

No. 20-122782-A

**IN THE COURT OF APPEALS
OF THE STATE OF KANSAS**

STATE OF KANSAS
Plaintiff-Appellee

v.

DZUNG N. NINH
Defendant-Appellant

BRIEF OF APPELLEE

Appeal from the District Court of Sedgwick County, Kansas
The Honorable Jeffrey L. Syrios, District Judge
District Court Case Number 17 CR 3023

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APPENDIX B

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STATEMENT OF THE ISSUES

- I. Does defendant's sufficiency of the evidence claim fail, where ample evidence demonstrates that the victim was overcome by force or fear?
- II. Did the prosecutor err in closing argument, where all of her statements were consistent with the law and evidence?
- III. Are the rape and aggravated criminal sodomy statutes unconstitutionally vague simply because they do not require proof that a defendant knew that the victim did not consent or was overcome by force or fear?
- IV. Was defendant denied the right to a unanimous verdict, where multiple acts instructions were issued and the victim's testimony established the elements of the crimes and identified defendant as the perpetrator?

STATEMENT OF THE FACTS

TV relocated from Vietnam to Wichita shortly before her 13th birthday in 2013, and moved in with her mother, XV, and XV's new husband, Dzung Ninh. (R. IX, 56-60.) TV shared a bedroom with her younger sister, KV, and two other younger siblings also lived in the family home. (R. IX, 57, 59, 63-64.)

Shortly after her 13th birthday, TV began spending more time with Ninh. (R. IX, 71-72.) TV became uncomfortable, however, when Ninh began hugging her and "grabbing parts of [her] body." (R. IX, 72.) Having never previously had a father figure in her life, TV liked the attention, but did not like the physical contact. (R. IX, 72-73.) In the summer before her eighth grade year, as TV was sitting on Ninh's lap while Ninh was using his computer in the living room, Ninh touched TV's breast over her clothing. (R. IX, 72-74, 82-83.) Later that summer, Ninh progressed to touching TV's breast under her shirt and bra. (R. IX, 83-85.)

Around the start of the school year, TV heard her mother and Ninh argue. (R. IX, 88.) TV did not want her mother and Ninh to divorce, as she wanted a father figure in the house for herself and her siblings. (R. IX, 88-89.) During the course of eighth grade, Ninh touched TV's breast on approximately 15 to 20 occasions while the two were alone in the living room. (R. IX, 90-92.) Ninh would stop touching TV if anyone else came into the room. (R. IX, 92.) On occasion, TV would grab Ninh's hand and pull it away from her breast and tell him to stop. (R. IX, 92-94.) While TV was still in eighth grade, Ninh also began touching her vagina on the outside of her clothing. (R. IX, 94-95.) TV occasionally pulled Ninh's hand away and told him "please don't do that." (R. IX, 95.) Eventually,

Ninh started touching TV's vagina under her pants and underwear; these incidents continued to take place in the living room while Ninh was at the computer. (R. IX, 97-98.) Ninh told TV not to tell anyone about the touchings, but TV confided in her sister, knowing that KV would not tell anyone else. (R. IX, 102.) TV sensed that Ninh was monitoring her interactions with others, and feared that he would find out if she disclosed to anyone other than her sister. (R. IX, 105-06.)

In TV's freshman year of high school, the sexual contact moved from the living room to TV's bedroom, while the rest of the family was asleep. (R. IX, 106-09.) Ninh would enter the bedroom after midnight and touch TV's breast and insert his finger in between her labia. (R. IX, 109-10.) Ninh used his finger to massage TV's vaginal area. (R. IX, 111.) TV did not consent to the touching and did not want it to continue. (R. IX, 113.) TV frequently considered telling her mother about the incidents, but declined to do so out of fear that the family would break apart. (R. IX, 114-15.)

The same kind of sexual incidents continued during TV's sophomore year, with Ninh touching TV's breast and inserting his finger in her vagina. (R. IX, 115-19.) The incidents continued to happen even though TV had started wearing a bra to bed in hopes of dissuading Ninh. (R. IX, 118-19.) In January of TV's sophomore year, Ninh began putting his mouth on TV's breast. (R. IX, 120-22.)

Ninh continued the same kind of sexual touchings during the early part of TV's junior year. (R. IX, 125, 129.) He also licked TV's vagina "once or twice." (R. IX, 125-30.) Ninh would spread TV's legs apart in order to gain access to her vagina. (R. IX, 127.) The sexual contact stopped early in TV's junior year, however, when she met Seth Watkins,

who ultimately became her boyfriend. (R. IX, 129-32.) TV still had not disclosed the sexual incidents to her mother, as she remained afraid of what would happen to her family. (R. IX, 137.)

Early in her senior year, TV confided in Watkins about the sexual abuse. (R. IX, 135-36.) At Watkins's urging, she then wrote a note informing her mother that Ninh had been touching her. (R. IX, 137; R. X, 103-04, 140.) In a follow-up conversation, TV told her mother that she did not want the touchings reported to police. (R. X, 106.)

TV and Watkins did not get to see each other much outside of school, and Ninh and XV had strict rules on how much time TV could spend using the internet. (R. IX, 221; R. X, 149.) The couple would try to video chat at night, though homework, Watkins's work schedule, and TV's internet restrictions and household chores often made that difficult. (R. IX, 227-28.)

In early September of TV's senior year, one final sexual encounter with Ninh occurred. (R. IX, 141-42.) Unlike during all of the previous incidents, on this occasion, Ninh penetrated TV's vagina with his penis. (R. IX, 149-56.) TV and Watkins had arranged for Watkins to witness the sexual encounter via video chat, and Watkins did, in fact, see much of the incident. (R. IX, 292-94; R. X, 153-62, 160, 166-68.) Despite having arranged for Watkins to watch the encounter, TV had not expected Ninh to put his penis in her vagina. (R. IX, 293-94.)

Watkins told XV about the incident the following day. (R. X, 108-09.) XV, in turn, called the police. (R. X, 112.) In an interview with Detective Chris Zandler, TV detailed the types of sexual contact that had occurred, using her grade level and age as guides. (R.

X, 237; R. XV, Exhibit 23.) Of note, TV told Zandler that defendant began using his mouth on her vagina during her sophomore year. (R. X, 238.)

TV underwent a sexual assault examination that revealed injuries to her genitalia consistent with blunt force penetrating trauma. (R. X, 11, 33-36, 44.) DNA evidence subsequently linked defendant to saliva found on TV's breast. (R. XIX, 45-47.)

Ninh was ultimately charged with seven sex offenses. (R. I, 258-61.) For the convenience of the reader, the charges are detailed as follows: count one, aggravated indecent liberties based on touching TV's breasts and vagina during eighth grade; counts two and three, rape based on digital penetration during freshman year; count four, rape based on digital penetration during sophomore year; count five, aggravated criminal sodomy based on oral sex during sophomore year; count six, aggravated criminal sodomy based on oral sex during junior year; and count seven, rape based on the September 2017 incident that Watkins watched during the video chat. (R. I, 258-60; R. XIX, 102-03.)

At trial, the defense did not deny the September 2017 sexual encounter, but argued that it was consensual and that defendant had been set up by TV and Watkins because they were upset about the rules that defendant placed on TV in the home. (R. XIX, 120-22.) The defense denied that the other encounters occurred, noting that there were no witnesses and arguing that TV's accounts were not credible. (R. XIX, 131-35.)

In closing argument, the prosecutor provided guidance to the jurors regarding the timeframes for the various counts, and reminded the jurors that they needed to unanimously agree on the same underlying act in order to convict of counts one through six. (R. XIX,

102-03, 108, 116-19.) The district court issued multiple acts instruction for counts one through six. (R. I, 266-71.)

The jury convicted defendant of counts one through six, but acquitted him of count seven. (R. XIX, 159-60.) Defendant filed a timely notice of appeal after sentencing. (R. I, 333.)

Additional facts are presented as needed in the Arguments and Authorities section of this brief.

ARGUMENTS AND AUTHORITIES

I. Defendant's sufficiency of the evidence claim fails, where ample evidence demonstrates that the victim was overcome by force or fear.

When the sufficiency of evidence is challenged in a criminal case, this court reviews the claim by looking at all the evidence in a light most favorable to the prosecution and determining whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt. See *State v. Frye*, 294 Kan. 364, 374-75, 277 P.3d 1091 (2012). It disregards evidence that conflicts with the verdict and makes no credibility determinations. Thus, it will not weigh the evidence or sift the record for facts or inferences contrary to the verdict. See *State v. Hayden*, 281 Kan. 112, 132, 130 P.3d 24 (2006). A conviction may be supported, in whole or in part, by circumstantial evidence. *State v. Lopez*, 36 Kan. App. 2d 723, 725, 143 P.3d 695 (2006). It is only in rare cases where the testimony is so incredible that no reasonable factfinder could find guilt beyond a reasonable doubt that a guilty verdict will be reversed. See *State v. Matlock*, 233 Kan. 1, 5-6, 660 P.2d 945 (1983).

Verdicts may be supported by circumstantial evidence, if such evidence provides a basis for a reasonable inference by the factfinder regarding the fact in issue. Circumstantial evidence need not exclude every other reasonable conclusion in order to be sufficient. *State v. Logsdon*, 304 Kan. 3, 25, 371 P.3d 836 (2016).

Defendant argues that his convictions for counts two through six must be reversed because the State failed to prove that that the victim was overcome by force or fear. (Appellant's Brief, 11-23.) The record shows otherwise.

Each of the rape and aggravated criminal sodomy charges required proof that the victim did not consent to the sexual contact and that she was overcome by force or fear. (R. I, 259-60, 267-71.) In *State v. Borthwick*, 255 Kan. 899, 880 P.2d 1261 (1994), our Supreme Court explained what type of evidence is sufficient to establish fear in a rape case. The court rejected the notion that the fear contemplated in the statute had to result from being threatened with a deadly weapon or threatened with "force that would prevent resistance by a reasonable person." 255 Kan. at 913. The Supreme Court refused to define in absolute terms the degree of fear required to sustain a conviction, explaining that "fear is inherently subjective" because "[w]hat renders one person immobilized by fear may not frighten another at all." 255 Kan. at 913. The *Borthwick* court declared:

"Under Kansas law, when a victim testifies that she was overcome by fear, and her testimony is not 'so incredible as to defy belief,' [citation omitted] there is sufficient evidence to present the ultimate determination to the factfinder. The reasonableness of a particular victim's fear may affect the jury's assessment of the victim's credibility in arriving at its verdict." 255 Kan. at 913-14.

The *Borthwick* court also discussed the “force” element, clarifying that “violent assaults and life-threatening actions are not necessary to sustain a ‘force or fear’ rape conviction.” 255 Kan. at 910.

“The force required to sustain a rape conviction in Kansas does not require that a rape victim resist her assailant to the point of becoming the victim of other crimes such as battery or aggravated assault. Kansas law does not require that a rape victim be physically overcome by force in the form of a beating or physical restraint in addition to forced sexual intercourse. Kansas law requires a showing that the victim did not consent to the sexual intercourse and that she was overcome by force or fear to facilitate the sexual intercourse.” 255 Kan. 899, Syl. ¶ 7.

In *State v. Brooks*, 298 Kan. 672, 317 P.3d 54 (2014), Brooks was convicted of raping his ex-wife, JP. The evidence established that Brooks telephoned JP and told her that he had copies of e-mails that indicated that she was having an affair with a married coworker. 298 Kan. at 689. Brooks read portions of these e-mails over the phone to JP, which gave JP a “very sick feeling.” He concluded the conversation by telling JP that he would come to her house that evening to have sex with her. JP testified at trial that Brooks acted angry over the phone and demanded to have sex, telling her, “It’s going to have to happen tonight,” and that she “owed” it to him.

That evening, Brooks arrived at JP’s house with a folder containing copies of the emails. 298 Kan. at 689. He told JP that he would give copies to her employer and to her coworker’s wife if she did not do as he said. JP testified:

“I tried to reason with him, I tried to get him to leave. I didn’t, you know, I didn’t want him there, and he got agitated, and his threats just remained the same, that he would take those e-mails, and he said he had copies of them at his apartment, and, you know, there is nothing that I could do to keep him from carrying out his threats ... if I didn’t have sex with him....”

- Brooks insisted that JP take off her underwear. 298 Kan. at 690.- JP testified that she “didn’t at his first request, but he started getting agitated, then I did.” Brooks took off his pants and put on a condom. JP sat down in a chair in the living room. Brooks came up to JP, held onto her legs, and had intercourse with her. JP had her hands over her face and her eyes closed so she would not have to look at Brooks.

Our Supreme Court concluded that such evidence was sufficient to show that JP was overcome by force or fear. *Brooks*, 298 Kan. at 690. The court specifically stated that a “rational factfinder could infer from the facts presented at trial that JP clearly feared Brooks would publicize the e-mails if she did not submit to having sex with him. And because of this fear, she ultimately submitted to having nonconsensual sex with Brooks.”

Here, TV testified that when the sexual touching began during her eighth grade year, there were times when she pulled defendant’s hand off her breast and told him to stop, though she acknowledged that there were other days when she did not attempt to pull defendant’s hand away. (R. IX, 92-94.) TV likewise tried to move defendant’s hand away when defendant began touching her vagina over her clothing in eighth grade. (R. IX, 94-96.) Defendant told TV not to tell anyone about what was happening, which made TV question whether “what’s happening between [her] and [her] dad was normal.” (R. IX, 101-02.) TV explained that defendant monitored her conversations to see who she was talking with and whether she told anyone about the sexual activity, and testified that, as a result, she feared that defendant would find out if she disclosed to anyone. (R. IX, 105-06.)

TV's freshman year was when defendant began digitally penetrating her vagina; TV did not consent to the touching. (R. IX, 113.) She frequently considered telling her mother, but decided not to because she feared that the family would break up; TV explained that she wanted her siblings to grow up with a father. (R. IX, 115.) By her sophomore year, TV began wearing a bra to bed because she did not want defendant to touch her and thought that wearing a bra would dissuade defendant. (R. IX, 118-19.) When defendant began performing oral sex on TV, he would pull down TV's pants and spread her legs apart. (R. IX, 125-27.)

When asked about the letter that she wrote her mother during her senior year, TV testified that she wrote that she "should have said this to you a long time ago but I was scared. I was afraid that this would do something to our family." (R. IX, 137.) Later in her testimony, TV provided additional context for why she had not disclosed sooner or demanded that defendant stop. She noted that if she failed to follow rules in the home, her phone would be taken away and her internet access would be restricted. (R. IX, 185-86.) TV feared that if she did not "do these things," i.e., submit to the sexual touching, she would lose her phone and internet access, as well as the ability to go out with friends and participate in extracurricular activities. (R. IX, 191.) She also noted that because her attempts to push defendant's hands away had not stopped defendant's sexual abuse, she eventually "just [gave] up and let it happen." (R. IX, 192.) In addition, TV did not fight back or say anything because she feared that something might happen to her or her siblings. (R. IX, 192.) She was also concerned that if she pushed back more forcefully, defendant would "try to do other things, like force me to do certain things or . . . forcefully just do the

things that he does to me.” (R. IX, 193-94.) Critically, she said that she was concerned that she would be injured if defendant used more force. (R. IX, 194.) Finally, TV testified that while she did not feel like she was forced to submit to defendant’s actions on September 7, 2017, she did feel forced “[a] lot of the time,” explaining that she often opted to “let him have his way now [because] it’s going to happen eventually.” (R. IX, 308.)

In sum, TV’s testimony shows that she feared not only for her physical safety, but for the long-term stability of her family. She also feared that defendant, who enforced many of the house rules, would take away her phone and internet access, and limit her ability to socialize with friends. Thus, rather than physically resisting, which had not stopped the sexual contact in the past, TV submitted to unwanted, nonconsensual sexual intercourse and sodomy with her stepfather. This evidence is even stronger than the evidence that was deemed sufficient in *Brooks*, especially given the fact that the victim in this case was a child and the perpetrator was her stepfather.

Defendant’s sufficiency of the evidence claim fails.

II. The prosecutor did not err in closing argument, where all of her statements were consistent with the law and evidence.

“To determine whether prosecutorial error has occurred, the appellate court must decide whether the prosecutorial acts complained of fall outside the wide latitude afforded prosecutors to conduct the State’s case and attempt to obtain a conviction in a manner that does not offend the defendant’s constitutional right to a fair trial. If error is found, the appellate court must next determine whether the error prejudiced the defendant’s due process rights to a fair trial.

In evaluating the prejudice step of our two-step analysis for reversible prosecutorial error, appellate courts shall look no further than, and shall exclusively apply, the traditional constitutional harmless inquiry demanded by *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 that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, where there is no reasonable possibility that the error contributed to the verdict.” *State v. Sherman*, 305 Kan. 88, Syl. ¶¶ 7-8, 378 P.3d 1060 (2016).

Defendant asserts that the prosecutor misstated the evidence and law, argued facts not in evidence, and inflamed and distracted the jury. (Appellant’s Brief, 23-29.) The record does not support these claims.

In the initial portion of closing argument, the prosecutor stated:

“We’ve already discussed the measure of force he’s putting into place. He’s already playing on her fears of a broken family. He’s continuing to engage in that. A rapist is only going to use as much force as they have to to be able to accomplish their goal, to accomplish their ends. The rapist isn’t going to hit someone unless they have to. He didn’t have to hit her. He didn’t have to strike her. He was able to utilize his parental authority in this household as the only force needed to accomplish this goal of his. (R. XIX, 114.)

In rebuttal closing, the prosecutor noted that once the incidents were reported to police, an investigation began. She continued: “And when they get investigated, the evidence that is found is the evidence that the defendant, the suspect, leaves behind. It is the evidence that the rapist leaves behind,” namely, saliva on the victim’s breast. (R. XIX, 143.)

Also in rebuttal closing, the prosecutor stated the following while discussing the final sexual encounter:

“[TV’s] described that they’re engaging in their typical conversation where the defendant is treating her like an adult, treating her like a confidant, the type of confidant who has promises, who has secrets from everyone else in the family.

He's treating her like she's special. She described how that type of touching he would engage in all through her teenage years, it wasn't the type of touching where – you know, some rapists are sadists. Some of them cause pain. Some rapists use alcohol so a victim doesn't know or is incapacitated and can't respond back. His form of force was grooming." (R. XIX, 144.)

Defendant claims that there are "many errors" with these comments. (Appellant's Brief, 26.) He first argues that what "some rapists" do is irrelevant, and that this reference "served to distract the jury from the matter at hand and fan the flames of prejudice." (Appellant's Brief, 26.) In a related argument, he asserts that the State discussed matters not admitted into evidence when it talked about "what various rapists are like." (Appellant's Brief, 26.) The record shows otherwise.

Detective Zandler testified that the progression of the sexual contact, beginning with over-the-clothing touching of the victim's breast and ultimately ending with penetration of the victim's vagina, is considered "grooming behavior." (R. XIX, 5-6.) Zandler said that he had encountered similar escalation of sexualized touching many times in his career. (R. XIX, 6-7.) He noted that such grooming is one method used by offenders, and explained that other offenders use alcohol or physical force in committing their crimes. (R. XIX, 7-8.) Thus, contrary to defendant's assertion, there was express testimony concerning the manner in which "various rapists" behave. And despite defendant's belief, the prosecutor's discussion of this evidence in closing argument was not irrelevant. As noted in Issue I, "Kansas law does not require that a rape victim be physically overcome by force in the form of a beating or physical restraint in addition to forced sexual intercourse." *Borthwick*, 255 Kan. 899, Syl. ¶ 7. In this case, the victim did not suffer significant physical injuries from the sexual encounters, and defendant did not physically overpower the victim. As

such, it was appropriate and relevant for the prosecutor to argue that defendant overcame the victim's will in other ways, in the process reminding the jurors that the use of excessive physical force or alcohol are not the only ways rape can be committed.

Defendant also complains that the State erred by repeatedly calling him a rapist, relying solely on *State v. Scott*, 271 Kan. 103, 114, 21 P.3d 516, cert. denied 534 U.S. 1047, 122 S. Ct. 630, 151 L.Ed.2d 550 (2001) (prosecutorial misconduct to call the accused a "killer"), for support. (Appellant's Brief, 26.) However, in a later case, our Supreme Court engaged in a lengthy discussion of its caselaw on such matters. In *State v. Scott*, 286 Kan. 54, 80-82, 183 P.3d 801 (2008), overruled on other grounds by *State v. Dunn*, 304 Kan. 773, 807-11, 375 P.3d 332 (2016), the court wrote:

"This court's jurisprudence regarding prosecutors referring to a defendant as a 'killer' or 'murderer' makes a distinction regarding the manner in which the statement is used. In *State v. Cravatt*, 267 Kan. 314, 333-34, 979 P.2d 679 (1999), we noted: "[W]e have in the past allowed the prosecution to refer to the defendant as a 'murderer' so long as nothing in the statement predicts consequences of acquittal or intensifies any kind of 'fear in the neighborhood' sentiment." In *Cravatt*, we found the prosecutor's comment to the jury that it should not 'let a murderer go free because of these half-baked theories the defense has presented to you' was not improper. 267 Kan. at 332, 979 P.2d 679; see also *State v. Collier*, 259 Kan. 346, 355, 913 P.2d 597 (1996) (holding a prosecutor's statement that if the jury was mad at his actions, it should be mad at him but should not 'let a murderer go free because of it' was not improper).

However, we have found comments characterizing the defendant as a 'murderer' or 'killer' to be improper in other contexts. In *State v. McCray*, 267 Kan. 339, 347, 979 P.2d 134 (1999), we held the prosecutor's remark directing the jury to '[l]ook at [the defendant], ladies and gentlemen, you have to look at him. That's what a murderer looks like, ladies and gentlemen,' was improper because it injected the prosecutor's personal opinion of the defendant's guilt. Similarly, in *State v. Hooker*, 271 Kan. 52, 67, 21 P.3d 964 (2001), we held the prosecutor's remark that the defendant had 'cold-blooded killing eyes' was improper for the same reason. Also, in

☞ [Scott, 271 Kan. at 114,] we stated the prosecutor’s remark to the jury, ‘Yeah, you have about eight feet separating you from the hands of a killer right here,’ was inflammatory and therefore improper.

The consistent rule to be taken from the cases is that a prosecutor may refer to the defendant as a murderer or killer in the course of arguing the evidence shows the defendant committed the murder. See *Cravatt*, 267 Kan. at 332–34, 979 P.2d 679. However, where such statements imply the prosecutor believes something other than the evidence shows the defendant to be a murderer, such as the prosecutor’s belief the defendant ‘looks like a murderer’ or has ‘cold-blooded killing eyes,’ or the statements do not relate to the evidence but are simply made to inflame the jury, such as a comment telling the jurors they are ‘eight feet from a killer,’ the argument will be held improper. See *Scott*, 271 Kan. at 114, 21 P.3d 516; *Hooker*, 271 Kan. at 67, 21 P.3d 964; *McCray*, 267 Kan. at 347-48, 979 P.2d 134.”

The State has not uncovered any published cases in which the use of the term “rapist” has been discussed. However, the matter was before this court in *State v. Ahmedin*, No. 105,378, 2012 WL 1919925 (Kan. App. 2012) (unpublished opinion), *rev. denied* May 20, 2013.¹ There, the prosecutor stated as follows in closing argument: “There is one thing, the last thing. If she would not have told, a rapist would not have been caught, and you would not have the opportunity today to find this man guilty for what he did to [J.Z.], and I ask that you do so.” 2012 WL 1919925, at *4. After discussing *Scott*, 286 Kan. 54, and evaluating the context of the prosecutor’s statement, this court found that the comment was not improper, noting that the comment “as made in the course of arguing the evidence showed Ahmedin committed the rape.” 2012 WL 1919925, at *4-5.

Here, it is first significant to note that the prosecutor only referred to defendant as a rapist once, while discussing the saliva that “the rapist” forgot to wipe off the victim’s

¹ All unpublished opinions are attached as required by Supreme Court Rule.

breast. (R. XIX, 143.) The other passages that defendant cites are more general references to how rapists operate. In any event, the prosecutor was directly discussing the evidence in referring to defendant as a rapist. She was not expressing a personal belief, referencing defendant's looks, or inflaming the jurors' passions by emphasizing how close they were sitting to a rapist. Consistent with the caselaw discussed above, the prosecutor did not err.

Defendant next argues that the State misstated the law when it equated grooming with force; he specifically asserts that grooming is something that takes place before an offense, while force must be present at the same time as the other elements of the crime. (Appellant's Brief, 26.) He relies on *State v. Akins*, 298 Kan. 592, 606, 315 P.3d 868 (2014), for support.

Akins can be readily distinguished. There, the prosecutor argued that Akins's earlier alleged grooming also satisfied the essential element of sexual intent at the time of the alleged criminal conduct. 298 Kan. at 606. However, the sex offenses that Akins was charged with were specific intent crimes. After noting that the specific intent required by a statute must simultaneously be present with the proscribed conduct, our Supreme Court concluded: "Here, the prosecutor's statement implied that Akins'[s] state of mind during past instances of 'grooming' was sufficient to establish the intent required for the crimes he later allegedly committed. But without acknowledging that the intent and conduct must be simultaneously present, it was a misstatement of the law." 298 Kan. at 606.

Defendant, by contrast, was charged with only one specific intent crime (aggravated indecent liberties with a child), while rape and aggravated criminal sodomy are general intent crimes. Critically, the prosecutor's grooming discussion did not come in the context

of discussing the aggravated indecent liberties charge; rather, in discussing that offense, the prosecutor argued that defendant possessed the requisite specific intent at the time of the touching that formed the basis for that charge. (R. XIX, 105-06.) Meanwhile, with respect to the remaining counts, when the prosecutor's comments are reviewed in their entirety, it is evident that the prosecutor did not point solely to "grooming" when discussing the "force or fear" element. Instead, the prosecutor noted defendant's control over the victim's phone and internet usage, the victim's fear that her family would break apart if she did not submit, and that the victim had attempted to physically resist defendant's sexual advances on some occasions. (R. XIX, 109-14.)

Defendant's final claim of prosecutorial error is based on the State's discussion of count two, which was based on digital penetration occurring during the victim's freshman year. In opening statement, the prosecutor said that the victim would describe that defendant "put a finger inside of her vagina," and would further describe "that it hurt." (R. IX, 17.) In closing argument, the prosecutor stated that "the specific conduct that is described in [count two] is the defendant's finger being inserted into her vagina." (R. XIX, 102-03.) Later in closing, the prosecutor said that when TV "describe[d] this action . . . [s]he also described that it would hurt so she usually pulled away." (R. XIX, 114.) Defendant asserts that while TV testified that defendant put his finger "between the skin flaps, i.e., her labia[,] there was not testimony he inserted his fingers in her vagina," and further argues that TV testified that the sexual contact was not painful. (Appellant's Brief, 27.)

In discussing the touching that formed the basis for count two, the victim testified that defendant “would run his hand – like, again, cup around my vagina and then start to run his finger in between and then he started massaging it.” (R. IX, 110.) The prosecutor followed up by asking the victim to clarify whether defendant inserted his finger in between “the labia” and the “skin flaps,” and the victim responded in the affirmative. (R. IX, 110.) Shortly thereafter, the prosecutor asked the victim whether defendant ever said anything while “his finger would be between . . . [her] vagina,” and the victim replied, “[n]o.” (R. IX, 111.) When this testimony is considered in its entirety, the prosecutor’s statement that defendant’s finger was in the victim’s vagina constitutes fair comment on the evidence. See K.S.A. 21-5501(a) (“Any penetration, however slight, is sufficient to constitute sexual intercourse.”).

Meanwhile, in her interview with Detective Zandler, the victim stated that when defendant started trying to put his finger inside her vagina during her freshman year, “[i]t was uncomfortable for me. It was hurting me so I usually just pull away when I feel like he’s going to do that.” (R. XV, Exhibit 23, 19:51-19:59.) She explained that “most of the time I was half asleep and when it started hurting I just knew that I had to move. I had to go pull away.” (R. XV, Exhibit 23, 20:10-20:19.) This provides specific evidentiary support for the prosecutor’s statement that the victim said that the digital contact with her vagina hurt.

While not abandoning the arguments advance above, the State alternatively asserts that any error that occurred is harmless. While the failure to object to alleged error in closing argument does not bar the issue from consideration on direct appeal, the lack of a

timely and specific objection is nevertheless still relevant to the court's inquiry. See *State v. Bunyard*, 281 Kan. 392, 420, 133 P.3d 14 (2006) (dissenting opinion by Chief Justice McFarland) ["The fact that the prosecutor's statements prompted neither an objection by counsel nor interruption by the judge also indicates that they were not glaring misstatements or conspicuously offensive. . . . See *People v. Rodriguez*, 794 P.2d 965, 972 (Colo. 1990) (recognizing lack of objection is factor to consider in examining prosecutorial misconduct, as lack of objection may demonstrate defense counsel's belief that argument was not overly damaging)."]; see also *State v. King*, 288 Kan. 333, 349, 204 P.3d 585 (2009); *State v. Miller*, 284 Kan. 682, 720, 163 P.3d 267 (2007).

When a defendant does not object to alleged prosecutorial error, the burden should be on defendant to show that any error warrants reversal. In fact, this used to be the rule in Kansas, until it was modified in *State v. Ward*, 292 Kan. 541, 568-69, 256 P.3d 801 (2011), *cert. denied* 565 U.S. 1221 (2012). But *Ward* purported to rely on federal law, and contrary to *Ward's* conclusion, the federal courts place the burden of establishing reversible error on the defendant when no objection was lodged at trial. *United States v. Olano*, 507 U.S. 725, 734-35, 113 S. Ct. 1770, 1778, 123 L. Ed. 2d 508 (1993) (burden of persuasion on prejudice is on the defendant when error was not preserved); *Molina-Martinez v. United States*, _____ U.S. _____ 136 S. Ct. 1338, 1343, 1347 (2016) (discussing the federal plain error rule when an objection is not lodged before the trial court).

The federal rule makes more sense, as the party benefiting from the alleged error should only have the burden of persuasion if it had the ability to correct the error at the trial

court level. Because there was no objection in this case, the burden should be on defendant to prove prejudice.

Regardless of which party bears the burden, defendant is not entitled to relief. The verdict shows that the jurors carefully considered the evidence and were not led astray by any allegedly improper comments in closing argument, as they acquitted defendant of count seven, which was based on the final sexual encounter between defendant and the victim. Moreover, as discussed above, the prosecutor pointed to evidence independent of grooming to support the “force or fear” element, and, as discussed in Issue I, TV’s testimony clearly established this element. Quite simply, defendant’s convictions were the result of overwhelming evidence that TV feared for her safety and the future of her family, and was worried that defendant would take away her phone and internet privileges – not based on the reference to grooming. Finally, even if this court somehow takes issue with the use of the word “rapist,” the jurors was already aware, based on the charges, that the State was asking them to find defendant guilty of rape. Thus, even if this court finds any error, defendant is not entitled to reversal of his convictions.

III. The rape and aggravated criminal sodomy statutes are not unconstitutionally vague simply because they do not require proof that a defendant knew that the victim did not consent or was overcome by force or fear.

The constitutionality of a statutory provision presents a question of law over which this court exercises unlimited review. *State v. Riojas*, 288 Kan. 379, 388, 204 P.3d 578 (2009). A statute is presumed constitutional, and all doubts must be resolved in favor of its validity. If there is any reasonable way to construe a statute as constitutionally valid,

the court must do so: A statute must clearly violate the constitution before it may be struck down. This court not only has the authority, but also the duty, to construe a statute in such a manner that it is constitutional if the same can be done within the apparent intent of the legislature in passing the statute. *State v. Johnson*, 286 Kan. 824, 842-43, 190 P.3d 207 (2008).

Defendant argues that K.S.A. 21-5503 and K.S.A. 21-5504 are unconstitutionally vague because the language “it shall not be a defense that the offender did not know or have a reason to know” does not provide sufficient warning for people to avoid unlawful conduct. (Appellant’s Brief, 29-36.) He is not entitled to relief on this claim.

Appellate courts employ a two-part test to determine whether a statute is unconstitutionally vague. First, the statute should give a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited. *Dissmeyer v. State*, 292 Kan. 37, 39, 249 P.3d 444 (2011). Second, the statute should provide explicit standards for its enforcement so as to prevent arbitrary and discriminatory enforcement. *State v. Rupnick*, 280 Kan. 720, 737, 125 P.3d 541 (2005). A vague statute is problematic in that it impermissibly delegates basic policy matters to police officers, judges, and juries for resolution on a case-by-case basis. 280 Kan. at 737.

The test for vagueness is often described as a common-sense determination about fundamental fairness. *State v. Richardson*, 289 Kan. 118, 124, 209 P.3d 696 (2009). “And “[a] statute will not be declared void for vagueness when it employs words commonly used, previously judicially defined, or having a settled meaning in law.”” *Village Villa v. Kansas Health Policy Authority*, 296 Kan. 315, 334, 291 P.3d 1056 (2013) (quoting

Kaufman v. Kansas Dept. of SRS, 248 Kan. 951, 958, 811 P.2d 876 [1991]). Additionally, a person “to whose conduct a statute clearly applies may not successfully challenge it for vagueness.” *Parker v. Levy*, 417 U.S. 733, 756, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974); *Hearn v. City of Overland Park*, 244 Kan. 638, 639, 772 P.2d 758 (1989). Although there may be marginal cases in which it is difficult to determine whether the particular conduct was prohibited, that is not sufficient reason to hold the language too ambiguous to define a criminal offense. *Hearn*, 244 Kan. at 640-41. “At its heart the test for vagueness is a commonsense determination of fundamental fairness.” *State v. Bollinger*, 302 Kan. 309, 318, 352 P.3d 1003 (2015), *cert. denied* 136 S. Ct. 858. As the party attacking the statute, defendant carries the burden of overcoming the presumption of constitutionality. See *State v. Williams*, 299 Kan. 911, 920, 329 P.3d 400 (2014).

Defendant was charged with rape under K.S.A. 21-5503(a)(1)(A), which defines the offense as knowingly engaging in sexual intercourse with a victim who does not consent to the sexual intercourse when the victim is overcome by force or fear. K.S.A. 21-5503(e), meanwhile, provides in relevant part that it shall not be a defense that the offender did not know or have reason to know that the victim did not consent to the sexual intercourse or that the victim was overcome by force or fear. Defendant was charged with aggravated criminal sodomy under K.S.A. 21-5504(b)(3)(A), which criminalizes sodomy with a victim who does not consent to the sodomy when the victim is overcome by force or fear. Subsection (f) states in pertinent part that it shall not be a defense that the offender did not know or have reason to know that the victim did not consent to the sodomy or that the victim was overcome by force or fear.

In *State v. Thomas*, _____ Kan. _____, 488 P.3d 517, 518 (2021), Thomas argued that K.S.A. 21-5503(e) transforms rape into a strict liability crime in violation of due process. Our Supreme Court assumed without deciding that rape is, in fact, a strict liability crime. The court disagreed, however, that this created a due process violation. The Supreme Court emphasized that the Legislature has the authority to create strict liability crimes, and held that Thomas had failed to show a violation of his due process rights. 488 P.3d at 519-20.

Here, defendant complains that the State need not prove that he “knowingly did anything other than have sex or sodomy,” and that he cannot argue that he did not have notice “of what was in [the victim’s] mind.” (Appellant’s Brief, 35.) Kansas Supreme Court caselaw recognizes the overlap between vagueness challenges and due process concerns. In *State v. Harris*, 311 Kan. 816, 821, 467 P.3d 504 (2020), the court wrote in discussing vagueness challenges: “The challenged statute must clear two distinct—albeit relatively low—hurdles. One hurdle is grounded in the due process requirements of the Fourteenth Amendment.” “A statute that ‘either requires or 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’ violates the Fourteenth Amendment to the United States Constitution and is thus void for vagueness.” *State v. Richardson*, 289 Kan. 118, 124, 209 P.3d 696 (2009), citing *State v. Dunn*, 233 Kan. 411, 418, 662 P.2d 1286 (1983). The *Harris* court summarized the due process concern elements of the vagueness doctrine thusly: “Does the statute fairly put people on notice as to the conduct proscribed?” 311 Kan. at 821-22.

In light of such caselaw, it is evident that defendant's argument that the statutes at issue prevent him from arguing that he lacked notice of the victim's mindset is, at its core, the same due process argument that was raised rejected in *Thomas*. Like *Thomas*, defendant "has failed to show that this is a violation of his due process rights or is outside the Legislature's broad authority to craft criminal laws." 488 P.3d at 520.

Meanwhile, defendant's observation that the statutes give prosecutors the discretion to charge rape and aggravated criminal sodomy knowing that they need not prove that the accused "knowingly did anything other than have sex or sodomy" does not provide him relief on his claim that the statutes fails to provide explicit standards for enforcement. As noted, a statute will not be declared void for vagueness when it employs words commonly used, previously judicially defined, or having a settled meaning in law. *Village Villa*, 296 Kan. at 334. Nothing in the "it shall not be a defense" language is in any way unclear. Again, defendant's true complaint appears to be that he does not believe that it is fair that an offender can be convicted of rape or sodomy absent knowledge that the victim did not consent or was overcome by force or fear. As discussed above, this argument was rejected by our Supreme Court in *Thomas*. Meanwhile, there are no legitimate concerns of arbitrary enforcement, as the State still must prove that the victim did not consent and that the victim was overcome by force or fear. The fact that these elements are subjective matters to be resolved by the jury in no way makes them unique; indeed, juries are routinely tasked with resolving disputed factual elements.

In sum, defendant's challenge fails because he does not identify any unclear language in the statutes, and because the statutes provide explicit standards for enforcement

so as to prevent arbitrary and discriminatory enforcement. Defendant's more general complaint that the statute unfairly allows for a conviction when an offender is unaware that the victim did not consent or was overcome by force or fear should be rejected in accordance with *Thomas*.

IV. Defendant was not denied the right to a unanimous verdict, where multiple acts instructions were issued and the victim's testimony established the elements of the crimes and identified defendant as the perpetrator.

Defendant's claim that his right to a unanimous verdict was violated presents a question of law subject to unlimited review. *State v. Morton*, 277 Kan. 575, 578, 86 P.3d 535 (2004).

Defendant's final claim is that the State violated his right to a unanimous verdict under the Sixth Amendment, section 5 of the Kansas Constitution Bill of Rights, and K.S.A. 22-3421. (Appellant's Brief, 36-50.) This claim does not warrant relief.

Defendant acknowledges that he did not raise a section 5 argument below. (Appellant's Brief, 37.) Appellate courts do not generally consider arguments raised by appellants for the first time on appeal. See *State v. Phillips*, 299 Kan. 479, 493, 325 P.3d 1095 (2014). He argues that this court should nevertheless address this claim because consideration of his argument is necessary to prevent the denial of a fundamental right, and because, in his view, it involves only a question of law arising on proved or admitted facts that is finally determinative of her case. (Appellant's Brief, 37-39.) See *Phillips*, 299 Kan. at 493. However, consideration of the section 5 argument is not necessary if the merits of defendant's Sixth Amendment rights are reviewed. Meanwhile, the second exception does

not apply, as defendant's argument necessarily involves an analysis of the evidence presented at trial.

In any event, defendant is not entitled to relief on the merits. Under Kansas law, a jury verdict in a criminal trial must be unanimous. K.S.A. 22-3421. "Normally this requirement is satisfied if the trial court instructs the jury that its verdict must be unanimous on each separate count. However, achieving unanimity can be complicated when the State charges a defendant with a single count based on multiple acts." *State v. Colston*, 290 Kan. 952, Syl. ¶ 2, 235 P.3d 1234 (2010), *overruled on other grounds by Dunn*, 304 Kan. 773. In a multiple acts case, several acts are alleged and any one of them could constitute the crime charged. *State v. Davis*, 275 Kan. 107, 115, 61 P.3d 701 (2003).

"This court will apply a three-part test to determine when a multiple acts situation has occurred such that the jury must agree on the same underlying criminal act. First, the court must determine if the case truly involves multiple acts, i.e., whether the defendant's conduct was part of one act or represents multiple acts which are separate and distinct from each other. Second, the court must consider whether error occurred, i.e., whether there was a failure by the State to elect an act or a failure by the court to instruct. Third, the court must determine whether the error is reversible." *Colston*, 290 Kan. 952.

Historically, our Supreme Court has treated the right to a unanimous jury verdict as purely statutory because neither the Kansas Constitution nor the United States Constitution required a unanimous jury verdict to convict in noncapital cases tried in state court. See *State v. Brown*, 298 Kan. 1040, 1055, 318 P. 3d 1005 (2014). But in *Ramos v. Louisiana*, 590 U.S. _____, 140 S. Ct. 1390, 1397, 206 L. Ed. 2d 583 (2020), the United States Supreme Court recently held that the Sixth Amendment right to a jury trial, as incorporated against the States through the Fourteenth Amendment, requires a unanimous jury verdict to convict

a defendant of a serious offense. Thus, a defendant charged in state court with a felony has a constitutional right to a unanimous jury verdict.

Here, it is clear that evidence of multiple acts was presented for counts one through six. Equally clear, however, is that a multiple acts instruction was issued for each of the six counts. (R. I, 266-71.) Simply stated, because these instructions were issued, no error occurred, as there is not a concern that the jury did not unanimously agree on the same underlying act for each count.

Defendant, however, claims that a multiple acts instruction is “merely a means to help ensure protection of the actual right” of a unanimous verdict. (Appellant’s Brief, 39.) In his eyes, despite the multiple acts instructions, his right to a unanimous verdict “was still contravened by the way in which the State chose to present its case.” (Appellant’s Brief, 40.) He specifically asserts that with respect to the first six counts, “[t]here is no way the jury could agree on any given incident because the State provided no evidence distinguishing” the various incidents. (Appellant’s Brief, 44-48.)

This court recently addressed a similar argument in *State v. Spackman*, No. 122,021, 2021 WL 4929156 (Kan. App. 2021) (unpublished opinion).² Spackman was convicted of seven felony sex crimes against two young girls. On appeal, he argued his right to a unanimous verdict under the Sixth Amendment was breached with respect to the counts involving one of the victims because the victim did not describe the instances of sexual abuse with sufficient particularity. 2021 WL 4929156, at * 4. Citing *Ramos*, this court

² The State acknowledges that the deadline for filing a petition for review in *Spackman* has not yet passed, and that the case is not yet final. The State nevertheless cites *Spackman* as persuasive authority.

acknowledged Spackman’s Sixth Amendment right, and, “[g]iven the Kansas Supreme Court’s approach to constitutional jurisprudence that typically recognizes rights under the Kansas Constitution equivalent to those the United States Supreme Court has found in comparable provisions of the United States Constitution,” presumed that “there is a right to unanimous jury verdicts in criminal cases grounded in § 10 of the Kansas Constitution Bill of Rights and, perhaps, in § 5.”

This court did not, however, agree with Spackman’s argument that his right had been violated. The panel wrote:

“[Spackman] appears to suggest the jurors could not possibly have agreed he committed particular acts of sexual abuse because L.S. described the incidents only in general terms. And, as a result, he says that deprived him of unanimous verdicts—a defect he likens to a structural error requiring reversal without a showing of actual prejudice. At the same time, however, Spackman submits the issue differs from a multiple acts problem in which jurors have been presented with evidence supporting more instances of wrongful conduct than charged crimes. To protect a defendant’s right to a unanimous verdict in that situation, the district court typically will instruct the jurors that they must agree on one specific act for each charge to return a guilty verdict. See *State v. Cottrell*, 310 Kan. 150, 154-55, 445 P.3d 1132 (2019) (recognizing rule but finding no multiple acts); [*Colston*, 290 Kan. at 961] (use of jury instruction); PIK Crim. 4th 68.100 (2020 Supp.) (instruction on multiple acts and need for unanimity as to particular act). Here, the district court included a unanimity instruction on all but one of the counts identifying L.S. as the victim, and Spackman has not challenged the one conviction for that reason.

We feel adrift in navigating Spackman’s constitutional argument. The jurors had to resolve a credibility contest between L.S. and Spackman and did so in favor of L.S. If believed, L.S.’s testimony established physical acts on Spackman’s part that entailed sexual contact proscribed under the applicable statutes. L.S. described where the acts took place and identified Spackman as her abuser. *Although the abuse involved repeated instances of the same sort of conduct, that does not amount to a constitutional defect in the State’s proof.* Spackman has not satisfactorily explained why we should treat it that way. *A putative victim’s unusually generic testimony about the charged*

criminal conduct might open a line of attack on his or her credibility and a closing argument urging the jurors to find a reasonable doubt about what really happened. But that's far different from a constitutional defect requiring reversal of a conviction for lack of jury unanimity. Spackman hasn't crossed that threshold." (Emphasis added.) 2021 WL 4929156, at *4.

Defendant's arguments are, in substance, the same that the *Spackman* court rejected. Recognizing that a multiple acts instruction was issued for each of the relevant counts, defendant instead attempts to focus on the evidence, arguing that jury unanimity was impossible because TV did not provide sufficient details to distinguish the incidents of sexual contact. As the *Spackman* court indicated, however, such an argument is instead tantamount to an assertion that the victim's testimony was so generic that it should not be deemed credible or sufficient to overcome reasonable doubt. This does not amount to a constitutional defect. The *Spackman* court's logic is sound, and should be followed by this court.

Moreover, defendant's position ignores the fact that juries are presumed to follow all instructions. *State v. Llamas*, 298 Kan. 246, 261, 311 P.3d 399 (2013). To accept defendant's argument, this court would have to conclude, without any evidence, that the jury ignored the multiple acts instructions, which expressly stated that in order for defendant to be convicted, the jurors "must unanimously agree upon the same underlying act." (R. I, 266-71.)

As our Supreme Court has noted, the multiple acts situation is especially common in sex offense cases. *Colston*, 290 Kan. at 961. This case illustrates why this is so; when a victim (especially a child) is victimized dozens, perhaps hundreds, of times, it is difficult to remember specific dates or other details that would more clearly distinguish one incident

from another. In defendant's view, it would be impossible to secure a unanimous verdict in such circumstances. However, the multiple acts instruction safeguards this very right.

While in no way abandoning the arguments advanced above, the State alternatively asserts that any error was harmless. As noted, claims of error in multiple acts cases have been subject to harmless error analysis. *Colston*, 290 Kan. 952. Because the right to jury unanimity is now considered a constitutional right in the wake of *Ramos*, any error will be declared harmless when the party benefiting from the error persuades the court "beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, i.e., proves there is no reasonable possibility that the error affected the verdict." *Ward*, 292 Kan. at 569.

Though defendant did not testify or call any witnesses at trial, the theory of defense with respect to the six counts of conviction was clear. Defense counsel argued in closing that there was no proof "on any of these counts," specifically arguing that TV was not credible, and that it was not believable that she was sexually abused in the home numerous times over a span of several years without anyone witnessing the abuse. (R. XIX, 132-35.) Our Supreme Court has been less inclined to reverse a multiple acts error where the defendant presented a unified defense, e.g., a general denial. See *State v. Moyer*, 306 Kan. 342, 362-63, 410 P.3d 71 (2017); *State v. De La Torre*, 300 Kan. 591, 599, 331 P.3d 815, cert. denied _____ U.S. _____, 135 S. Ct. 728, 190 L. Ed.2d 455 (2014). Quite simply, this case came down to a credibility contest; if the jury believed defendant's account, it would have acquitted him of the six counts at issue.

In sum, defendant fails to show a violation of his constitutional or statutory rights to a unanimous verdict.

CONCLUSION

Defendant's sufficiency of the evidence claim fails, where ample evidence demonstrates that the victim was overcome by force or fear.

The prosecutor did not err in closing argument, where all of her statements were consistent with the law and evidence.

The rape and aggravated criminal sodomy statutes are not unconstitutionally vague simply because they do not require proof that a defendant knew that the victim did not consent or was overcome by force or fear.

Defendant was not denied the right to a unanimous verdict, where multiple acts instructions were issued and the victim's testimony established the elements of the crimes and identified defendant as the perpetrator.

The State respectfully requests that defendant's convictions be affirmed.

Respectfully Submitted,

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APPENDIX A

276 P.3d 838 (Table)

Unpublished Disposition

(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)

Court of Appeals of Kansas.

STATE of Kansas, Appellee,

v.

Hassen AHMEDIN, Appellant.

No.

105,378

May 18, 2012.

Review Denied May 20, 2013.

Synopsis

Background: Defendant was convicted in the Seward District Court, Clint B. Peterson, J., of rape, and he appealed.

Holdings: The Court of Appeals held that:

[1] fact that juror was engaged to an assistant county attorney did not warrant new trial;

[2] it was not improper for prosecutor, during closing argument, to refer to defendant as "a rapist;" and

[3] defendant failed to establish that lack of an interpreter at his sentencing hearing rose to a constitutional violation.

Affirmed.

West Headnotes (4)

[1] Criminal Law ⇐ Competency of Jurors and Challenges

Fact that juror was engaged to an assistant county attorney did not warrant new trial in rape case

because juror did not misrepresent or provide false or misleading information during voir dire; juror was never asked if she was related to any of the attorneys or anyone in law enforcement, and there was no showing of prejudice.

[2] Criminal Law ⇐ Sex offenses, incest, and prostitution

It was not improper for prosecutor, during closing argument, to refer to defendant as "a rapist," and even if it was improper, this was not gross and flagrant misconduct; both parties' closing arguments focused on the issue of whether victim consented to sex with defendant and whether her claim of rape was false, majority of the prosecutor's closing statement was refuting arguments of defense counsel and addressing the evidence, prosecutor's rapist comment was made in the course of arguing the evidence showed defendant committed the rape, there was singular reference to defendant as a "rapist," and defendant's testimony was not credible.

[3] Criminal Law ⇐ Appointment and services of interpreter

Defendant failed to establish that lack of an interpreter at his sentencing hearing rose to a constitutional violation; there was little in the record to support a finding that defendant's English skills were such that an interpreter was constitutionally required, and although defendant's trial counsel expressed some difficulty in communicating with his client, these statements were tenuous at best, and after the court stated interpreter would not be appointed for the sentencing hearing, defense made no further effort to document defendant's level of understanding of English, and there was no indication that defense counsel ever used an interpreter in his private meetings with defendant. U.S.C.A. Const.Amend. 6, 14.

1 Cases that cite this headnote

[4] Criminal Law ⇐ Appointment and services of interpreter

Statutory mandate, that an interpreter shall be appointed to someone whose primary language is not English, should not be ignored, and where there is doubt as to a defendant's proficiency in English, the better practice is to honor the statutory mandate and appoint an interpreter; however, the statutory mandate had no sanctions for violations. K.S.A. 75-4351(b).

1 Cases that cite this headnote

Appeal from Seward District Court; Clint B. Peterson, Judge.

Attorneys and Law Firms

Matthew J. Edge, of Kansas Appellate Defender Office, for appellant.

Don L. Scott, county attorney, and Derek Schmidt, attorney general, for appellee.

Before GREENE, C.J., GREEN and BUSER, JJ.

MEMORANDUM OPINION

PER CURIAM.

*1 Hassen Ahmedin appeals his conviction and sentence for rape, arguing juror misconduct, prosecutorial misconduct, and violation of statutory and constitutional rights when he was denied an interpreter for posttrial and sentencing proceedings. Concluding that Ahmedin's claims of error are either baseless or harmless, we affirm his conviction and sentence.

FACTUAL AND PROCEDURAL BACKGROUND

On June 25, 2009, Ahmedin had sexual intercourse with J.Z. at her boyfriend's apartment, claiming the encounter was consensual. J.Z. left the apartment immediately after the encounter, met with the police, gave a statement, and submitted to a sexual assault examination. Ahmedin was charged with rape and criminal restraint and bound over for trial. In November 2009, a jury trial was conducted but resulted in a hung jury.

At a second jury trial in February 2010, Ahmedin testified in his own defense. He indicated that J.Z. was the aggressor and she never asked him to stop. Following the encounter, J.Z. asked him for \$20, but he said he had no money. He then got up to take a shower, and after he got out of the shower J.Z. smiled and winked at him as he left the room. Shortly after he had finished taking a shower, the police arrived at the residence.

The jury found Ahmedin guilty of rape. At the hearing on his motion for new trial and sentencing, the district court declined to have an interpreter present, reiterating its previously expressed belief that Ahmedin adequately understood English. The motion for new trial based on jury misconduct was denied, and Ahmedin was sentenced to a presumptive 155 months' imprisonment. Ahmedin timely appeals.

Further factual detail is provided below to the extent necessary to our analysis of the issues framed.

DID THE DISTRICT COURT ABUSE ITS DISCRETION IN DENYING AHMEDIN'S MOTION FOR NEW TRIAL BASED UPON JUROR MISCONDUCT?

[1] Although Ahmedin cited two instances of juror misconduct in his motion for new trial, on appeal he argues only one: that a juror failed to disclose that she was engaged to an assistant county attorney. We review an order denying a motion for new trial for an abuse of discretion. *State v. Mathis*, 281 Kan. 99, 103-04, 130 P.3d 14 (2006). Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable. If reasonable persons could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. *State v. Gant*, 288 Kan. 76, 81-82, 201 P.3d 673 (2009).

If a defendant's constitutional rights have been violated during a trial, a judge's discretion to deny a motion for a new trial is limited. A trial court abuses its discretion when it denies a motion for a new trial based on juror misconduct if the defendant can show that (1) an act of the jury constituted misconduct and (2) the misconduct substantially prejudiced the defendant's right to a fair trial. *State v. Jenkins*, 269 Kan. 334, 338, 2 P.3d 769 (2000).

*2 The record shows that after the jury was sworn in and J.Z. began her testimony, defense counsel reported to the court that he had just learned that juror M.D. was engaged to an assistant county attorney. The defense objected to M.D. remaining on the jury, questioning whether she could remain unbiased. The district court overruled the objection, noting defense counsel should have been more careful in asking questions during the voir dire process. During voir dire of the group in which M.D. was called, none of the jurors were asked—by the State or the defense lawyers—whether they knew or were related to the attorneys, law enforcement officers, or any witnesses. In fact, Ahmedin's attorney asked only broad questions about their understanding of reasonable doubt, the State's burden of proof, and whether they or a family member had ever been accused of a crime.

During the second day of trial, the court again addressed M.D.'s presence on the jury. At this time, defense counsel argued that the defense had disclosed their relationships with potential jurors to the State before trial and yet the State had failed to advise them of M.D.'s relationship to an assistant county attorney. The State argued that judges' and attorneys' spouses served on juries all the time and that no bias had been shown. Again the court reiterated that the defense made choices regarding the questions that were asked of potential jurors. The judge also noted that M.D.'s father was a defense attorney in town and overruled the defense's objections.

After the defendant testified, the jury was excused, but M.D. was questioned about her ability to be impartial. She advised the court that she was engaged to an assistant county attorney but she would not be influenced by that relationship in deciding the case. She also testified that she had not had contact with her fiance since the trial started, except for seeing him in the courthouse, and that they had not discussed the case. Finally, she stated that she had not heard anything about this case prior to being called for jury service.

K.S.A. 22-3423(1)(e) permits the district court to grant a mistrial if a juror's false statement during voir dire prevents a fair trial. In the few Kansas cases addressing a juror's failure to disclose information, the Kansas Supreme Court has stated that “[j]uror misconduct in civil and criminal cases is not a ground for reversal, new trial, or mistrial unless it is shown to have substantially prejudiced a party's rights. The party claiming prejudice has the burden of proof.” [Citation omitted.]” *State v. Hopkins*, 257 Kan. 723, 725, 896 P.2d 373 (1995) (denial of mistrial when juror in rape case failed to disclose that his ex-girlfriend had been raped); see also

State v. Weaver, No. 97,921, 2009 WL 2242420, at *3–4 (Kan.App.2009) (unpublished opinion), *rev. denied* 290 Kan. 1104 (2010) (mistrial not warranted when the jury foreman failed to disclose during voir dire that he used to be a police officer).

*3 Our review of Kansas authorities on this question reveals that we have not found reversible juror misconduct unless a juror gives a false or deceptive answer to a direct inquiry. When a prospective juror gives a false or deceptive answer to a question pertaining to his or her qualifications with the result that counsel is deprived of further opportunity to determine whether the juror is impartial, and the juror is accepted, a party deceived thereby is entitled to a new trial even if the juror's possible prejudice is not shown to have caused an unjust verdict. *Kerby v. Hiesterman*, 162 Kan. 490, Syl. ¶ 3, 178 P.2d 194 (1947); see also *Peoples Bank of Pratt v. Integral Ins. Co.*, 251 Kan. 809, 815, 840 P.2d 503 (1992) (error in denying new trial in wrongful death action where juror gave false information on juror questionnaire and plaintiffs' counsel did not disclose to court or defense counsel that one of the firms representing plaintiffs was actively representing the juror in civil litigation).

Our Supreme Court has not been impressed with allegations that a juror has merely failed to volunteer information that may be relevant to his or her qualifications. In *Hopkins*, the court reasoned:

“[The prospective juror] did not make a false statement or give misleading information. He was asked if he had heard everything that had occurred. He was not asked if he would have responded to any of the questions asked of other potential jurors. What he was asked by the prosecution was: ‘Is there anything or something that sticks out in your mind that you want to talk about?’

“Based on that question, the defendant asked the trial judge to find that juror misconduct occurred. During voir dire defendant's counsel asked no questions of this juror in the general area complained of. *Potential jurors are not required to be mind readers. Juror misconduct must be based on more than the failure to volunteer information a potential juror speculates or surmises is important to counsel.* The trial judge did not err in finding there was no juror misconduct.” (Emphasis added.) *Hopkins*, 257 Kan. at 726, 896 P.2d 373.

Here, the juror did not misrepresent or provide false or misleading information during voir dire. She was never asked if she was related to any of the attorneys or anyone in law enforcement. There has been no showing of prejudice. We must conclude that Ahmedin's claim of juror misconduct must fail given the current state of Kansas law on this subject.

Although neither party has cited to federal or out-of-state authorities, we note in passing that some courts have recognized that juror bias may sometimes be inferred despite no affirmative misstatements by the juror. See, e.g., *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556–57, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984) (Blackmon, J., concurring) (a party is entitled to a posttrial hearing with the opportunity to establish “actual bias or, in exceptional circumstances, that the facts are such that bias is to be inferred”); *Smith v. Phillips*, 455 U.S. 209, 222, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982) (O'Connor, J., concurring) (“[T]here are some extreme situations that would justify a finding of implied bias ... includ[ing] a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction.”); see also *United States v. Polichemi*, 219 F.3d 698, 704–05 (7th Cir.2000), cert. denied 531 U.S. 1168, 121 S.Ct. 1131, 148 L.Ed.2d 997 (2001) (15-year employee of United States Attorney's Office held biased as a matter of law); *Manuel v. State*, 541 P.2d 233, 237 (Okla.Crim.App.1975) (prospective juror's failure to disclose his marriage to employee of district attorney's office in rural area required new trial); *State v. Selthausen*, 338 Wis.2d 286, 809 N.W.2d 14 (2012) (member of judge's family cannot be found to be per se prejudiced). Because any such implied bias doctrine has not been recognized in Kansas, and because it appears to be inconsistent with our Supreme Court's clear statement of applicable law in *Hopkins*, we are not inclined to consider implied bias here.

*4 For these reasons, we reject Ahmedin's claim of juror misconduct.

DID THE DISTRICT COURT ABUSE ITS DISCRETION
IN DENYING AHMEDIN'S MOTION FOR NEW TRIAL
BASED UPON PROSECUTORIAL MISCONDUCT?

[2] Ahmedin also contends he was deprived of a fair trial due to the prosecutor's comments in closing argument. Specifically, Ahmedin focuses on the prosecutor's final comment:

“There is one thing, the last thing. If she would not have told, a rapist would not have been caught, and you would not have the opportunity today to find this man guilty for what he did to [J.Z.], and I ask that you do so.”

In his brief, Ahmedin suggests that both the prosecutor's reference to Ahmedin as “a rapist” and his reference to the jury's “opportunity” to find him guilty constituted prosecutorial misconduct.

In its ruling on Ahmedin's motion for new trial, the district court held that reversible error could not be based on a case of misconduct when no contemporaneous objection was made. The court also relied on the two-step process for analyzing prosecutorial misconduct. The court first concluded the prosecutor's statement referring to Ahmedin as a rapist exceeded the latitude granted to a prosecutor when discussing the evidence and that the State's evidence was not overwhelming. The court then determined, however, that there was no corroboration for Ahmedin's version of events and that Ahmedin's witness, Said Goodir, was “so incredible [sic] as to be itself credible evidence of the defendant's guilt.” Consequently, the court found the prosecutor's use of the term “rapist” did not deny Ahmedin a fair trial and a new trial would not be permitted because of the lack of a timely objection.

The district court's analysis of the allegation of prosecutorial misconduct was fundamentally incorrect. The Kansas appellate courts have repeatedly stated that an objection is not required to preserve claims of prosecutorial misconduct that occurs during opening statement or closing argument.

See, e.g., *State v. Miller*, 293 Kan. 535, 550, 264 P.3d 461 (2011). The same standard of review applies whether or not a timely objection was made. *State v. McReynolds*, 288 Kan. 318, 322–23, 202 P.3d 658 (2009).

When improper comments were allegedly made by a prosecutor in opening statement or closing argument,

appellate review employs a two-step analysis. First, the appellate court must decide whether the prosecutor's statements go outside the wide latitude allowed to prosecutors in discussing the evidence. Second, if misconduct occurred, the court must determine whether the improper remarks amount to plain error by prejudicing the jury and depriving the defendant of a fair trial. ¶ *Miller*, 293 Kan. at 550, 264 P.3d 461.

Although there are no published Kansas opinions discussing the propriety of using the term "rapist" in closing argument, the Supreme Court decision in ¶ *State v. Scott*, 286 Kan. 54, 78, 183 P.3d 801 (2008), provides some helpful guidance for analysis. In *Scott*, a capital murder case, the prosecutor referred to Scott as a "murderer" and "killer" several times in closing argument. ¶ 286 Kan. at 80, 183 P.3d 801. After reviewing the context of the references, the Court concluded that some of the comments were proper and some were improper. In delineating between the proper and improper comments, the Court reasoned:

*5 "The consistent rule to be taken from the cases is that a prosecutor may refer to the defendant as a murderer or killer in the course of arguing the evidence shows the defendant committed the murder. See ¶ [State v.] *Cravatt*, 267 Kan. [314], 332-34 [, 979 P.2d 679 (1999)]. However, where such statements imply the prosecutor believes something other than the evidence shows the defendant to be a murderer, such as the prosecutor's belief the defendant 'looks like a murderer' or has 'cold-blooded killing eyes,' or the statements do not relate to the evidence but are simply made to inflame the jury, such as a comment telling the jurors they are 'eight feet from a killer,' the argument will be held improper. See ¶ [State v.] *Scott*, 271 Kan. [103], 114, [21 P.3d 516, cert. denied 534 U.S. 1047, 122 S.Ct. 630, 151 L.Ed.2d 550 (2001)]; ¶ [State v.] *Hooker*, 271 Kan. [52.] 67, [21 P.3d 964 (2001)]; ¶ [State v.] *McCray*, 267 Kan. [339.] 347-48, [979 P.2d 134 (1999)]." ¶ *Scott*, 286 Kan. at 81-82, 183 P.3d 801.

Both parties' closing arguments focused on the issue of whether J.Z. consented to sex with Ahmedin and whether her claim of rape was false. In his closing, defense counsel discussed why J.Z. might make a false charge of rape. Counsel cited J.Z.'s fears her boyfriend, Samir, would find out about the encounter. Counsel pointed out that in J.Z.'s 911 call, she

reported Ahmedin "keeps trying to have sex with me" and it was the 911 operator who first used the word "rape." Counsel argued everything after the 911 call was a snowball that kept growing. Defense counsel noted that during the investigation process, J.Z. would cry when others were present and not cry when she was by herself. He pointed out that J.Z. testified she bit and scratched Ahmedin, but he had no such injuries when he was arrested. Finally, counsel cited inconsistencies in J.Z.'s various statements and the fact that J.Z. took no action to call anyone after Ahmedin fondled her and then left to smoke a cigarette. In conclusion, defense counsel argued that the case was all about covering up a bad decision by J.Z.

The prosecutor's final closing argument addressed defense counsel arguments. After discussing a couple of specific points, the prosecutor began a litany of the consequences J.Z. had to encounter after reporting the rape. He talked about J.Z. having to come to court repeatedly to testify and be cross-examined. If she had not reported, the prosecutor stated, she would not have had to call her mother and tell her she was raped; she would not have had to tell her boyfriend of the rape; she would not have been subjected to 7 hours of interviews and an invasive physical examination. According to the prosecutor: "All of this to perpetrate a fraud? I think not."

After summarizing all J.Z. had to go through to prosecute the case, the prosecutor, in his very last statement to the jury, made the statement quoted above.

The majority of the prosecutor's closing statement was refuting arguments of defense counsel and addressing the evidence, and the prosecutor's last comment was made in the course of arguing the evidence showed Ahmedin committed the rape. The comment was certainly not as egregious as that criticized in *Scott*, and we conclude it was not improper.

*6 If we were to reach the second step of the prosecutorial misconduct analysis, we must then consider additional factors. Was the misconduct so gross and flagrant as to deny the defendant a fair trial? Did the remarks show ill will on the part of the prosecutor? And finally, was the evidence against the defendant of the nature that the misconduct would likely have little weight in the minds of the jurors? ¶ *Scott*, 286 Kan. at 78, 183 P.3d 801. Before the third factor may override the first two factors, the appellate court must be confident that both the harmless error tests of K.S.A. 60-261 and the federal

constitutional harmless error rule are satisfied. *State v. Tosh*, 278 Kan. 83, Syl. ¶ 2, 91 P.3d 1204 (2004).

Here, the isolated nature of the singular reference to the attacker as a “rapist,” the lack of any direct and express connection to the defendant, and the restricted use to defend the victim’s report of the incident convinces us that this was not gross and flagrant misconduct, and it does not appear motivated by ill will. Although we concede that this was a case turning on credibility and not one of overwhelming evidence of guilt, we also note the district court’s observation that neither the testimony of Ahmedin or J.Z.’s boyfriend was at all credible. Therefore, even if we were to move to the second step of analysis of prosecutorial misconduct, we are not convinced that the reference to a “rapist” denied Ahmedin a fair trial. We fail to see a reasonable possibility that the misconduct contributed to the verdict. See *State v. Ward*, 292 Kan. 541, 565, 256 P.3d 801 (2011).

DID THE DISTRICT COURT VIOLATE AHMEDIN’S STATUTORY OR CONSTITUTIONAL RIGHTS WHEN IT CONDUCTED POSTTRIAL AND SENTENCING PROCEEDINGS WITHOUT AN INTERPRETER?

On appeal, Ahmedin contends that the district court erred in finding he did not require an interpreter for posttrial proceedings, thus violating K.S.A. 75-4351(b) and his constitutional due process right to be present at all critical stages of the proceeding. Ahmedin was 34 years old and of Somali descent and had moved to the United States about 5 years before this trial. When J.Z. and Ahmedin talked on the day of the incident, they spoke English.

The arrest affidavit indicates that police interviewed Ahmedin after J.Z.’s report and that the officer had no real difficulty communicating with Ahmedin during the initial portion of the interrogation. At some point, however, “Ahmedin decided he could no longer understand” the officer when the *Miranda* warnings were given. (A recording was made of this interview and reviewed by the district judge, but it is not included in the record on appeal.) The arresting officer testified that after arriving at the apartment, he called out from in front of the door, asking Ahmedin to come out; the officer made the request in both English and Spanish. Ahmedin responded immediately to the officer’s demand. During the arraignment, defense counsel advised that he had talked with Ahmedin “as

best I could” and that Ahmedin’s family advised him that he was “not as fluent in English.”

*7 The court noted in the initial arraignment that although Ahmedin acted as if he did not understand English, he had been able to speak and communicate during the first appearance. During the arraignment, Ahmedin repeatedly indicated he did not understand the charges and he was not guilty, but he told the court his name and how old he was. He also confirmed he lived in Georgia but had moved here and was working here for 6 months. After the prosecutor read the charges, the court asked Ahmedin if he needed an attorney, but Ahmedin stated he did not understand and he did not speak English. When asked if he knew what a lawyer was, Ahmedin said, “Yeah, I want a translator, too.” Defense counsel reported he had some conversations with Ahmedin about Ahmedin’s family and their contact numbers. However, the family advised counsel that Ahmedin was not fluent in English. When the court attempted to question Ahmedin, the defendant appeared not to understand the court’s questions. Following a continuance, the arraignment was held with an interpreter.

Ahmedin was appointed a translator by the court for both jury trials. When he appeared for sentencing, however, Ahmedin’s counsel inquired whether an interpreter would be attending the hearing. The court explained that, based on his previous factual findings, an interpreter was appointed for trial in “the abundance of caution.” However, the court believed Ahmedin understood English enough to go forward and that the State had already expended substantial money on interpreter services for Ahmedin. Ahmedin’s counsel did not object to the court’s ruling, although the court apparently treated the inquiry as an objection by noting the Court of Appeals could disagree with him, reverse the sentence and order a resentencing hearing.

Constitutional Standard

[3] The Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution require that a criminal defendant must be present at all critical stages of a criminal proceeding.

State v. Engelhardt, 280 Kan. 113, 122, 119 P.3d 1148 (2006). Sentencing is one of the critical stages. *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Because the right to be present at a proceeding necessarily includes the ability to understand the process, the need to provide interpreters to ensure this constitutional right

has been recognized. ¶¶ *State v. Calderon*, 270 Kan. 241, 245, 247, 13 P.3d 871 (2000); see also ¶¶ *United States v. Cirrincione*, 780 F.2d 620, 634 (7th Cir.1985).

Ahmedin cites to *Calderon* as support for his claim that failure to appoint an interpreter during the sentencing hearing was structural error and reversible. In *Calderon*, however, there was no dispute that the defendant required an interpreter.

¶¶ 270 Kan. at 246, 13 P.3d 871. And subsequent cases seem to retreat from *Calderon's* use of a structural error analysis.

See ¶¶ *Engelhardt*, 280 Kan. at 124, 119 P.3d 1148 (limiting *Calderon's* structural error analysis to facts of that case); *Shaha v.State*, 44 Kan.App.2d 334, 337, 236 P.3d 560 (2010), rev. denied 292 Kan. 965 (2011) (*Calderon* standard not applicable when challenge is to adequacy of interpreter).

*8 Federal courts have recognized that the constitutional right of a defendant to an interpreter is a matter within the trial court's discretion. In determining whether a defendant is constitutionally entitled to an interpreter, the court "must balance the defendant's rights to confrontation and effective assistance against the public's interest in the economical administration of criminal law." ¶¶ *Valladares v. United States*, 871 F.2d 1564, 1566 (11th Cir.1989).

On this score, federal precedent instructs that we ask only whether there is " 'a reasonable probability that, but for the error claimed, the result of the proceeding would have been different.' [Citation omitted.]" ¶¶ *U.S. v. Hasan*, 526 F.3d 653, 665 (10th Cir.2008). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ¶¶ *Sallahdin v.Gibson*, 275 F.3d 1211, 1235 (10th Cir.2002).

Without having the DVD of the police interview, and being limited to the cold transcript, it is difficult to judge the level of Ahmedin's ability to speak English. The judge made his findings based on the DVD and Ahmedin's reactions in the courtroom, which are lost in a cold record. Ahmedin asserts there is no substantial competent evidence to support the finding he adequately understood English. However, we find little in the record to support a finding that Ahmedin's English skills were such that an interpreter was constitutionally required. Although Ahmedin's trial counsel expressed some difficulty in communicating with his client, these statements were tenuous at best. After the district court stated an

interpreter would not be appointed for the sentencing hearing, defense made no further effort to document Ahmedin's level of understanding of English. There was no effort to establish Ahmedin's level of education or that counsel could not communicate with Ahmedin without an interpreter; in fact, there is no evidence that counsel ever used an interpreter in his private meetings with Ahmedin. The record is not inconsistent with a conclusion that Ahmedin was exaggerating his limitations with the English language.

Although it is better practice to provide an interpreter when the issue is in doubt, Ahmedin has failed to establish the lack of an interpreter at his sentencing hearing rose to a constitutional violation. We simply cannot conclude that, but for the error claimed, the result of either the motion for new trial or the sentencing would have been different. The motion for new trial was not dependent on any contribution from Ahmedin but rather turned on the alleged juror misconduct; and the sentencing was straightforward, with Ahmedin receiving a presumptive term of imprisonment that is otherwise not subject to appeal. See ¶¶ *State v. Johnson*, 286 Kan. 824, 851–52, 190 P.3d 207 (2008). In the last analysis, Ahmedin's failure to get an interpreter at his hearing does not undermine our confidence in the outcome of that proceeding in any way. See ¶¶ *Sallahdin*, 275 F.3d at 1235.

Statutory Standard

*9 Even if Ahmedin was not entitled to an interpreter under constitutional principles, he contends the district court's failure to appoint an interpreter during sentencing violated the requirements of K.S.A. 75-4351(b).

Kansas statutes have been adopted to recognize the constitutional requirements discussed in *Engelhardt*. K.S.A. 22-3405(1) states that a defendant in a felony case "shall be present at the arraignment, at every stage of the trial ..., and at the imposition of sentence, except as otherwise provided by law." Likewise, K.S.A. 75-4351(b) states that a qualified interpreter shall be appointed "for persons whose primary language is one other than English" in court proceedings that could result in a penal sanction against the person. (Emphasis added.)

Although K.S.A. 75-4351(b) states that an interpreter "shall" be appointed to someone whose primary language is not English, the Kansas Supreme Court has repeatedly held that failure to appoint an interpreter before taking a statement from

an accused was not reversible error. In ¶ *State v. Zuniga*, 237 Kan. 788, 791–92, 703 P.2d 805 (1985), the court found that 75–4351(e), which required appointment of an interpreter before any attempt to interrogate or take a statement in a criminal case, did not require suppression of a confession made in the absence of an interpreter. The court reasoned that the statute was designed to create authority for government entities for the selection, appointment, and compensation of interpreters, and did not contain any sanctions for violations of its provisions. ¶ 237 Kan. at 791, 703 P.2d 805; see also *State v. Nguyen*, 251 Kan. 69, 75, 78, 833 P.2d 937 (1992) (following *Zuniga*.)

[4] Given our Supreme Court's indication that the statutory mandates have no sanctions for violations, we decline to conclude that Ahmedin is entitled to a remand for posttrial and sentencing hearings. Nevertheless, we again note that the statutory mandate should not be ignored, and that where there is doubt as to a defendant's proficiency in English, the better practice is to honor the statutory mandate and appoint an interpreter.

Affirmed.

All Citations

276 P.3d 838 (Table), 2012 WL 1919925

APPENDIX B

2021 WL 4929156

Unpublished Disposition

Only the Westlaw citation is currently available.

NOT DESIGNATED FOR PUBLICATION

Court of Appeals of Kansas.

STATE OF KANSAS, Appellee,

v.

JOSEPH DOUGLAS SPACKMAN, Appellant.

No.

122,021

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October 22, 2021

Appeal from Johnson District Court; SARA WELCH, judge.
Opinion filed October 22, 2021. Affirmed.

Attorneys and Law Firms

James M. Latta, of Kansas Appellate Defender Office, for appellant.

Shawn E. Minihan, assistant district attorney, Stephen M. Howe, district attorney, and Derek Schmidt, attorney general, for appellee.

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

MEMORANDUM OPINION

PER CURIAM:

*1 A jury in Johnson County District Court found Defendant Joseph Douglas Spackman guilty of six felony sex crimes against the older daughter of his then-wife and one felony sex crime against the younger daughter. Spackman has challenged the district court proceedings and the resulting convictions on an array of grounds. We find no bases warranting relief and, therefore, affirm the convictions and resulting sentences.

FACTUAL AND PROCEDURAL HISTORY

Given the issues on appeal, we need not set out the details of the sexual abuse. Spackman does not dispute the sufficiency of the trial evidence—principally the testimony of the victims—to support the elements of the charged crimes. The jury believed the accounts of L.S., the older victim, and M.S.,

the younger victim, over Spackman's testimony denying any wrongdoing. We do, however, offer an overview of the development of the case against Spackman.

L.S., who was born in 2000, initially accused Spackman of touching her twice in inappropriately sexual ways in March 2012. L.S. reported the incidents, both of which happened around spring break, to school employees several days later. Although law enforcement officers and a caseworker from the Department for Children and Families investigated L.S.'s accusation, no action was taken against Spackman. At the time, E.S., the children's mother, suggested L.S. made up the claims and described her daughter as having been otherwise untruthful and a disciplinary problem. E.S. and Spackman had been dating for several years and were then recently married.

In February 2016, M.S., who was born in 2005, told L.S. that Spackman had touched her inappropriately. L.S. immediately had M.S. repeat what she had said in a video recording on a laptop. The girls, who were visibly upset, played the video for their mother. E.S. packed some clothing and other things; she and the children left the house and stayed with a friend. The friend recommended that E.S. take M.S. to the hospital. E.S. did so.

A specially trained nurse conducted a forensic sexual assault examination of M.S. And hospital personnel contacted the Overland Park Police Department. Officers with the department began an investigation. M.S. recounted how Spackman assaulted her. During the investigation, L.S. reported that Spackman had continued to sexually abuse her after the 2012 incidents. The forensic examination of M.S. yielded DNA evidence consistent with Spackman, such that 1 in about 750 randomly selected Caucasian or Hispanic males would match the sample.

The State proceeded to trial against Spackman in January 2019 on one count of aggravated indecent liberties with a child involving M.S. and four counts of aggravated indecent liberties with a child, one count of statutory rape, and one count of criminal sodomy involving L.S. As we indicated, L.S. and M.S. testified during the trial, along with other prosecution witnesses including the nurse and the DNA analyst. Spackman testified in his own defense and denied having any inappropriate physical contact with either L.S. or M.S. He suggested L.S. disliked him and enlisted M.S. to falsely accuse him of sexually abusing her. He testified L.S. had admitted to him that she lied in 2012 when she accused him. Spackman also told the jurors his DNA could have been

transferred to M.S. if they had inadvertently used the same bath towel.

*2 The jury convicted Spackman as charged. At a later hearing, the district court sentenced Spackman to a term life in prison with parole eligibility after 25 years for each of the off-grid convictions to be served concurrently but consecutive to terms of years for the guidelines convictions. The composite sentence yielded a controlling term of incarceration of life plus 110 months with lifetime parole should Spackman be conditionally released from prison. Spackman has appealed.

LEGAL ANALYSIS

Spackman raises multiple issues on appeal: (1) The crimes of conviction unconstitutionally impose a form of strict liability; (2) L.S.'s testimony was so nonspecific the jurors could not have reached a constitutionally permissible unanimous verdict; (3) the Kansas rape shield law violates his due process rights; (4) the prosecutor made improper statements during jury selection and in closing argument depriving him of a fair trial; and (5) the cumulative effect of the trial errors likewise precluded a fair trial. We take those points up in order, adding facts as necessary.

Strict Liability

Spackman contends the crime of rape, as codified in § 21-5503, K.S.A. 2020 Supp. 21-5503, violates the Kansas Constitution Bill of Rights § 1 and § 5 because it imposes a form of strict liability if the victim is under 14 years of age. He then invites us to find the same constitutional defect undermines § 21-5504, K.S.A. 2020 Supp. 21-5504, criminalizing sodomy, and § 21-5506, K.S.A. 2020 Supp. 21-5506, criminalizing indecent liberties with a child, because those crimes also treat the victim's age as an element of some forms of the offenses. We find the arguments unpersuasive. Spackman did not raise these constitutional arguments in the district court, and the parties spar over whether we should consider them. We assume they have been properly preserved and presented.

Under § 21-5503(a)(3), K.S.A. 2020 Supp. 21-5503(a)(3), an individual commits rape by having sexual intercourse with a child under 14 years of age. The individual need not know the child's age, and the lack of knowledge is not a defense. See § 21-5204(b), K.S.A. 2020 Supp. 21-5204(b). Spackman says that form of the crime, commonly known as statutory rape, imposes a species of

strict liability that curtails or eliminates bad intent or a mens rea. For purposes of this appeal, we do not quibble with the characterization of statutory rape as a strict liability crime. See *State v. Dinkel*, 314 Kan. ____, 2021 WL 4343322, at *9 (No. 113,705, filed September 24, 2021) (“[T]here is no mental culpability requirement for rape of a child under 14.”; cf. *State v. Thomas*, 313 Kan. 660, 662, 488 P.3d 517 (2021) (court assumes rape to be strict liability crime in rejecting defendant's due process claim K.S.A. 2020 Supp. 21-5204 impermissibly dispenses with requirement defendants know or have reason to know victims have not consented)).

From that premise, Spackman submits statutory rape violates the right to jury trial preserved in § 5. Section 5 of the Kansas Constitution Bill of Rights states: “The right of trial by jury shall be inviolate.” And the Kansas Supreme Court has construed the language as retaining “the jury trial right as it historically existed at common law when our state's Constitution came into existence.” *State v. Albano*, 313 Kan. 638, Syl. ¶ 1, 487 P.3d 750 (2021). Spackman posits that strict liability crimes were unknown at common law. In other words, according to Spackman, common-law crimes invariably consisted of a requisite bad act (the actus reus) and a requisite bad intent (the mens rea). We aren't disposed to accept that premise. But even if it were true, it proves too little here.

*3 First, as the court recognized in *Albano*, what's protected in § 5 is the division of decision-making between a jury and the district court. In a criminal case, the jury is constitutionally mandated to decide the facts bearing on guilt or innocence based on the trial evidence. The district court, then, determines matters of law and imposes an appropriate punishment upon a guilty verdict. 313 Kan. at 647-48, 652. A jury's fact finding necessarily corresponds to the elements of a given crime. What § 5 protects is the fact-finding function itself, not the crime-specific elements to be found. Spackman's proposition rests on a petrification of the substantive criminal law as it was in 1859 when the Kansas Constitution, including § 5, was ratified. Section 5 did no such thing, as the discussion in *Albano* confirms.

Moreover, Spackman's argument falters because Kansas had supplanted common-law crimes with a comprehensive criminal code before the Kansas Constitution was drafted and ratified. See Kan. Terr. L. 1859, ch. 28; Kan. Terr. L. 1855, ch. 48. The legislative enactment of a criminal code supersedes common-law crimes. See *State v. Sexton*, 232 Kan. 539, Syl. ¶ 1, 657 P.2d 43 (1983); *State v. Young*, 55 Kan.

349, 356, 40 P. 659 (1895). So the right to jury trial did not encompass common-law crimes at the time of ratification. Rather, defendants were entitled to have juries determine their guilt or innocence based on crimes legislatively codified in the territorial laws.

In 1859, the territorial criminal code included statutory rape, defined as “carnally and unlawfully knowing any female child under the age of ten years.” Kan. Terr. L. 1859, ch. 28, § 26. When the framers drafted § 5, Kansas recognized statutory rape as curtailing the required mens rea based on the victim’s young age in a way similar to Spackman’s characterization of rape under § K.S.A. 2020 Supp. 21-5503(a)(3) as a strict liability crime. See *In re Lloyd*, 51 Kan. 501, 502-03, 33 P. 307 (1893) (recognizing underage victim’s consent did not furnish defense negating criminality of act of sexual intercourse under statute using same language as territorial proscription of statutory rape). In short, there was no extant common-law offense governing sexual intercourse with children below a specified age when the Kansas Constitution was drafted and ratified, so § 5 would not have preserved some right to jury trial for that crime to the exclusion of a prosecution for violating the statutory crime already enacted in the territorial laws. Kan. Const. Schedule § 4 (territorial laws to remain in effect upon congressional approval of Constitution until those laws otherwise repealed). In the same vein, nothing in Spackman’s argument (or in § 5) would preclude the Kansas Legislature from amending the criminal code from time to time, and those amendments would not expand or contract the constitutional right protected in § 5.

Spackman similarly asserts statutory rape violates liberty interests protected in the Kansas Constitution Bill of Rights § 1 because the crime is not narrowly tailored to promote a compelling governmental interest. Cf. *Hodes & Nauser; MDs v. Schmidt*, 309 Kan. 610, 671, 440 P.3d 461 (2019) (Section 1 protects fundamental right of personal autonomy subject to narrowly tailored limitations promoting compelling governmental interest). He contends a statute containing a knowledge or scienter requirement as to the victim’s age would be just as effective in protecting children and promoting public policies grounded in the criminal law. And he says statutory rape is, therefore, not narrowly tailored. Spackman’s premise of equivalent deterrence is specious, and he cites no legal or social science support for it.

Assuming § 1 even reaches this aspect of § K.S.A. 2020 Supp. 21-5503(a)(3), we are unpersuaded the treatment of

the child’s age is constitutionally infirm, especially given the deep historical roots of statutory rape as a crime that does not require the perpetrator’s knowledge of the victim’s age. See *Thomas*, 313 Kan. at 664 (noting longstanding recognition of “constitutional validity” of statutory rape under Kansas law); see also 65 Am. Jur. 2d, Rape § 11 (public policy interests in criminalizing statutory rape); 6 Am. Jur. 2d, Proof of Facts § 63, Mistake as to Age of Statutory Rape Victim § 1 (historical basis for crime). Protecting children under 14 years of age from sexual exploitation at the hand of adults, even if they ostensibly consent, is a compelling governmental interest. For the most part, children of that age lack the maturity to make well-reasoned decisions about engaging in sexual relations and may be manipulated (often easily) by much older adults.

Statutory rape laws, such as § K.S.A. 2020 Supp. 21-5503(a)(3), place the risk of error on the adult and thus deter sexual conduct if there is doubt about the other participant’s age. That’s sufficiently focused to survive constitutional examination. And the deterrent effect undercuts Spackman’s foundational premise. Narrow tailoring doesn’t necessarily require the most exacting standard—here, requiring an adult to have actual knowledge of a sexual partner’s age—to be constitutionally acceptable where the regulated conduct is itself socially undesirable and commands no constitutional protection. See *State v. Mossman*, 294 Kan. 901, 910-11, 281 P.3d 153 (2012) (recognizing typically exploitive nature of sexual relations between adult and underage teen).

*4 As we indicated, Spackman invites us to adopt either or both of his arguments to invalidate those forms of criminal sodomy and indecent liberties with a child that include elements dependent upon the victim’s age. For the same reasons we have found the arguments unavailing as to statutory rape, we decline Spackman’s invitation to apply them elsewhere.

Unanimous Verdict

Spackman next argues he has a right to a unanimous jury verdict under the Sixth Amendment to the United States Constitution and that right was breached in L.S.’s testimony outlining the instances of sexual abuse because they were not described with sufficient particularity. We agree Spackman has identified a newly recognized constitutional right, but we don’t share his application of it. Again, we bypass the parties’ fencing over preservation of this issue for appellate review.

In *Ramos v. Louisiana*, 590 U.S. ___, 140 S. Ct. 1390, 1396-97, 206 L. Ed. 2d 583 (2020), the United States Supreme Court held that the unanimous verdict requirement it had long recognized as a component of the Sixth Amendment right to jury trial in federal criminal cases should be incorporated through the Fourteenth Amendment and applied to state criminal prosecutions. Given the Kansas Supreme Court's approach to constitutional jurisprudence that typically recognizes rights under the Kansas Constitution equivalent to those the United States Supreme Court has found in comparable provisions of the United States Constitution, we presume there is a right to unanimous jury verdicts in criminal cases grounded in § 10 of the Kansas Constitution Bill of Rights and, perhaps, in § 5.

But we find Spackman's argument for a violation of his constitutional right to a unanimous jury verdict difficult to follow. He appears to suggest the jurors could not possibly have agreed he committed particular acts of sexual abuse because L.S. described the incidents only in general terms. And, as a result, he says that deprived him of unanimous verdicts—a defect he likens to a structural error requiring reversal without a showing of actual prejudice. At the same time, however, Spackman submits the issue differs from a multiple acts problem in which jurors have been presented with evidence supporting more instances of wrongful conduct than charged crimes. To protect a defendant's right to a unanimous verdict in that situation, the district court typically will instruct the jurors that they must agree on one specific act for each charge to return a guilty verdict. See *State v. Cottrell*, 310 Kan. 150, 154-55, 445 P.3d 1132 (2019) (recognizing rule but finding no multiple acts); *State v. Colston*, 290 Kan. 952, 961, 235 P.3d 1234 (2010) (use of jury instruction); PIK Crim. 4th 68.100 (2020 Supp.) (instruction on multiple acts and need for unanimity as to particular act). Here, the district court included a unanimity instruction on all but one of the counts identifying L.S. as the victim, and Spackman has not challenged the one conviction for that reason.

We feel adrift in navigating Spackman's constitutional argument. The jurors had to resolve a credibility contest between L.S. and Spackman and did so in favor of L.S. If believed, L.S.'s testimony established physical acts on Spackman's part that entailed sexual contact proscribed under the applicable statutes. L.S. described where the acts took place and identified Spackman as her abuser. Although the abuse involved repeated instances of the same sort of conduct, that does not amount to a constitutional defect in the State's

proof. Spackman has not satisfactorily explained why we should treat it that way. A putative victim's unusually generic testimony about the charged criminal conduct might open a line of attack on his or her credibility and a closing argument urging the jurors to find a reasonable doubt about what really happened. But that's far different from a constitutional defect requiring reversal of a conviction for lack of jury unanimity. Spackman hasn't crossed that threshold.

Rape Shield Statute

*§ Spackman next argues that K.S.A. 2020 Supp. 21-5502, commonly known as the rape shield law, is unconstitutional and cannot be enforced. In turn, he submits the district court improperly relied on the statute in refusing to admit evidence he says bears on L.S.'s credibility. We find the argument strained and unpersuasive. This is another issue Spackman has raised for the first time on appeal. We indulge him and put aside the State's counter based on lack of preservation.

Spackman wanted to introduce evidence at trial that after the incidents at issue here, L.S. went on a sexually oriented website and lied about her age to access the content. He also wanted to introduce evidence that L.S. had made accusations of sexual abuse against other individuals. Under K.S.A. 2020 Supp. 21-5502(b), in a sex crimes prosecution, the defendant generally cannot introduce evidence of the victim's "previous sexual conduct." A defendant must file a pretrial motion with the district court to do so. After a hearing, the district court may allow such evidence if it is relevant and not otherwise inadmissible. K.S.A. 2020 Supp. 21-5502(b).

The district court denied Spackman's motion, finding the evidence was not sufficiently probative of L.S.'s credibility to be admitted as an exception to the general prohibition in K.S.A. 2020 Supp. 21-5502(b). Spackman has not asserted the district court incorrectly applied the rape shield statute or otherwise abused its discretion in denying the motion. Rather, he attacks the constitutionality of K.S.A. 2020 Supp. 21-5502 on the grounds it deprives criminal defendants of due process by creating an unlevel evidentiary playing field or lack of reciprocity with the State in pretrial practices. Spackman cites K.S.A. 2020 Supp. 60-455 as a counterpoint allowing the admission of a criminal defendant's other crimes or civil wrongs as trial evidence. He contends what he characterizes as the disparities between the exclusion of evidence pertaining to victims in sex crime cases under K.S.A. 2020 Supp. 21-5502 and the admission of evidence pertaining to criminal defendants under K.S.A. 2020 Supp. 60-455 create a due

process violation, and he cites *Wardius v. Oregon*, 412 U.S. 470, 472, 93 S. Ct. 2208, 37 L. Ed. 2d 82 (1973), as his supporting authority.

But *Wardius* offers an inapt comparison. In *Wardius*, the Court held that an Oregon statute violated fundamental due process rights by requiring criminal defendants to identify before trial any witnesses supporting an alibi defense without imposing a reciprocal obligation on the State to disclose witnesses who would rebut the alibi. *Wardius*, 412 U.S. at 472. The constitutional vice lay in “requir[ing] a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.” *Wardius*, 412 U.S. at 476. Although the *Wardius* Court suggested due process requires some “balance of forces between the accused and his accuser,” it did not examine reciprocity apart from the disclosure of alibi witnesses. *Wardius*, 412 U.S. at 474.

The Court recognized a due process need for mutual pretrial discovery of evidence bearing on a narrow issue: a defendant’s claimed alibi. Spackman presents us with quite a different proposition. He says two statutes regulating the admissibility, not the discovery, of different types of evidence somehow offend the discrete due process protection for criminal defendants embodied in *Wardius*. And, in turn, the rape shield law must be declared unconstitutional. Spackman’s logical and legal leap tumbles into the abyss. The juxtaposition of the rape shield protections in K.S.A. 2020 Supp. 21-5502 and the use of other crimes evidence in K.S.A. 2020 Supp. 60-455 does not create an imbalance upending constitutional due process.

*6 As we have explained, K.S.A. 2020 Supp. 21-5502 imposes a general rule of inadmissibility in a sex crime prosecution of evidence about the victim’s “sexual conduct”—an exceptionally encompassing category typically covering intimate lawful activity most people endeavor to keep private. But the statute permits a district court to make a case specific determination that such evidence might be of such relevance as to be admissible. The statute, then, does not impose a categorical exclusion of sexual conduct evidence.

Similarly, K.S.A. 2020 Supp. 60-455(a) generally treats a criminal defendant’s commission of “a crime or civil wrong” apart from the charged crimes as inadmissible trial evidence. The statute contains two exceptions to the general rule of inadmissibility. Other crimes evidence may be admitted if

those facts bear on some aspect of the charged crime. For example, the State may circumstantially prove identity by showing the defendant previously committed similar crimes using a highly distinctive method common to the charged crime. The State, likewise, could show the defendant stole a car to use as a getaway vehicle in a charged jewelry store robbery, even though the defendant had not been charged with auto theft. See K.S.A. 2020 Supp. 60-455(b) (admissibility to prove “material fact” including identity, preparation, and plan); K.S.A. 2020 Supp. 60-455(c) (admissibility to prove “modus operandi” as establishing identity). More to the point here, perhaps, is the second exception: In prosecutions for designated sex crimes, the State may offer evidence the defendant committed other statutorily defined acts of “sexual misconduct” to prove propensity or for any other relevant purpose. K.S.A. 2020 Supp. 60-455(d).

The State must give the defendant notice at least 10 days before trial of any evidence to be offered under K.S.A. 2020 Supp. 60-455, affording the defendant the opportunity to file a motion in limine with the district court to preclude or limit the evidence. K.S.A. 2020 Supp. 60-455(e). In any event, the district court should exclude the evidence if its probative value is substantially outweighed by its undue prejudice to the defendant. *State v. Hachmeister*, 311 Kan. 504, 510-11, 464 P.3d 947 (2020).

We fail to see a degradation of Spackman’s due process rights in the way he alleges. There is no discordance between K.S.A. 2020 Supp. 21-5502 and K.S.A. 2020 Supp. 60-455 implicating due process protections for criminal defendants comparable to the defect the *Wardius* Court found in Oregon’s one-sided disclosure of alibi evidence. The rape shield statute contains a general rule of exclusion of certain lawful activity of victims of sex crimes. Conversely, K.S.A. 2020 Supp. 60-455(d) has a general rule of admissibility in sex crimes prosecutions of defendants’ acts of sexual misconduct apart from the charged crimes. By statutory definition, those acts almost certainly will be illegal. K.S.A. 2020 Supp. 60-455(g) (defining acts of sexual misconduct). The two categories of evidence regulated by K.S.A. 2020 Supp. 21-5502(b) and K.S.A. 2020 Supp. 60-455(d) are materially different and certainly do not comprise reciprocal discovery and evidentiary treatment of a single factual circumstance like an alibi.

Moreover, each statute permits judicial intervention before trial to override the general rule to ensure a fair trial in any given case. So a defendant may be permitted to use

evidence of a victim's sexual conduct upon a specific showing of relevance and need, notwithstanding the default against admissibility in K.S.A. 2020 Supp. 21-5502. Likewise, a defendant may successfully exclude other crimes evidence under K.S.A. 2020 Supp. 60-455 with a specific showing of irrelevance or undue prejudice. Those procedures for judicial notice and hearing avoid any gross imbalance between the State and the defense undermining due process protections comparable to the forced disclosure of a defendant's alibi evidence with no reciprocal disclosure of the State's countervailing evidence.

Prosecutorial Error

*7 Spackman next contends the prosecutor made improper comments twice during jury selection and twice in closing argument. Spackman brands those remarks as prosecutorial error that deprived him of a fair trial.

We examine claims of prosecutorial error with a revamped standard the Kansas Supreme Court initially outlined in *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016). The analytical model first considers whether an error has occurred and then weighs any prejudice to the defendant resulting from the error. Comments made during jury selection, opening statement, or closing argument will be considered error if they fall outside the wide latitude afforded a prosecutor in selecting fair-minded jurors or in discussing the evidence and the law in statements to those jurors. *State v. Sherman*, 305 Kan. at 109. This simply transplanted the initial step in the former process, though substituting the term “error” for “misconduct,” a more pejorative label at least connoting a deliberate violation of the rules even when there might be only an inadvertent mistake. *State v. Sherman*, 305 Kan. at 104-05.

If an appellate court finds the challenged comments to be prosecutorial error, it must then consider prejudice measured by the test set out in *State v. Ward*, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 (2011), for a constitutional wrong. The State, as the party benefiting from the error, must demonstrate “beyond a reasonable doubt” that the mistake “did not affect the outcome of the trial” taking account of the full trial record. *State v. Sherman*, 305 Kan. at 109 (quoting *State v. Ward*, 292 Kan. 541, Syl. ¶ 6). That is, the appellate court must determine if the error deprived the defendant of a fair trial—a constitutional protection rooted both in due process and in the right to trial itself. *State v. Sherman*, 305 Kan. at 98-99, 109. The

prejudice analysis in *Sherman* replaced a multifactor standard that also considered the prosecutor's bad intent or ill will—breaches of professional conduct the court concluded could be more appropriately addressed in ways other than reversing a conviction in the absence of material prejudice. *State v. Sherman*, 305 Kan. at 114-15.

We first consider jury selection. District courts permit the lawyers to question potential jurors to explore for experiences or preconceived notions—a euphemism for biases and prejudices—that might cloud their ability to be fair in the case at hand. See K.S.A. 2020 Supp. 22-3408(3) (lawyers shall be permitted to question potential jurors subject to district court's reasonable restrictions; district court may also examine potential jurors); see also *State v. Hudgins*, 301 Kan. 629, 635, 346 P.3d 1062 (2015) (outlining purpose of selection process and district court's authority to regulate lawyers' questioning of potential jurors). What might be a serious preconception or blind spot for a juror in one case or a type of case might not be in others. The give-and-take necessarily touches on issues and evidence that may arise during the trial, permitting the lawyers to gauge prospective jurors' overt views and more subjective perceptions. The reconnaissance allows the lawyers to challenge potential jurors for legal cause and to use a statutorily allotted number of peremptory strikes to remove remaining candidates who may harbor inhospitable perspectives on a party, a claim, or some aspect of the anticipated evidence. See K.S.A. 22-3410 (identifying grounds supporting challenges for cause); K.S.A. 2020 Supp. 22-3412 (peremptory challenges of prospective jurors). The process is not, however, supposed to be an unvarnished opportunity for the lawyers to inculcate prospective jurors with their spin on the law or the evidence. Some lawyers try to do a great deal of juror “education” in the selection process, but there is an amorphous boundary that shouldn't be crossed.

*8 Spackman submits the prosecutor overstepped with questions to the prospective jurors inquiring how they would feel if they had to come into court and discuss a sexual encounter in front of strangers. He did not raise an objection to the line of inquiry with the district court, but the absence of an objection does not preclude appellate review of possible prosecutorial error. The prosecutor's examination strikes us as falling in the fuzzy area near the boundary line separating proper examination of a jury panel from the improper. The line of questions probed whether the prospective jurors would be uncomfortable in that situation ostensibly (we assume) to assess how they might react to L.S. and M.S. as witnesses.

But the questions also inferentially disposed the prospective jurors to put themselves in L.S.'s and M.S.'s position both as witnesses and victims of sex crimes. A prosecutor's suggestion that jurors consider how they would feel or react if they were the victim of the charged crime or a member of the victim's family amounts to an improper argument appealing to their emotions rather than assisting them in fairly assessing the evidence and applying the law to their assessment. See *State v. Lowery*, 308 Kan. 1183, 1208-09, 427 P.3d 865 (2018).

If the prosecutor were concerned about potential juror reaction to children making allegations of wrongdoing generally or of sexual abuse in particular, there were more direct ways of probing the issue without closing in on an improper equation of the prospective jurors and the victims. That said, even if the line of inquiry amounted to prosecutorial error, it was isolated, comparatively subtle, and remote from the jurors' work in hearing the evidence and rendering their verdicts. Cf. *State v. Boothby*, 310 Kan. 619, 629, 448 P.3d 416 (2019) (district court's misstatement during jury selection both "brief" and "attenuated" from later trial proceedings, resulting in no material prejudice to defendant). This was not an elaborate (and improper) exhortation in closing argument to the jurors just before they began deliberations. See *State v. Genzel*, No. 120,602, 2020 WL 3481499, at *6-7, *11-12 (Kan. App.) (unpublished opinion) (prosecutor's extended pitch in closing argument that jurors needed to protect child alleging sexual abuse because adults around child failed to do so substantially contributed to reversal of conviction), *rev. denied* 312 Kan. 896 (2020). We do not see tangible untoward repercussions for Spackman.

Spackman also complains that during jury selection, the prosecutor said any sex act with a child under 16 years of age is unlawful in Kansas. The remark is technically incorrect. Someone younger than 16 who is married may lawfully engage in consensual sexual activity with his or her spouse. See *K.S.A. 2020 Supp. 21-5503(d)*; *K.S.A. 2020 Supp. 21-5506(c)*. The narrow exception to the prosecutor's general comment about unlawful sexual conduct directed at children had no bearing on this case and never came up during the trial, since Spackman was not married to either L.S. or M.S.

Lawyers are not permitted to misstate the law in their remarks to or in front of jurors. *State v. Tahah*, 302 Kan. 783, 791, 358 P.3d 819 (2015). A prosecutor's misstatement of the law is commonly considered error under the *Sherman*

standard. Here, we are, however, inclined to characterize the prosecutor's remark as a mistake but not necessarily prosecutorial error on the notion that a rule of reason should apply to the determination. The remark could be characterized as an overly broad or incomplete generalization that in no way materially misled the prosecutive jurors. But that may be no more than a benign way of describing some errors. To be sure, however, the misstatement was wholly extraneous to the case. Had the prosecutor observed (incorrectly) during jury selection that Kansas no longer criminalizes sodomy between consenting adults of the same sex, although it does, see *K.S.A. 2020 Supp. 21-5504(a)(1)*, we would have a similar situation. Although that part of the sodomy statute is unconstitutional and cannot be enforced, it remains part of the criminal code, so the prosecutor would be technically incorrect about a legal issue having nothing to do with the case. See *State v. Franco*, 49 Kan. App. 2d 924, 934, 319 P.3d 551 (2015) (recognizing *K.S.A. 2013 Supp. 21-5504[a][1]* to be constitutionally unenforceable).

*9 A rule of reason in assessing prosecutorial error would inject line-drawing when, perhaps, the *Sherman* court intended none, especially as to mistaken statements of legal principles. In *Sherman*, the court focused on the revamped prejudice standard and did not offer a detailed discussion of what amounts to error. At least when it comes to telling jurors what the law is or is not, the test may be binary—a mistaken statement, however trivial or irrelevant, necessarily creates prosecutorial error. We, therefore, assume a categorical rule in this respect and treat the remark as prosecutorial error. Having done so, we are certain the error did not influence the outcome of the trial in any way.

Turning to closing argument, Spackman complains the prosecutor told the jurors that they could convict him of aggravated indecent liberties with a child for his contact with M.S. because she was less than 17 years old. We agree the prosecutor materially misstated the law and committed error. The charge required the jurors to find that M.S. was less than 14 years old when Spackman sexually assaulted her. But we are unpersuaded the single mistaken reference to the age requirement deprived Spackman of a fair trial.

First, the prosecutor's misstatement was not repeated and, at most, amounted to a fleeting reference to a specific age as an element of the crime. Second, the pertinent instruction correctly informed the jurors they had to find M.S. was under 14 years of age to convict Spackman. The district

court, of course, read the instructions to the jurors before the lawyers' closing arguments, and the jurors had copies of the instructions to consult during their deliberations. We have no reason to suspect the jurors elevated the isolated remark of the prosecutor over the jury instructions; we, therefore, presume the jurors followed the instructions absent a contrary indication. See *Hachmeister*, 311 Kan. at 513 (appellate courts presume jurors follow instructions given by district court); *State v. Gonzalez*, 307 Kan. 575, 595, 412 P.3d 968 (2018). And the undisputed evidence established M.S. was less than 14 years old when Spackman allegedly abused her. We are convinced the mistake did not deprive Spackman of a fair trial.

Spackman also challenges the prosecutor's comment in closing argument that a forensic sexual assault examination is "not a fun procedure." The prosecutor briefly described the examination, which typically includes physically intrusive probes to recover biological evidence from the victim's body. The description recapitulated testimony from the nurse who examined M.S. The prosecutor's characterization was a single aside that did not appear to be tied to any more fully developed argument to the jurors. We believe we may safely assume most people would agree that such an examination is not fun. In that respect, the comment does not strike us as error.

But Spackman contends the prosecutor sought to elicit sympathy for M.S. by pointing out she had to go through a "not fun" forensic sexual assault examination. The suggestion seems to be stretch. The remark would have been, at best, an exceptionally oblique request for the jurors' undue solicitude. The examination itself had independent relevance in the case, since it generated DNA evidence against Spackman and, thus, was an appropriate topic of discussion in the closing arguments.

On appeal, the State suggests the prosecutor's description of the examination was an argument designed to bolster credibility—M.S. would not have falsely reported a sexual assault because she then would face an intimate, unpleasant physical examination. But the trial record does not show M.S. knew what a sexual assault examination entailed before she accused Spackman. So that justification for the prosecutor's comment doesn't hold up very well. We return to our initial observation that the prosecutor's remark was an accurate characterization of the examination that simply seems to have been dropped into the closing argument in furtherance of

no greater or more significant point. As such, it was not prosecutorial error. And if it were, its rather disembodied quality did not compromise Spackman's right to a fair trial.

Cumulative Error

*10 Appellate courts may weigh the collective effect of trial errors and grant relief if their overall impact deprived the defendant of a fair hearing even when the errors considered individually would not necessarily require reversal of a conviction. ¶ *State v. Harris*, 310 Kan. 1026, 1041, 453 P.3d 1172 (2019); ¶ *State v. Smith-Parker*, 301 Kan. 132, 167-68, 340 P.3d 485 (2014). Spackman urges us to do so here and find reversible error. An appellate court should examine the entire trial record to assess multiple trial errors in the aggregate. ¶ 301 Kan. at 167-68. The assessment necessarily takes into account "how the trial judge dealt with the errors as they arose; the nature and number of errors and their interrelationship, if any; and the overall strength of the evidence." ¶ *State v. Miller*, 308 Kan. 1119, 1176, 427 P.3d 907 (2018). When the heightened review for constitutional error applies to any of the deficiencies—as it does for the prosecutor's misstatement of the law in closing argument—that standard governs the cumulative error analysis. ¶ *State v. Thomas*, 311 Kan. 905, 914, 468 P.3d 323 (2020).

The only errors we have found arose in the prosecutor's comments in jury selection and one remark in closing argument. Each of them, at most, presented a nominal or trivial misstatement. As we have already explained, singly there was no reversible error. Without repeating our discussion here, we cannot conclude the errors had a pyramiding effect that amplified their otherwise minimal influence during the trial into a collective erosion of Spackman's right to a fair proceeding. Without gilding the lily, the errors were innocuous individually and assessed together they remained so. We are persuaded beyond a reasonable doubt that the outcome of the trial would have been the same had those errors never happened.

Affirmed.

All Citations

Slip Copy, 2021 WL 4929156 (Table)

CERTIFICATE OF SERVICE

This is to certify that a copy of Appellee's Brief was e-mailed to Jennifer C. Roth, Kansas Appellate Defender Office, adoservice@sbids.org, on this 4th day of November, 2021.

/s/ Matt J. Maloney
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