiting from the error has to show there was no reasonable probability the wrongfully admitted evidence affected the outcome of the trial as a whole. *See State v. Broxton*, 311 Kan. 357, 366, 461 P.3d 54 (2020).

The evidence the Defendant committed this crime was strong. There was video evidence establishing the victim getting out of the Defendant's car, there was an eyewitness saying the Defendant did it, and there was the Defendant's own exhibit that put him at the scene of the shooting, additionally law enforcement located 40-caliber ammunition at the Defendant's home. (R. 27, 165, 250, Trial Exhibits 14-17, Defendant's Exhibit A).

VIII. THE DEFENDANT IS D.J. AND THE WITNESSES TESTIFIED AS SUCH. (PRO SE ISSUE IV).

It is unclear what the Defendant is actually arguing in Issue 4. Is appears that he makes two arguments in this issue: A) the district court erred in failing to suppress Morris Hollinshed's identification of the Defendant as D.J., and B) there was insufficient evidence to establish that the Defendant and D.J. were the same person. These were addressed previously in this brief in Issue I and Issue VII.

CONCLUSION

For all the above reasons, this Court should affirm the Defendant's conviction for first-degree murder. Additionally, if this Court believes there needs to be a new waiver of the Defendant's right to counsel for sentencing, then this Court should remand for further fact finding at the trial level.

Respectfully submitted,

MARK A. DUPREE SR.
Wyandotte County District Attorney
710 N. 7th Street – Suite 10
Kansas City, KS. 66101

/s/ Kayla Roehler
KAYLA ROEHLER #26796
Deputy District Attorney
Wyandotte County District Attorney's Office
710 N. 7th Street – Suite 10
Kansas City, KS. 66101
(913) 573-2851
(913) 573-2948 (Fax)
Email address: DAWyCoefiling@wycokck.org

KRIS W. KOBACH
Attorney General
Memorial Hall Building
120 S.W. 10th Avenue - 2nd Floor
Topeka, KS. 66612

ATTORNEYS FOR APPELLEE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of the above and foregoing Brief of Appellee was made by e-mailing a copy to the Kansas Appellate Defender Office, Jayhawk Tower, 700 Jackson, Suite 900, Topeka, KS 66603 at ADOService@sbids.org and mailed to the defendant at Winfield Correctional Facility on the 5th day of July, 2023.

/s/ Kayla Roehler
Kayla Roehler, #26796
Deputy District Attorney

Mays v. State

Court of Appeals of Kansas

April 26, 2019, Opinion Filed

Nos. 113,456, 113,457

Reporter
2019 Kan. App. Unpub. LEXIS 277 *; 439 P.3d 353; 2019 WL 1868365

SHAWNDELL MAYS, Appellant, v. STATE OF KANSAS, Appellee.

Notice: NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE KANSAS RULES FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE PACIFIC REPORTER.

Prior History: [*1] Appeal from Wyandotte District Court; R. WAYNE LAMPSON, judge.

State v. Mays, 277 Kan. 359, 85 P.3d 1208, 2004 Kan. LEXIS 141 (Mar. 19, 2004)

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

Core Terms

district court, trial counsel, ineffective, sentencing, juvenile, hearsay, self-defense, evidentiary hearing, murder, contends, first-degree, convicted, shootings, MOVANT, confession, custody, argues, appellate counsel, fail to object, proceedings, courts, jurors, failure to object, circumstances, misstated, asserts, cases, truck, reasonable probability, distinctive group

Counsel: Christopher Mann, of Mann Law Firm, P.A., of Lenexa, for appellant.

Shawndell Mays, appellant, Pro se.

Daniel G. Obermeier, assistant district attorney, Mark A. Dupree Sr., district attorney, and Derek Schmidt, attorney general, for appellee.

Judges: Before BRUNS, P.J., MALONE and POWELL, JJ.

Opinion

MEMORANDUM OPINION

PER CURIAM: This consolidated appeal has taken a very unorthodox procedural path to reach this panel. In 2001, a jury convicted Shawndell Mays of two counts of first-degree murder, two counts of attempted first-degree murder, two counts of criminal possession of a firearm by a juvenile, and one count of conspiracy to commit first-degree murder. Mays' convictions were affirmed on appeal by the Kansas Supreme Court in *State v. Mays*, 277 Kan. 359, 385, 85 P.3d 1208 (2004). In 2006, Mays moved for relief under K.S.A. 60-1507 based on a variety of grounds, including ineffective assistance of counsel. Unfortunately, the motion was not ruled upon for several years and Mays filed a petition for writ of mandamus in 2010. After counsel was appointed to represent Mays, his attorney filed another K.S.A. 60-1507 motion on his behalf in 2012 and supplemented [*2] it in 2013. The

district court ultimately dismissed both motions following a nonevidentiary hearing. Thereafter, Mays appealed.

On October 27, 2016, this court remanded the K.S.A. 60-1507 motion filed in 2006 to the district court for further proceedings but retained jurisdiction over the appeals. On remand, the district court held a hearing on December 22, 2016, and the district court filed a Journal Entry on March 7, 2017, in which it again denied the 2006 motion. Thereafter, the matter was returned to this court and the parties briefed the issues. In addition, Mays filed a supplemental pro se brief in which he asserted two additional issues. Although we do not find the majority of Mays' arguments to be persuasive, we do find that the district court should have held an evidentiary hearing on some of the issues relating to the effectiveness of his trial counsel. Thus, we affirm in part, reverse in part, and remand for an evidentiary hearing.

FACTS

In affirming Mays' convictions, the Kansas Supreme Court summarized the underlying facts as follows:

> "This case involved two separate drive-by shootings in January 2000. The first occurred on the night of January 24, 2000. According to the testimony of Marcus **[*3]** Quinn, he and Joseph Morton were sitting and talking in a car parked in an empty lot across the street from Quinn's home near 20th Street and Longwood in Kansas City, Kansas. While sitting there, Quinn saw a red truck. About 30 minutes later, Quinn saw the same red truck followed by a car. This time the truck stopped and its occupants shot multiple times at the Chevrolet Caprice in which Morton and Quinn were sitting. Quinn testified that the right side of his head was grazed, but he was not seriously injured. Morton ran away from the scene, but later died at a hospital. The second shooting occurred on the afternoon of January 26, 2000. Christopher Union and Lee Brooks were driving a white pickup truck near 30th and Spring when gunshots were fired at the truck. Both Brooks and Union were injured; Union died from his injuries.
>
> "The police investigation of the two shooting incidents eventually led to the custodial interrogations of Michael White, Shawndell Mays, Keith Mays, Peter Davis, and Carvell England on January 27, 2000. (Shawndell Mays will be referred to throughout this opinion as Mays; Keith Mays will be referred to by first and last name.) All of them talked to the investigators, **[*4]** describing the events of the two shootings to various degrees, with Mays and White admitting to firing shots during both incidents and all of them admitting to being a witness to one or both occurrences. Mays was 16 years old at the time of the shootings; he turned age 17 on January 29, 3 days after the second shooting.
>
> "In the same information, the State charged White, Mays, Davis, Keith Mays, and England with various charges relating to the shootings on January 24, January 26, or both. Three of the codefendants, including Mays, were juveniles. The court authorized the State to prosecute the three as adults pursuant to K.S.A. 38-1636(a)(2). The five codefendants' joint trial lasted nearly 3 weeks, during which 39 witnesses testified. The redacted statements of each of the five codefendants were played for the jury over

defense counsels' objections. Generally, all of the codefendants denied the allegations and, through cross-examination of the State's witnesses, sought to create reasonable doubt. Each codefendant also generally relied upon a self-defense theory.

"The jury convicted Mays of two counts of first-degree murder, two counts of attempted first-degree murder, two counts of criminal possession of [*5] a firearm by a juvenile, and one count of conspiracy to commit first-degree murder. The jury also convicted Davis and White of various charges but acquitted Keith Mays and England of all charges." *Mays*, 277 Kan. at 362-63.

Mays filed a pro se K.S.A. 60-1507 motion on June 29, 2006. In his motion, Mays asserted various trial errors and numerous claims of ineffective assistance of trial and appellate counsel. Evidently, the motion languished in the system for several years with little or no action being taken. As such, Mays filed a petition for a writ of mandamus on July 16, 2010, in which he brought the matter to the district court's attention.

On August 31, 2011, the district court appointed counsel to represent Mays on his K.S.A. 60-1507 motion. After the first attorney appointed to represent him failed to appear at a hearing, the district court appointed another attorney to represent Mays. The new attorney filed a second K.S.A. 60-1507 motion on behalf of Mays on November 5, 2012. Moreover, counsel supplemented the K.S.A. 60-1507 motion on September 30, 2013.

After a holding a nonevidentiary hearing, the district court granted the State's motion to dismiss on December 5, 2013. Mays filed two notices of appeal and this court consolidated the appeals on May 27, 2015. [*6] Subsequently, Mays filed a motion to remand the K.S.A. 60-1507 motion filed in 2006 to the district court for a hearing because the district court had failed to adequately address the issues raised in that motion. This court agreed and entered an order on October 27, 2016, remanding this matter to the district court "for the limited purpose of allowing for proceedings on the K.S.A. 60-1507 claim that was filed [in 2006]" However, this court retained jurisdiction over the consolidated appeal.

On December 22, 2016, the district court held a hearing to consider the K.S.A. 60-1507 motion filed by Mays in 2006. Although the district court and the parties suggest that this was an "evidentiary hearing," a review of the transcript reveals that no witnesses were called and no evidence was presented. Instead, the district court heard oral arguments from counsel on the issues presented. Following the hearing, the district court took the matter under advisement. On March 6, 2017, the district court entered an order denying the claims asserted by Mays in the K.S.A. 60-1507 motion filed in 2006.

On April 20, 2017, this court lifted the stay issued in this consolidated appeal and issued a briefing schedule. Because Mays failed to file a brief in a timely [*7] manner, we dismissed the consolidated appeal on November 2, 2017. However, on March 26, 2018, Mays filed a motion to reinstate the consolidated appeal based on the factors in *State v. Ortiz*, 230 Kan. 733, Syl. ¶¶ 1-3, 640 P.2d 1255 (1982). Our court agreed and reinstated the appeal. Now that the parties have fully briefed the issues presented, this matter is now ready for decision.

ANALYSIS

Standard of Review

At the outset, this case presents a very unusual question—did the district court hold an evidentiary hearing on either or both motions? The answer to this question is significant because our standard of review depends on the procedure followed by the district court. Although the district court and the parties all suggest that an evidentiary hearing was held on December 22, 2016, we have reviewed the hearing transcript and find nothing to indicate that evidence was presented. Likewise, we have scrutinized the record on appeal and can find nothing to indicate that Mays has ever been afforded the opportunity to present evidence over the many years that the K.S.A. 60-1507 motions were pending.

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

> "'(1) The court may determine that the motion, files, and case records conclusively show the prisoner is entitled **[*8]** to no relief and deny the motion summarily; (2) the court may determine from the motion, files, and records that a potentially substantial issue exists, in which case a preliminary hearing may be held. If the court then determines there is no substantial issue, the court may deny the motion; or (3) the court may determine from the motion, files, records, or preliminary hearing that a substantial issue is presented requiring a full hearing.' [Citation omitted.]" *Sola-Morales v. State*, 300 Kan. 875, 881, 335 P.3d 1162 (2014).

Because we can find nothing in the record to establish that the district court held a "full hearing" or that Mays ever turned down the opportunity to present evidence, we conduct a de novo review to determine whether the motion, files, and records of the case conclusively establish that Mays is not entitled to relief. See *Sola-Morales*, 300 Kan. at 881.

The right to counsel in criminal cases is provided by the Sixth Amendment to the United States Constitution:

> "'The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." This right to counsel is applicable to state proceedings under the Fourteenth Amendment. *Miller v. State*, 298 Kan. 921, 929, 318 P.3d 155 (2014). This guarantee includes the right to more than the mere presence of counsel[. It] also [includes] the effective assistance of counsel. **[*9]** *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674, *reh. denied* 467 U.S. 1267, 104 S. Ct. 3562, 82 L. Ed. 2d 864 (1984); see also *Chamberlain v. State*, 236 Kan. 650, 656-57, 694 P.2d 468 (1985) (adopting *Strickland*). We have acknowledged that "[t]he purpose of the effective assistance guarantee 'is simply to ensure that criminal defendants receive a fair trial.'" *State v. Galaviz*, 296 Kan. 168, 174, 291 P.3d 62 (2012) (quoting *Strickland*, 466 U.S. at 689.'" *Fuller v State*, 303 Kan. 478, 486, 363 P.3d 373 (2015).

Similarly, the Kansas Constitution Bill of Rights § 10 and K.S.A. 22-4503 enshrine the right to effective counsel. See *State v. Lawson*, 296 Kan. 1084, 1093-94, 297 P.3d 1164 (2013); Kan. Const. Bill of Rights § 10.

To prevail on a claim of ineffective assistance

of counsel, a criminal defendant must establish (1) that the performance of trial counsel was deficient under the totality of the circumstances, and (2) that the movant suffered prejudice—in other words, that there is a reasonable probability the jury would have reached a different result absent the deficient performance. *Sola-Morales*, 300 Kan. at 882 (relying on *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 [1984]). The burden to establish ineffective assistance of counsel is on the movant. *Fuller*, 303 Kan. at 486; *State v. Jackson*, 255 Kan. 455, 463, 874 P.2d 1138 (1994).

The benchmark for determining an ineffective assistance of counsel claim is whether the attorney's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a fair and just result. *Bledsoe v. State*, 283 Kan. 81, 90, 150 P.3d 868 (2007). Judicial scrutiny of counsel's performance in a claim of ineffective assistance of counsel is highly deferential and requires consideration of the totality of the evidence before the judge or jury. See **[*10]** *State v. Kelly*, 298 Kan. 965, 970, 318 P.3d 987 (2014). "[A] fair assessment of attorney performance requires that every effort must be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Crowther v. State*, 45 Kan. App. 2d 559, 564, 249 P.3d 1214 (2011).

To establish prejudice, the defendant must demonstrate a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *State v. Sprague*, 303 Kan. 418, 426, 362 P.3d 828 (2015). Where a movant cannot demonstrate the prejudice prong of *Strickland*, the court need not consider whether error actually occurred. See *Edgar v. State*, 294 Kan. 828, 830, 283 P.3d 152 (2012). Prejudice is demonstrated by a showing that there was a reasonable probability that, but for counsel's error, the outcome of the hearing would have been different. 294 Kan. at 829.

If counsel has made a strategic decision after making a thorough investigation of the law and the facts relevant to the realistically available options, then counsel's decision is virtually unchallengeable. Strategic decisions made after a less than comprehensive investigation are reasonable exactly to the extent a reasonable professional judgment **[*11]** supports the limitations on the investigation. *State v. Cheatham*, 296 Kan. 417, 437, 292 P.3d 318 (2013). Here, it is impossible to determine trial counsel's strategy because trial counsel has not testified nor has any other evidence been presented.

Failure to Challenge the Constitutionality of K.S.A. 21-3401

Mays contends that his convictions should be reversed because his trial attorney did not challenge the constitutionality of K.S.A. 21-3401. Specifically, he argues that the first-degree murder statute is unconstitutional for failing to provide a definition of premeditation. Mays asserts that because no definition is provided, the statute is so vague that it fails to give ordinary people fair notice of the conduct it punishes and invites arbitrary enforcement in violation of the Fifth Amendment to the Constitution of the United States. We disagree.

The question of whether a statute is

constitutional presents a question of law subject to unlimited review. *State v. Bollinger*, 302 Kan. 309, 318, 352 P.3d 1003 (2015), *cert. denied* 136 S. Ct. 858, 193 L. Ed. 2d 721 (2016). In reviewing a statute, the appellate courts presume statutes are constitutional and must resolve all doubts in favor of a statute's validity. Courts must interpret a statute in a way that makes it constitutional if there is any reasonable construction that would maintain the Legislature's apparent intent. *State v. Petersen-Beard*, 304 Kan. 192, 194, 377 P.3d 1127 (2016), *cert. denied* 137 S. Ct. 226, 196 L. Ed. 2d 175 (2016).

To determine whether a criminal **[*12]** statute is unconstitutionally vague, the appellate courts employ a two-part test. First, the court assesses whether the statute gives adequate warning of the proscribed conduct. A statute is unconstitutionally vague if it fails to "'provide a person of ordinary intelligence fair notice of what is prohibited.' [Citations omitted.]" *Bollinger*, 302 Kan. at 318. In the second step, the court determines whether the statute adequately guards against arbitrary and unreasonable enforcement. 302 Kan. at 318.

> "It is difficult for a challenger to succeed in persuading a court that a statute is facially unconstitutional. Such challenges are disfavored, because they may rest on speculation, may be contrary to the fundamental principle of judicial restraint, and may threaten to undermine the democratic process. It is easier for a challenger to succeed in persuading a court that a statute is unconstitutional as applied to that particular challenger. [Citations omitted.]" 302 Kan. at 318-19.

A void for vagueness challenge is based on the due process requirement that a statute's language must convey a sufficient warning of the conduct proscribed when measured by common understanding and practice. *State v. Adams*, 254 Kan. 436, 438, 866 P.2d 1017 (1994). A statute must also adequately guard against arbitrary and discriminatory **[*13]** enforcement. *State v. Bryan*, 259 Kan. 143, 146, 910 P.2d 212 (1996). A statute is unconstitutionally vague if it "'forbids the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application . . .'" *Adams*, 254 Kan. at 439 (quoting *State v. Dunn*, 233 Kan. 411, 418, 662 P.2d 1286 [1983]).

Vague laws offend several important values by impermissibly delegating basic policy matters to policemen, judges, and juries for resolution on a subjective basis, with the dangers of arbitrary and discriminatory application. *State v. Taylor*, 316 P.3d 172, 2014 WL 113451, at *4 (Kan. App. 2014) (unpublished opinion). See *City of Wichita v. Hackett*, 275 Kan. 848, 854, 69 P.3d 621 (2003). Significantly, a statute is not unconstitutionally vague if its words are commonly used, judicially defined, or have a settled meaning in law. *Hackett*, 275 Kan. at 853-54.

Here, Mays was convicted of premeditated murder under K.S.A. 21-3401. At trial, the jury was instructed that "[p]remediation means to have thought the matter over beforehand," as set forth in PIK Crim. 3d 56.04(b). As the State points out in its brief, the Kansas Supreme Court has rejected challenges to K.S.A. 21-3401 that are similar to the one asserted by Mays. See *State v. Groschang*, 272 Kan. 652, 668, 36 P.3d 231 (2001). Furthermore, our Supreme Court "has approved the PIK definition of premeditation in a series of cases." *State v. Lawrence*, 281 Kan. 1081, 1090-91, 135 P.3d 1211 (2006) (citing *State v. Martis*,

277 Kan. 267, 302, 83 P.3d 1216 [2004]); *State v. Hebert*, 277 Kan. 61, 89, 82 P.3d 470 (2004); *State v. Pabst*, 273 Kan. 658, 661-63, 44 P.3d 1230 (2002); *State v. Jamison*, 269 Kan. 564, 573, 7 P.3d 1204 (2000).

Mays fails to cite to any caselaw in support of his position that K.S.A. 21-3401 is unconstitutionally vague. In addition, **[*14]** he does not assert that the cases handed down by our Supreme Court on this issue were wrongly decided. Accordingly, we conclude that Mays has failed to establish his trial counsel was ineffective for failing to challenge K.S.A. 21-3401 for vagueness or that the result of his trial would have been different had she done so.

Failure to Challenge Legality of Confession

Next, Mays contends that his trial counsel was ineffective because she failed to challenge the legality of his confession under 18 U.S.C. § 5033, which addresses the procedure to be followed when a juvenile is taken into federal custody. Mays argues that his attorney should have challenged his confession because he was apprehended by the Fugitive Apprehension Task Force and, as a result, federal jurisdiction was invoked. Mays claims there is a reasonable probability that had his attorney challenged his confession under 18 U.S.C. § 5033, the result of the motion to suppress would have been different. Again, we disagree.

We note from a review of the record that trial counsel did attempt to suppress Mays' confession. Ultimately, the district court denied Mays' motion to suppress and admitted his statement into evidence at trial. On appeal, our Supreme Court evaluated the **[*15]** voluntariness of Mays' confession and concluded that "it was not error to determine that [Mays'] waiver of his *Miranda* rights was knowing, voluntary, and intelligent." *Mays*, 277 Kan. at 377. However, it does not appear that the issue of suppression under 18 U.S.C. § 5033 was presented on direct appeal.

Title 18 U.S.C. § 5033 provides:

> "Whenever a juvenile is taken into custody for an alleged act of juvenile delinquency, the arresting officer shall immediately advise such juvenile of his legal rights, in language comprehensive to a juvenile, and shall immediately notify the Attorney General and the juvenile's parents, guardian, or custodian of such custody. The arresting officer shall also notify the parents, guardian, or custodian of the rights of the juvenile and of the nature of the alleged offense.
>
> "The juvenile shall be taken before a magistrate forthwith. In no event shall the juvenile be detained for longer than a reasonable period of time before being brought before a magistrate judge."

K.S.A. 22-2102 mandates that the Kansas Code for Criminal Procedure "shall govern proceedings in all criminal cases in the courts of the state of Kansas." The Kansas Code for Criminal Procedure does not adopt—in whole or in part—federal criminal procedure. Moreover, **[*16]** we find nothing in the plain language of 18 U.S.C. § 5033 or in cases interpreting the federal law to mandate its application in state courts. Likewise, Mays cites no authority supporting his position that 18 U.S.C. § 5033 applies in state court proceedings.

Although we are aware of no Kansas case interpreting the application of 18 U.S.C. § 5033, federal courts have held that "a federal arrest or a federal charge is a necessary

prerequisite to the statute's application. [Citation omitted.]" *United States v. Doe*, 155 F. 3d 1070, 1076 (9th Cir. 1998). In *Doe*, which involved a defendant in tribal custody, the United States Court of Appeals for the Ninth Circuit found the United States Supreme Court's opinion in *United States v. Alvarez-Sanchez*, 511 U.S. 350, 114 S. Ct. 1599, 128 L. Ed. 2d 319 (1994), to be instructive. The United States Supreme Court held in *Alvarez-Sanchez* that the protections of 18 U.S.C. § 3501(c) (delay in bringing person before a magistrate) did not apply to a person questioned by a federal officer while being held on state charges. 511 U.S. at 358-59.

In *Doe*, the Ninth Circuit found the reasoning in *Alvarez-Sanchez* to be persuasive because both 18 U.S.C. § 5033 and 18 U.S.C. § 3501(c) address "someone being taken into 'custody' by an 'arresting officer.'" *Doe*, 155 F.3d at 1077. The Ninth Circuit also found that 18 U.S.C. § 5033 did not apply when the defendant was merely being questioned by the federal officer. It stated that the defendant in *Doe* "was being held **[*17]** on tribal charges of aggravated assault only. There is no doubt that he was in custody, but that custody was tribal and therefore did not trigger the protections of § 5033." 155 F.3d at 1077.

The Ninth Circuit did note in *Doe* that under special circumstances, a person may be deemed to be in federal custody "where there is a 'working arrangement' between the federal and tribal officers to deprive a suspect of federal procedural rights." 155 F.3d at 1078 (citing *United States v. Leeds*, 505 F.2d 161, 163-64 [10th Cir. 1974]). In this case, even though there were federal agents involved in Mays' arrest, there is no allegation of collaboration between federal and state authorities to deprive him of his rights under 18 U.S.C. § 5033. Under these circumstances, we conclude that Mays has failed to establish his trial counsel was ineffective for failing to challenge the admissibility of his confession under 18 U.S.C. § 5033.

Failure to Object to Exclusion of Ex-Felons from Venire Panel

Mays also contends that his trial counsel was ineffective for failing to object to the exclusion of ex-felons from the jury panel in violation of the Sixth Amendment right to be tried by an impartial jury that reflects a fair cross section of the community. Specifically, Mays complains that his trial counsel should have objected to the exclusion of three potential **[*18]** jurors who evidently had felony records. Mays claims the failure to object to the exclusion of jurors with a prior felony "ultimately worked to [his] disadvantage" by depriving the jury panel of an ex-felon's views on sending a juvenile to prison. We find this argument to be unpersuasive.

K.S.A. 43-158(c) provides that those persons who have been convicted of a felony in the last 10 years "shall be excused from jury service" by the district court. Mays alleges this statute is unconstitutional because it deprives criminal defendants the right to be tried by an impartial jury that reflects a fair cross section of the community. See *Berghuis v. Smith*, 559 U.S. 314, 319, 130 S. Ct. 1382, 176 L. Ed. 2d 249 (2010). To establish a violation of the Sixth Amendment's fair cross section requirement, a defendant must show:

> "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not

> fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Duren v. Missouri*, 439 U.S. 357, 364, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979).

A distinctive group is one that is recognizable, distinct, and singled out for different treatment under the law. *Castaneda v. Partida*, 430 U.S. 482, 494, 97 S. Ct. 1272, 51 L. Ed. 2d 498 (1977). Distinctive **[*19]** groups are generally comprised of immutable characteristics such as race or color. See *Hernandez v. Texas*, 347 U.S. 475, 478, 74 S. Ct. 667, 98 L. Ed. 866 (1954). However, other characteristics may create distinctive groups:

> "[C]ommunity prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated." 347 U.S. at 478.

Without providing any authority to support his position, Mays claims that convicted felons are a distinctive group in Wyandotte County and should be afforded protection from being excluded from the venire panel. He claims that excluding convicted felons from jury panels is not fair or reasonable. Mays asserts that the underrepresentation of prior felons in Wyandotte County is due to systemic exclusion.

In *State v. Ji*, 251 Kan. 3, 8, 832 P.2d 1176 (1992), our Supreme Court rejected a defendant's challenge to the constitutionality of K.S.A. 43-158(a) on the basis that it excluded those persons unable to read, write, **[*20]** and understand English with a degree of proficiency sufficient to fill out the jury questionnaire. In *State v. Baker*, 249 Kan. 431, 436-37, 819 P.2d 1173 (1991), our Supreme Court analyzed the Kansas statutes relating to jury panels—including K.S.A. 43-158—and held the statutes were "not violative of defendant's constitutional and statutory right to a jury that is a fair cross section of the community." 249 Kan. 431, 819 P.2d 1173, Syl. ¶ 1. Similarly, federal courts have upheld statutes excluding felons from jury panels as constitutional because the exclusion is rationally related to the legitimate governmental purpose of guaranteeing the probity of jurors. See *United States v. Foxworth*, 599 F.2d 1, 4 (1st Cir. 1979); see also *United States v. Best*, 214 F. Supp. 2d 897, 904-05 (N.D. Ind. 2002) (the exclusion of convicted felons from juries is a constitutional limitation on jury qualifications).

In *United States v. Greene*, 995 F.2d 793, 796 (8th Cir. 1993), the United States Court of Appeals for the Eighth Circuit expressly rejected a claim that the exclusion of felons is impermissible because it has a disparate impact on potential jurors who are African-American. In *Greene*, the Eighth Circuit noted that one of the purposes of the fair cross section requirement is to preserve "'public confidence in the fairness of the criminal justice system.'" 995 F.2d at 797 (quoting *Taylor v. Louisiana*, 419 U.S. 522, 530, 95 S. Ct. 692, 42 L. Ed. 2d 690 [1975]). The *Greene* court concluded:

> "Since we accept the proposition that the exclusion is rationally related **[*21]** to the legitimate governmental purpose of

> assuring the unquestionable integrity of jurors and selecting jurors who are likely to be unbiased, it is only a small step to accepting the proposition that the significant governmental interest in having jurors who can be relied upon to perform their duties conscientiously, and in accordance with the law, is an 'adequate justification,' for the 'infringement of the defendant's interest in a jury chosen from a fair community cross section.' We therefore affirm the trial court on its holding that Mr. Greene proved no violation of the constitutional guarantee of juries chosen from a fair cross-section of the community." [Citations omitted.] 995 F.2d at 798.

Here, Mays has not shown that ex-felons constitute a distinctive group nor has he shown that their exclusion from jury service violates the Sixth Amendment. He has not cited any cases finding that such a provision violates the Sixth Amendment, and there is substantial caselaw from federal courts that have rejected similar arguments. Therefore, we conclude that Mays has failed to establish his trial counsel was ineffective for failing to object to the exclusion of ex-felons from the venire panel.

*Failure to Object to State's Alleged Misstatement [*22] of Law*

In addition, Mays contends that his trial counsel was ineffective for failing to object to the alleged misstatement of the elements of aiding and abetting during voir dire. He argues that the prosecutor failed to explain that in order to be convicted of aiding and abetting first-degree murder, the State must prove that he intentionally aided and abetted a first-degree murder. In particular, Mays claims the prosecutor misstated the law when he explained that a person who "'does just a little bit to aid'" may be convicted of aiding and abetting first degree murder. In response, the State denies that the prosecutor misstated the law on aiding abetting.

During voir dire, the prosecutor informed the potential jurors:

> "I don't have the instruction in front of me and I have to step into the Court's shoes because the Court's going to instruct you and tell you what the law is. But to paraphrase that instruction, it talks about the amount—sorry, I don't remember the exact language it uses, but it talks about someone who does just a little bit to aid and someone who does a lot to aid can be found equally guilty with the person who actually does it."

The prosecutor then posed the following **[*23]** scenario:

> "[L]et's say we just put three cases out in front of you, one who actually does the killing and one who just does a little bit to aid in the killing, one who does a lot to aid in the killing, could you *given that all things are proven too*, of course, beyond a reasonable doubt, could you find all three of them guilty or only some?" (Emphasis added).

We note that the prosecutor attempted to make it clear to the jury that it is the State's burden to prove all the elements of a crime—including the intent of the defendant. The State's burden of proof was also set forth in the instructions given to the jury after the evidence was presented. Furthermore, the district court properly instructed the jury on the principles of aiding and abetting and the requisite mental

culpability. Thus, we find no error.

Even if the prosecutor's statements constituted error, we find it to be harmless error under the circumstances presented. See *State v. Rivera*, 48 Kan. App. 2d 417, 444, 291 P.3d 512 (2012) (a misstatement of law in a preliminary jury instruction can be cured by the district court submitting the correct instruction to the jury at the end of trial). In light of the instructions given by the district court as well as the time between the alleged misstatements **[*24]** and the case being submitted to the jury, we find that any error was cured. As such, we conclude that Mays has failed to establish his trial counsel was ineffective for failing to object to the prosecutor's statements made during voir dire regarding the elements of aiding and abetting.

Failure to Assert a Theory of Self-Defense

Mays further contends that his trial counsel was ineffective for failing to raise self-defense at trial. He argues that his attorney should have mentioned his theory of self-defense during opening statements. Also, Mays claims that his attorney should have advised him of the need to testify in support of his theory of self-defense. In addition, Mays points to the fact that trial counsel failed to present evidence regarding the shooting death of Mays' 10-year-old cousin, which he claims supports his self-defense theory.

Although the State contends that Mays waived this issue by failing to cite to the record with specificity, we note that his allegations are primarily based on claims regarding things that trial counsel failed to do. It is difficult—if not impossible—to point to specific places in the record under these circumstances. Furthermore, we find that Mays' **[*25]** claims relating to the theory of self-defense were adequately set out in his original K.S.A. 60-1507 motion.

In particular, Mays outlined the following concerns in the K.S.A. 60-1507 motion he filed in 2006:

> "(I) TRIAL COUNSEL GAVE A ONE MINUTE OPENING STATEMENT WHERE SHE FAILED TO EXPRESS WHAT SHE THOUGHT THE EVIDENCE WOULD PROVE IN FAVOR OF MOVANT, NOR DID SHE RELATE WHAT THE DEFENSE WOULD BE SO THE JURY COULD BE EVALUATING THE EVIDENCE PRESENTED IN A LIGHT OF MOVANT'S ASSERTED DEFENSE.
>
> . . . .
>
> "(K) TRIAL COUNSEL FAILED TO INTRODUCE EVIDENCE OF THE SHOOTING DEATH OF MOVANT'S COUSIN, [C.C.], WHICH WAS THE ENTIRE BASIS OF THE ASSERTED DEFENSE THAT MOVANT'S ACTIONS WERE PREDICATED UPON A BELIEF THAT HIS LIFE WAS IN IMMEDIATE DANGER, AND THE BASIS FOR THAT BELIEF WAS THE SHOOTING DEATH OF HIS COUSIN AND MATTERS RELATED THERETO. MOVANT HAD AN ABSOLUTE RIGHT TO PRESENT ANY AND ALL EVIDENCE RELATED TO HIS STATE OF MIND AND HIS BELIEFE THAT HIS LIFE WAS IN DANGER.
>
> "(L) TRIAL COUNSEL FAILED TO ADVISE MOVANT OF THE NEED FOR HIM TO TAKE THE STAND IN HIS OWN DEFENSE, AND SHE FAILED TO CALL HIM TO THE STAND, WHICH WAS REQUIRED TO ESTABLISH HIS

> DEFENSE OF SELF DEFENSE. WITHOUT MOVANT TESTIFYING IN HIS OWN DEFENSE THE JURY WAS [*26] LEFT WITH ABOSLUTELY NO EVIDENCE TO RULE IN HIS FAVOR ON THE ISSUE BECAUSE NOTHING ESTABLISHED THAT HE WAS IN IMMEDIATE APPREHENSION OF GREAT BODILY HARM."

On appeal, Mays cites to *State v. Johnson*, 350 P.3d 1137, 2015 WL 3632205, at *5 (Kan. App. 2015) (unpublished opinion). In that case, the defendant claimed that he chose not to testify at trial in support of his theory of self-defense because he felt that his attorney's failure to discuss the defense during opening statements precluded him from pursuing the theory. On appeal, a panel of our court held that trial counsel's actions were not ineffective because the attorney had explained to his client that his testimony was crucial to support a theory of self-defense. The panel also found that the defendant knowingly made the decision not to testify. 350 P.3d 1137, 2015 WL 3632205, at *5.

Here, we do not have the benefit of trial counsel's testimony at an evidentiary hearing. Perhaps Mays' attorney could adequately explain her trial strategy and the decisions she made. However, there is simply no way to know based on the record as it currently exists. The State points to the lack of a record to note that there is nothing to indicate that Mays ever told his attorney that he wanted to assert self-defense or that she ever advised him about whether [*27] he should testify in support of his theory of self-defense. But this is the type of issue that is best resolved at an evidentiary hearing where the movant and trial counsel both testify regarding the events.

Finally, the State claims that the record shows that trial counsel acted reasonably as a matter of trial strategy. Again, without trial counsel's testimony regarding her trial strategy and the reasons for her decisions, it is impossible to determine. Mays asserts that there is a reasonable probability that the result of his trial would have been different if his attorney had pursued his theory of self-defense in her opening statement, presented evidence of his cousin's death, and properly advised him of the effect of his decision not to testify on a theory of self-defense. Thus, we conclude that it is appropriate to remand this issue to the district court for an evidentiary hearing.

Failure to Object to the Admission of Hearsay Evidence

Similarly, Mays contends that his trial counsel was ineffective for failing to object to the admission of certain hearsay statements at trial. Specifically, he claims his attorney should have objected to the admission of hearsay during the testimony [*28] of Alberta Bailey, Anthony Dantzler, and Gary Hahn. Further, Mays argues that the admission of the hearsay evidence substantially increased the likelihood of him being convicted on the charge of conspiracy to commit first-degree murder.

Again, the State asserts that Mays has waived this issue because he fails to point to evidence in the trial transcript in support of his assertion. Although he does not directly cite to the hearsay statements made at trial, Mays points to the following hearsay evidence mentioned in the Kansas Supreme Court's decision in his direct appeal:

> "Alberta Bailey, a former roommate of Michael White's, testified that White told

Bailey and her fiancé to watch the news 'because we smoked that nigger Antwan.' No contemporaneous objection was made. White's counsel then sought to cross-examine Bailey about the statement because there was no victim named Antwan involved in the case. When White's counsel asked Bailey to repeat White's statement, Mays' counsel objected on the grounds of prejudice to Mays and asked that the witness be instructed to use the pronoun 'I' rather than 'we' in order to cure the *Bruton* problem. The trial court overruled Mays' objection, finding **[*29]** there was no confrontation problem. The witness then repeated White's statement.

"Mays also argues there was insufficient evidence to support his conviction of conspiracy to commit first-degree murder. The evidence regarding the conspiracy count consisted of the testimony of Bailey described above, as well as the testimony of two other people who lived in the same crack house as Bailey. Anthony Dantzler testified that White and several other young men, including Mays, came in and out of the house with guns in their hands near the end of January 2000. Dantzler testified that at one point when the young men came back to the house they were happy and jumping around. Dantzler heard something mentioned about a white truck. Union and Brooks were driving a white truck when they were shot.

"Another housemate, Gary Hahn, also testified observing White and his 'buddies' with guns at the house around the time of the shootings. Hahn heard the group talk about going to do a hit before they left the house. When they returned, they were jumping up and down and laughing." *Mays*, 277 Kan. at 383-84.

On direct appeal, our Supreme Court addressed the hearsay issue as follows:

> "Mays contends that all of the evidence mentioned above **[*30]** was hearsay and it was inadmissible under the coconspirator exception to the hearsay rule. See K.S.A. 2003 Supp. 60-460(i)(2). In fact, only those portions of the testimony where the witnesses described the young men's statements or conversations were hearsay. The rest of the testimony involved the witnesses' visual observations of the young men and was not hearsay. In any event, Mays did not object to any of the evidence on hearsay grounds.
>
> "A defendant's failure to timely object at trial to alleged hearsay statements precludes the defendant from raising the issue on appeal. *State v. Carr*, 265 Kan. 608, 620, 963 P.2d 421 (1998). This is true even where the defendant alleges a violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution. *State v. Bryant*, 272 Kan. 1204, 1207-08, 38 P.3d 661 (2002)." *Mays*, 277 Kan. at 384-85.

We conclude that this issue has been properly preserved and that it should also be addressed at an evidentiary hearing in which Mays has the opportunity to testify, to call his trial counsel as a witness, and to present other evidence. Again, we cannot determine from the record as it currently exists whether there was a legitimate strategic reason for Mays' attorney to permit those portions of the testimony where the witnesses described the statements or conversations of others without asserting a hearsay objection. Thus, we remand this issue

to the district court for [*31] an evidentiary hearing.

Failure to Object to Instruction No. 5

Additionally, Mays contends that his trial counsel was ineffective for failing to object to a jury instruction that he alleges was erroneous. In particular, he contends that Instruction No. 5 shifted the burden of proof to him. The State responds that the instruction was legally proper and that the burden never shifted to Mays.

Instruction No. 5 stated:

> "Ordinarily a person intends all of the usual consequences of their voluntary acts. This inference may be considered by you along with all the other evidence in the case. You may accept or reject it in determining whether the State has met its burden to prove the required criminal intent of the defendant. This burden never shifts to the defendant."

In support of his argument, Mays cites *State v. Johnson*, 233 Kan. 981, 985, 666 P.2d 706 (1983). In *Johnson*, the Kansas Supreme Court distinguished between jury instructions that shift the burden of proof and those that properly instruct on a statutory presumption. Our Supreme Court cited with approval the PIK instruction that was used by the district court this case. The instruction does not shift the burden of proof to the defendant nor does it destroy the presumption of innocence. 233 Kan. at 985-86. [*32] Therefore, we conclude that Mays has failed to establish his trial counsel was ineffective for failing to object to Instruction No. 5.

Claim of Ineffective Appellate Counsel

Mays asserts that he was denied the right to effective assistance of appellate counsel. First, he claims that appellate counsel was ineffective for not arguing that his confession should have been suppressed under 18 U.S.C. § 5033. Second, he argues that appellate counsel should have raised the issue on appeal regarding Instruction No. 5. We find both arguments to be meritless.

The test for ineffective assistance of appellate counsel is the same as that for trial counsel. *Miller v. State*, 298 Kan. 921, 930-31, 318 P.3d 155 (2014). Here, we have found as a matter of law that 18 U.S.C. § 5033 has no application in this case. Likewise, we have found as a matter of law that Instruction No. 5 was properly given by the district court. As such, we conclude that Mays has failed to establish that he was denied his right to effective assistance of appellate counsel.

Withdrawal of Request for Mental Evaluation Prior to Sentencing

In a pro se supplemental brief, Mays contends that his trial counsel was ineffective for withdrawing her request for an additional competency hearing and proceeding to sentencing. Prior to [*33] sentencing, the district court ordered a competency evaluation at the defendant's request. However, before the evaluation was completed, Mays' attorney withdrew the request for an evaluation on the day of sentencing. As a result, the district court sentenced Mays without having the benefit of an evaluation report.

We note from the record that Mays' competency was an issue prior to trial. It was also an issue in his direct appeal. As our Supreme Court noted in its decision, there was

evidence that Mays had a low IQ, used drugs, and suffers from Post-Traumatic Stress Disorder (PTSD) as a result of his cousin's traumatic death. *Mays*, 277 Kan. at 372-77. The current issue involves Mays' mental competency at the time of sentencing.

At the hearing held on December 22, 2016, the attorney representing Mays on his K.S.A. 60-1507 motions stated: "At sentencing, the court had authorized having a mental evaluation by Dr. Logan. I think that [Mays] was supposed to go to a state hospital after that. They didn't go ahead and do that. They didn't get that second evaluation."

In response, the district court inquired why the evaluation was not completed:

> "THE COURT: And why weren't they followed through? Does anyone know?
>
> "Do you know, Mr. Mays? [***34**]
> "MR. MAYS: Yes.
> "THE COURT: Tell me.
> "MR. MAYS: During the time they stopped my sentencing and they continued it from the rest of my codefendants. So—
> "THE COURT: Were you the only juvenile of the bunch?
> "MR. MAYS: Yes, that actually got found guilty.
> "THE COURT: Okay. You're the only juvenile that was convicted then in this group?
> "MR. MAYS: Yes.
> "THE COURT: Okay.
> "MR. MAYS: In the transcripts he gave, Jerry Gorman was supposed to take over the proceedings to make sure, I guess, the funding or however it was supposed to get done. He offered to take over that.
> "THE COURT: The funding for what?
> "MR. MAYS: For the evaluation.
> "THE COURT: For the evaluation?
> "MR. MAYS: Yeah, so at that time—
> "THE COURT: That would be unusual.
> "MR. MAYS: I mean, it's all right here in the transcripts, though.
> "THE COURT: Okay.
> "MR. MAYS: So at that time I had to wait on the evaluation or whatever to get done. But then my attorney came back and told me during sentencing—he's, like, we're about to go on with the sentencing proceedings because she said that the State didn't pay for Dr. Logan so they're not going to pay for these other evaluations to get done. So we just ought to go on and get through the sentence."

In the [***35**] Journal Entry filed on March 7, 2017, the district court concluded that Mays "fails to show that a second evaluation would have given any different information to the Court, or that he would have been given any different sentence." On appeal, Mays argues that the second mental evaluation should have been performed due to his age, his competency to understand the proceedings, and his PTSD.

It is impossible for us to determine from the record why the request for a second mental evaluation was withdrawn. We do know that Mays received two consecutive hard 25 life sentences in the underlying criminal case. Had the evaluation been performed, it is possible that it would have provided mitigating factors that could have resulted in a lighter sentence. Thus, we find that this issue should also be remanded to the district court for an evidentiary hearing to determine whether trial counsel was ineffective based on her withdrawal of the request for a second mental evaluation to be completed prior to sentencing.

Failure to Object to the Length of Sentence

Finally, Mays contends in his supplemental brief that his trial counsel was ineffective for failing to object to his sentence on the grounds that **[*36]** it violated the Eighth Amendment prohibiting cruel and unusual punishment. Mays argues that his sentence is unconstitutional because he was a juvenile when he committed the crimes. Mays asserts both a case-specific challenge and a categorical challenge.

A case specific challenge cannot be raised for the first time on appeal because the district court was not given the opportunity to make factual findings. See *State v. Williams*, 298 Kan. 1075, 1084-85, 319 P.3d 528 (2014). A categorical challenge has been addressed for the first time on appeal in the event that the appellant has invoked an exception to the general rule that issues cannot be raised for the first time on appeal. 298 Kan. 1075, 319 P.3d 528, Syl. ¶¶ 3, 4. However, Mays gives no reason as to why we should consider this issue for the first time on appeal. Moreover, Mays did not raise this issue in either of his K.S.A. 60-1507 motions. In order to invoke an exception to the general rule that a party may not raise a constitutional issue for the first time on appeal, Kansas Supreme Court Rule 6.02(a)(5) (2019 Kan. S. Ct. R. 34) requires that the party affirmatively invoke and argue an exception. Failure to do so results in an abandonment of the issue. See *State v. Godfrey*, 301 Kan. 1041, 350 P.3d 1068, Syl. (2015). Mays fails to invoke or argue an exception as to why this issue should be raised for the first time on appeal. Under these **[*37]** circumstances, we conclude that this issue has been waived and abandoned.

CONCLUSION

In summary, we affirm the district court's decision on the issues of counsel's failure to challenge the constitutionality of K.S.A 21-3401, counsel's failure to challenge the legality of his confession, counsel's failure to object to the exclusion of ex-felons from the jury, counsel's failure to object to the State's alleged misstatements of law, counsel's failure to object to the jury instruction, and Mays' claims of ineffective assistance of appellate counsel. However, we reverse the district court's dismissal of the following claims of ineffective assistance of trial counsel without holding an evidentiary hearing: (1) failure to assert a theory of self-defense; (2) failure to object to the admission of hearsay evidence; (3) and withdrawal of Mays' request for a mental evaluation prior to sentencing. Furthermore, we remand these issues to the district court for an evidentiary hearing.

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

End of Document

State v. Turner

Court of Appeals of Kansas

September 16, 2016, Opinion Filed

No. 114,378

Reporter
2016 Kan. App. Unpub. LEXIS 774 *; 379 P.3d 1152

STATE OF KANSAS, Appellee, v. TIMOTHY L. TURNER, Appellant.

Notice: NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE KANSAS RULES FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE PACIFIC REPORTER.

Subsequent History: Review dismissed by State v. Turner, 2017 Kan. LEXIS 826 (Kan., Sept. 14, 2017)

Prior History: [*1] Appeal from Douglas District Court; SALLY D. POKORNY, judge.

Disposition: Affirmed.

Core Terms

right to counsel, sentence, marijuana, district court, proceedings, illegal sentence, municipal court, misdemeanor, circumstances, appears, waived, motion to withdraw, disposition hearing, documents, felony

Counsel: Adam M. Hall, of Collister & Kampschroeder, of Lawrence, for appellant.

Julia Leth-Perez, legal intern, Natalie Yoza, assistant district attorney, Charles E. Branson, district attorney, and Derek Schmidt, attorney general, for appellee.

Judges: Before ARNOLD-BURGER, P.J., MCANANY and GARDNER, JJ.

Opinion

Per Curiam: Timothy Turner, who had a prior misdemeanor conviction for possession of marijuana, was charged in a later incident with felony possession of marijuana. Turner pled no contest to this charge, and the district court found him guilty. Turner's criminal history consisted of 1 person juvenile adjudication and 13 person misdemeanor convictions, including his prior marijuana conviction. Turner did not object to his criminal history. The court sentenced Turner to 42 months in prison. This court affirmed Turner's sentence on appeal.

Turner then filed a motion to correct an illegal sentence. One of his claims was that his sentence was based on his prior misdemeanor marijuana conviction in municipal court when he was not represented by counsel. According to Turner, he did not effectively waive his right to counsel in that case, so his [*2] uncounseled municipal conviction was unconstitutional and could not be used as a basis to enhance his sentence in his current case. Turner later moved to withdraw his plea, and that motion was heard along with his motion to correct an illegal

sentence.

At the hearing on Turner's motions no witnesses testified, but the court considered various documents relating to Turner's municipal court conviction. Turner acknowledged the municipal court record of his prior misdemeanor possession of marijuana conviction indicated he waived the right to counsel and pled guilty on June 25, 2008. But his counsel stated:

> "I will leave it up to the Court to find whether or not that docket sheet that appears to show [Turner] appears pro se, possession of marijuana, guilty, with a 7/25/08 date, and whether that is enough proof to show that that relates to the waiver and makes it a valid waiver."

At the hearing, the district court was not called upon to make credibility determinations regarding the testimony of any witness. The hearing was confined to an examination of several written documents, which we are in as good a position as the district court to evaluate. Thus, our consideration of the documents is **[*3]** de novo. See *Telegram Publishing Co. v. Kansas Dept. of Transportation*, 275 Kan. 779, 784, 69 P.3d 578 (2003). The documents show:

> August 17, 2007—City of Lawrence citation issued to Turner for possession of marijuana and various driving violations. Court date: September 12, 2007.
>
> September 12, 2007—Turner's original court appearance date. Turner fails to appear. Bench warrant to be issued.
>
> September 26, 2007—Bench warrant issued.
>
> January 9, 2008—Turner posts cash bond.
>
> January 23, 2008—Turner appears for arraignment and pleads not guilty. Trial is set for March 28, 2008. This trial date must have been continued. There is no reference to any court action in the case on March 28, 2008.
>
> July 25, 2008—Turner appears and pleads guilty to possession of marijuana. Sentencing is scheduled for September 16, 2008. This same date Turner signs a "Waiver of Counsel and Plea Advisory." The municipal judge certifies that Turner signed the waiver in the judge's presence and that Turner had been fully informed of the charges and his right to counsel. There is no entry of any court action in the case on September 16, 2008. From the next entry it appears that Turner did not appear for sentencing as ordered by the court.
>
> December 8, 2008—Bench warrant issued. Turner is apparently in jail and scheduled **[*4]** for release on April 2, 2009.
>
> April 2, 2009—Municipal court disposition hearing. Document notes the charge of possession of marijuana and the finding of guilty. Court imposes $200 fine plus various costs and fees.

The district court denied Turner's motion to correct an illegal sentence.

With respect to Turner's motion to withdraw his plea, he argued that because his prior municipal conviction for possession of marijuana was invalid because his plea was taken without the benefit of counsel, he should have been charged in this current case with misdemeanor possession of marijuana rather than a felony. Thus, he should be entitled to withdraw his plea to this improper charge.

The district court denied Turner's motion to withdraw his plea, finding that he failed to show manifest injustice. This appeal is from the rulings on both motions.

Motion to Withdraw Plea

As a preliminary matter, the State contends that Turner's motion to withdraw his plea was untimely because it was not filed within the 1-year time period defined in K.S.A. 2015 Supp. 22-3210(e)(1), and Turner has not shown excusable neglect to extend this filing deadline. But the mandate following Turner's direct appeal was not issued until November 21, 2013. Turner **[*5]** filed the motion to withdraw his plea on May 6, 2014, less than 1 year later. So Turner's motion was timely.

"A person accused of a misdemeanor has a Sixth Amendment right to counsel if the sentence to be imposed upon conviction includes a term of imprisonment, even if the jail time is suspended or conditioned upon a term of probation." *State v. Youngblood*, 288 Kan. 659, Syl. ¶ 2, 206 P.3d 518 (2009). "The right to counsel arises at the stage of the proceedings where guilt is adjudicated, eligibility for imprisonment is established, and the prison sentence determined." 288 Kan. 659, 206 P.3d 518, Syl. ¶ 2. A defendant may exercise the right to self-representation only after a knowing and intelligent waiver of the Sixth Amendment right to counsel. *State v. Vann*, 280 Kan. 782, 793, 127 P.3d 307 (2006).

Turner acknowledges that the waiver of his right to counsel in municipal court was valid at the time he executed it. But he argues the waiver lost its validity when so much time passed between the time he entered it "and the actual entry of a plea other than not guilty." This is premised on the contention that he did not enter his guilty plea on the day he executed the waiver but later at the disposition hearing. He also makes the related argument that his guilty plea exceeded the waiver's scope. This argument is premised on the contention that the waiver he **[*6]** signed contemplated an immediate plea which did not occur.

We conclude from the documents set forth above that on July 25, 2008, Turner appeared in court and signed a valid waiver of his right to counsel and entered a plea of guilty. Thus, the premise for both of Turner's arguments is not supported by the facts.

But even if, contrary to the facts that we and the district court found, Turner did not enter his plea until April 2, 2009, the day of his disposition hearing, the delay did not invalidate his prior waiver of his right to counsel.

Turner relies on a law review article, *Goldschmidt, Has He "Made his Bed and Now Must Lie in It"? Toward Recognition of the Pro Se Defendant's Sixth Amendment Right to Post-Trial Readmonishment of the Right to Counsel*, 8 DePaul J. for Soc. Just. 287 (2015), to support the contention that his prior valid waiver of the right to counsel expired with the passage of time. In fact, this law review article recognizes that many federal and state courts do not require that the trial court readmonish the defendant regarding the right to counsel when the defendant previously waived that right. 8 DePaul J. for Soc. Just. 287, 353-74.

A case that exemplifies the ongoing validity **[*7]** of a waiver of counsel is *United States v. Hantzis*, 625 F.3d 575, 581 (9th Cir. 2010). There, the court held that a waiver of the right to counsel need not be renewed in subsequent proceedings "unless intervening events substantially change the circumstances" existing at the time of the waiver to the extent that "the defendant can no longer be considered to have knowingly and intelligently waived the right to counsel." 625 F.3d at 580-81. The court

stated:

> "'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 or there are circumstances which suggest that the waiver was limited to a particular stage of the proceedings.' [Citations omitted.]" 625 F.3d at 581.

Similar holdings are found in *United States v. McBride*, 362 F.3d 360, 367 (6th Cir. 2004) (the general rule of federal courts is "that a defendant's waiver of counsel at trial carries over to subsequent proceedings absent a substantial change in circumstances"); *United States v. Unger*, 915 F.2d 759, 762 (1st Cir. 1990) (the district court was free to find that the defendant's earlier waiver was still in force at the sentencing hearing in the absence of intervening events); *United States v. Fazzini*, 871 F.2d 635, 643 (7th Cir. 1989) ("Once the defendant has knowingly **[*8]** and intelligently waived his right to counsel, only a substantial change in circumstances will require the district court to inquire whether the defendant wishes to revoke his earlier waiver."); *Arnold v. United States*, 414 F.2d 1056, 1059 (9th Cir. 1969) (a new waiver need not be obtained at every subsequent court appearance of the defendant after a competent waiver of the right to counsel); *Davis v. United States*, 226 F.2d 834, 840 (8th Cir. 1955) (same); *People v. Baker*, 92 Ill. 2d 85, 91-92, 440 N.E.2d 856, 860-61, 65 Ill. Dec. 1 (1982) ("The greater number of courts considering the precise issue here presented have held that a competent waiver of counsel by a defendant once made before the court carries forward to all subsequent proceedings unless defendant later requests counsel or there are circumstances which suggest that the waiver was limited to a particular stage of the proceedings."); *accord State v. Steed*, 109 Ariz. 137, 506 P.2d 1031, 1033 (Ariz. 1977); *State v. Carpenter*, 390 So. 2d 1296, 1299 (La. 1980); *State v. Tiff*, 199 Neb. 519, 531-32, 260 N.W.2d 296 (1977); *Lay v. State*, 2008 OK CR 7, ¶ 11, 179 P.3d 615, 620 (2008) (defendant's "waiver of counsel was valid for the entire trial, including the sentencing phase"); *State v. Modica*, 136 Wash. App. 434, 445, 149 P.3d 446 (2006) ("[A] valid waiver of the right to assistance of counsel generally continues throughout the criminal proceedings, unless the circumstances suggest that the waiver was limited . . . . [I]t is not ordinarily incumbent upon a trial court to intervene at a later stage of the proceedings to inquire about a party's continuing desire to proceed pro se."); *State v. Mathis*, 159 N.W.2d 729, 39 Wis. 2d 453 (1968).

With respect to Turner's first **[*9]** argument, we find (and Turner asserts) no change of circumstances that would have required the district court to reaffirm at the April 2, 2009, disposition hearing Turner's earlier waiver of his right to counsel. Further, Turner never asserted his right to counsel or sought to revoke his waiver at this later disposition hearing.

With respect to Turner's second argument, his original waiver of his right to counsel was not predicated on any particular time period, so the later uncounseled proceedings on April 2, 2009, did not exceed the scope of the waiver.

Finally, Turner's reliance on *Menefield v. Borg*, 881 F.2d 696 (9th Cir. 1989), is unfounded. In *Menefield* the defendant waived the right to counsel and proceeded to trial pro se. After being convicted, he asked the trial court to

appoint counsel to assist him in preparing a motion for a new trial. The trial court denied this request. The Ninth Circuit concluded that the defendant's prior waiver did not bar his later request for counsel. Unlike in *Menefield*, Turner never sought to disavow or revoke his prior waiver of his right to counsel by later affirmatively requesting the appointment of counsel. *Menefield* provides no assistance to Turner.

The district court did not err in denying **[*10]** Turner's motion to withdraw his plea.

Motion to Correct an Illegal Sentence

K.S.A. 22-3504(1) provides that "[t]he court may correct an illegal sentence at any time."

> "'[A]n "illegal sentence" under K.S.A. 22-3504 [is]: (1) a sentence imposed by a court without jurisdiction; (2) a sentence that does not conform to the applicable statutory provision, either in character or the term of authorized punishment; or (3) a sentence that is ambiguous with respect to the time and manner in which it is to be served.' [Citations omitted.]" *State v. Moncla*, 301 Kan. 549, 551, 343 P.3d 1161 (2015).

Turner challenges the district court's use of his prior misdemeanor marijuana conviction to enhance his current sentence, asserting the prior conviction was obtained in violation of his right to counsel. The States contends this motion is not the appropriate procedural vehicle to raise this challenge to his prior municipal court conviction. But Turner alleges the municipal court conviction produced an erroneous crime severity level, and he would have been convicted of a misdemeanor offense but for the improper consideration of his uncounseled municipal court conviction. We conclude that Turner's motion to correct an illegal sentence is an appropriate procedural vehicle to assert this challenge. See *State v. Delacruz*, 258 Kan. 129, 899 P.2d 1042 (1995). **[*11]**

In considering this claim we apply the same legal analysis to the facts described above and, without becoming unduly repetitious, conclude that the district court did not err in denying Turner's motion to correct an illegal sentence. The sentence for Turner's felony conviction was predicated upon Turner having a prior conviction for misdemeanor possession of marijuana. Turner contends this was error because his prior uncounseled municipal court conviction was invalid and could not be used to support a felony conviction. But Turner waived his right to counsel in municipal court, so the district court properly considered it in sentencing Turner for felony possession of marijuana. The court did not err in denying his motion to correct an illegal sentence.

Affirmed.

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State v. Williams

Court of Appeals of Kansas

August 28, 1998, Opinion Filed

No. 78,857

Reporter
1998 Kan. App. Unpub. LEXIS 1171 *

STATE OF KANSAS, Appellee, v. JAMAL R. WILLIAMS, Appellant.

Notice: NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE KANSAS RULES FOR CITATION OF UNPUBLISHED OPINIONS.

Subsequent History: Reported at State v. Williams, 963 P.2d 447, 1998 Kan. App. LEXIS 548 (Kan. Ct. App., 1998)

Prior History: [*1] Appeal from Sedgwick District Court; THOMAS E. MALONE and JOSEPH BRIBIESCA, judges.

Disposition: Affirmed.

Core Terms

aggravated battery, pick-up, arrest, district court, probable cause, cocaine, motion to suppress evidence, suppression of evidence, factual findings, identification, credibility, demeanor, weapons, baggie, felony, pulled, tavern

Counsel: Otilia Rosales, student intern, Rick Kittel, assistant appellate defender, and Jessica R. Kunen, chief appellate defender, for appellant.

David Lowden, assistant district attorney, Nola Foulston, district attorney, and Carla f. Stovall, attorney general, for appellee.

Judges: Before GERNON, P.J., PADDOCK, S.J., and CHARLES E. WORDEN, District Judge, assigned.

Opinion

MEMORANDUM OPINION

Per Curiam: Defendant Jamal R. Williams appeals his bench conviction for possession of cocaine, K.S.A. 1997 Supp. 65-4160(a) and no tax stamp, K.S.A. 79-5208.

Defendant contends the district court erred in denying his motion to suppress evidence. This court normally gives great deference to the district court's factual findings when it reviews the suppression of evidence. "[T]he ultimate determination of the trial court's suppression of evidence is a legal question requiring independent appellate determination." *State v. Longbine*, 257 Kan. 713, Syl. ¶ 3, 896 P.2d 367 (1995). The State has the burden of proving the lawfulness of a search and seizure on a motion to suppress evidence. *State v. Houze*, 23 Kan. App. 2d 336, 337, 930 P.2d 620 (1997), [*2] *rev. denied* March 18, 1997.

Officer Robert Bachman saw the defendant come out of a tavern that served alcohol. The defendant did not look like he was 21 years old,

as required for him to be in the tavern. Bachman and Officer Joseph Lake pulled up beside the defendant and asked him how old he was. The defendant replied he was 19, turned away, and continued walking. Bachman got out of the car and asked the defendant for identification; defendant said he did not have any identification and his name was Antoine Johnson. Bachman recognized the defendant from a photograph with a pick-up order for the defendant for aggravated battery. Bachman was told a few days before that the defendant was the suspect in the aggravated battery and he knew there was a pick-up order for him. The pick-up order was based upon the statement of a shooting victim who had identified Williams as the person who had shot him. In preparation for arresting the defendant for the aggravated battery, Lake patted down the defendant for weapons. Lake thought he had something in his hand; Bachman opened the defendant's hand and found a baggie with crack cocaine.

Williams testified the officers got out of their patrol car, asked **[*3]** him if he had any weapons, and then patted him down. Williams said Bachman reached into his pocket and pulled out the baggie with cocaine. The district court made a factual finding that the events occurred the way Bachman testified because his testimony was more credible than the defendant's testimony. "'The trial court's observations of the demeanor of the officers and the defendant during testimony at the motion to suppress is essential to deciding if the State met its burden. The appellate court cannot decide a question of fact that is based upon conflicting testimony which requires an assessment of the demeanor and credibility of the witnesses. "' *State v. Kriegh*, 23 Kan. App. 2d 935, 938, 937 P.2d 453 (1997) (quoting *State v. Ruden*, 245 Kan. 95, 106, 774 P.2d 972 [1989]).

An officer can arrest a person without an arrest warrant-if the officer has probable cause to believe the person has committed a felony. K.S.A. 1997 Supp. 22-2401(c)(1). See *State v. Aikins*, 261 Kan. 346, 355, 932 P.2d 408 (1997). Bachman was told before the stop that defendant was a suspect in the aggravated battery case; Bachman also knew of the pick-up order for defendant.

"'Probable cause is the reasonable **[*4]** belief that a specific crime has been committed and that the defendant committed the crime. It does not require evidence of each element of the crime or evidence to the degree necessary to prove guilt beyond a reasonable doubt.'" *Aikins*, 261 Kan. at 355 (quoting *State v. Grissom*, 251 Kan. 851, Syl. ¶ 22, 840 P.2d 1142 [1992]). With his knowledge that the defendant was a suspect in the aggravated battery case, Bachman had probable cause to believe Williams had committed that felony. The warrantless arrest was valid under K.S.A. 1997 Supp. 22-2401(c)(1), so the district court did not err in denying the defendant's motion to dismiss.

Affirmed.

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