NOT DESIGNATED FOR PUBLICATION

No. 112,645

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

JOSIAH R. BUNYARD,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; CHRISTOPHER M. MAGANA, judge. Opinion filed April 29, 2016. Affirmed.

Richard Ney, of Ney & Adams, of Wichita, for appellant.

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

Before ATCHESON, P.J., GARDNER, J., and BURGESS, S.J.

ATCHESON, J.: Defendant Josiah R. Bunyard challenges on multiple grounds his convictions for aggravated battery and several other crimes following a jury trial in Sedgwick County District Court and the sentence he later received from the district court. We find no error based on any of the points Bunyard has asserted and, therefore, affirm in all respects.

The crimes arose from a fraying relationship between Bunyard and Jennifer Wood when they were romantically involved. Given the issues Bunyard has raised on appeal, we need not detail the trial evidence. The jury convicted Bunyard of aggravated battery, a

severity level 4 person felony, for striking Wood and breaking her jaw in October 2013. During the same incident, Bunyard choked Wood, resulting in a conviction for misdemeanor battery.

When the charges were filed against Bunyard, the State obtained a protective order prohibiting Bunyard from communicating or otherwise interacting with Wood. Bunyard later attempted to contact Wood by passing a letter to her through an intermediary. The letter arguably sought to discourage Wood's participation in the criminal case. Based on the letter, the State charged Bunyard in a new case with two misdemeanors for violating the protective order and intimidating a witness. The two cases were eventually consolidated before trial despite Bunyard's objection. At trial, the State used Wood's preliminary hearing testimony after the district court determined Wood to be unavailable as a witness. Bunyard objected to that ruling. The jury convicted Bunyard of the charges related to the letter.

In all, then, in a week-long trial in February 2014, the jury convicted Bunyard of one felony for the aggravated battery of Wood and three misdemeanors.

At sentencing, the district court scored six earlier convictions of Bunyard for misdemeanor battery in determining his criminal history, even though the convictions had been expunged. Bunyard objected. Based on the resulting criminal history category of B, the district court imposed a low presumptive sentence on Bunyard, requiring him to serve 144 months in prison and 36 months on postrelease supervision. Bunyard was ordered to serve jail sentences on the misdemeanors concurrently with the prison sentence. Bunyard has timely appealed. We take up the appellate issues in the order Bunyard has briefed them, adding facts and procedural history as necessary.

LEGAL ANALYSIS

Request for Self-Representation

Despite being represented by lawyers throughout this case, Bunyard drafted and filed dozens of motions and other requests for relief in the district court. In those papers, he never asked to represent himself. Toward the end of a long hearing the Friday before trial, Bunyard tried to personally argue his cause to the district court rather than relying on his lawyer. In what appears to have been a poorly conceived effort to maintain some orderliness in the proceedings, the district court told Bunyard he could either speak through his lawyer or represent himself. Bunyard ostensibly took up the offer of self-representation but never followed through with his acceptance of that responsibility and, rather, reverted to relying on his lawyer. Under the circumstances, we find Bunyard was not deprived of his right to self-representation—a right of constitutional magnitude preserved for criminal defendants in the Sixth Amendment to the United States Constitution. *Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *State v. Jones*, 290 Kan. 373, 377, 228 P.3d 394 (2010).

By our cursory count, Bunyard was represented successively by at least three lawyers in the district court. During the hearing just before trial, Bunyard apparently believed both the prosecutor and his own lawyer weren't fully informing the district court about Wood's availability as a witness. He vocally interjected himself into the substantive discussion. The district court tried to rein in Bunyard without much success. Finally, the district court told Bunyard he could choose either to have his lawyer argue on his behalf or represent himself. The exchange unfolded this way:

"THE DEFENDANT: Your honor, could I please be heard?

"THE COURT: Mr. Bunyard, you have appointed counsel who has filed this motion or is responding to this motion, so you're either having [your lawyer] argue this case—or are you representing yourself? Which is it?

"THE DEFENDANT: I'll represent myself, if that's the choice. I will definitely—

"THE COURT: You're seeking to have [your lawyer] taken off this case?

"THE DEFENDANT: If those are my options, then, yes.

"THE COURT: What are you asking, Mr. Bunyard?

"THE DEFENDANT: I'm asking to be heard right now."

The district court then recessed the hearing to allow Bunyard to confer privately with his lawyer. After speaking with Bunyard, the lawyer continued arguing against the State's request and asked the district court to defer a ruling in the hope Wood could be located and subpoenaed over the weekend. The district court indicated it intended to rule, prompting Bunyard to declare, "I want it on the record I wish to represent myself unequivocally."

The district court told Bunyard it would take up his request for self-representation after he spoke further with his lawyer and filed a "proper motion." The district court then granted the State's motion to use Wood's preliminary hearing testimony at trial, issued a material witness bond for Wood, granted without objection three motions to endorse witnesses, and recessed the hearing until Monday—the day the trial was to begin.[1]

[1]Apart from orderliness, there are sound reasons a criminal defendant ought not personally speak in court hearings. First, of course, lawyers are trained advocates and generally know how to craft effective arguments in light of the factual circumstances and the governing legal principles. The vast majority of nonlawyers have no comparable skills and aren't nearly as adept at lawyering as they might imagine themselves. Second, what a party personally says in court typically amounts to an admission that can later be admitted as evidence against him or her. See *State v. Burks*, 134 Kan. 607, 608-09, 7 P.2d 36 (1932); *United States v. Thetford*, 806 F.3d 442, 447 (8th Cir. 2015).

And as to orderliness, we fail to see the wisdom in attempting to quiet outspoken defendants by throwing down a gauntlet to be silent or to fire your lawyer and represent yourself. The challenge invites needless complications, especially with an otherwise personally litigious defendant.

At the reconvened hearing, Bunyard's lawyer informed the district court he had conferred with his client over the weekend. The lawyer outlined the motions he would argue, many of which Bunyard had personally filed, and explained Bunyard had agreed to withdraw the others. In response to an inquiry from the district court, Bunyard said the arrangement was satisfactory, so long as the lawyer raised the points they had discussed. The district court heard argument from the lawyer and the prosecutor on those motions and other pretrial matters. The district court ruled, and jury selection began that afternoon.

Nobody mentioned Bunyard's request for self-representation. Bunyard never restated his desire to represent himself. Nor did he otherwise complain about how the pretrial hearing was conducted on Monday. The district court, however, did not affirmatively raise the issue of self-representation and, at the conclusion of the hearing, failed to give Bunyard an opportunity to assent to his lawyer's handling of the pending matters.

Although criminal defendants have a constitutional right to self-representation, the right is not absolute. For example, a defendant may be incapable of exercising the right even though he or she is otherwise competent to stand trial. See *Indiana v. Edwards*, 554 U.S. 164, 177-78, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008). Likewise, a court need not honor a request for self-representation when its timing would disrupt an ongoing trial. See *State v. Cromwell*, 253 Kan. 495, 505, 856 P.2d 1299 (1993) ("If a defendant does not ask to represent himself before trial starts, the court has discretion whether to grant his request for self-representation."); *Hill v. Curtain*, 792 F.3d 670, 677-79 (6th Cir. 2015) (no constitutional error in denying criminal defendant's motion for self-representation made on first day of jury trial). Neither of those considerations is in play here. We recognize that the wrongful denial of a request for self-representation is not subject to review for harmlessness and amounts to a structural error requiring relief

without regard to actual prejudice. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-49, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006); *Jones*, 290 Kan. at 382-83.

But self-representation also necessarily entails a waiver of the Sixth Amendment right to be represented by a lawyer at all critical stages of a criminal prosecution. So a criminal defendant exercising the right to self-representation and concomitantly relinquishing the right to counsel must do so knowingly and intelligently. *Faretta*, 422 U.S. at 835; *Jones*, 290 Kan. at 376-77. That is, the decision must be an informed one. To insure the sufficiency of a criminal defendant's choice to represent himself or herself, a district court must advise the defendant of the pitfalls of abandoning the right to counsel. *Jones*, 290 Kan. at 376-77; see *Iowa v. Tovar*, 541 U.S. 77, 87-89, 124 S. Ct. 1379, 158 L. Ed. 2d 209 (2004). Here, Bunyard received no such admonition from the district court. As far as the record shows, Bunyard's interjections for self-representation were not fully informed decisions regarding the exercise of his Sixth Amendment rights.

In the unusual circumstances of this case, we find Bunyard was not denied the right to represent himself. No single aspect of this case controls or fully informs our conclusion. Rather, the confluence of all of them leads to that result. Of particular significance, Bunyard was exceptionally active personally in the defense of the charges both through his extensive pro se filings and his comments during court appearances. Yet, he did not make a request for self-representation until the district court mentioned it a couple of days before trial. Bunyard did not then act on the district court's direction by preparing even a nominal or bare-bones motion for self-representation—something that was within his capacity. The district court clearly communicated to Bunyard that it would consider such a request; there were no mixed signals suggesting the district court had rejected or inevitably would reject the request. Finally, during the conclusion of the pretrial conference the morning of trial, Bunyard affirmatively assented to his lawyer's argument of the remaining motions. He did not resurrect self-representation as an issue. Bunyard's conduct, therefore, was indelibly inconsistent with a continuing desire for self-

representation. Based on the totality of the circumstances, we conclude Bunyard's right to self-representation was not impermissibly compromised.

At the same time, however, we should not be understood to say the district court handled the matter adroitly. We've already made plain we think otherwise. Moreover, a district court cannot effectively filibuster a criminal defendant's spontaneous request for self-representation by refusing to rule on the request or by imposing requirements that the defendant reassert that request in a detailed written form or in successive hearings to secure a ruling. See *State v. Vann*, 280 Kan. 782, 794, 127 P.3d 307 (2006). Nor can a district court act in a manner likely to foster the impression the request will necessarily be denied or withhold a discussion of the implications of self-representation to stymie a defendant's desire to represent himself or herself.

Here, however, we do not have a functional or deliberate undermining of Bunyard's rights. Bunyard did not follow through on the impromptu remarks he made in response to the district court's efforts to run an orderly hearing. What Bunyard actually wanted seems to have been an opportunity to coach his lawyer on how best to argue the pretrial motions. He got to do so and never returned to self-representation as an alternative. We, therefore, reject the point as a ground for reversing the convictions.

Use of Wood's Preliminary Hearing Testimony

As we have indicated, the Friday before trial, the State asked to substitute Wood's preliminary hearing testimony for her live testimony. Bunyard duly objected. After an evidentiary hearing, the district court granted the request, and the State did not produce Wood to testify in person at trial. On appeal, Bunyard asserts two ways the district court erred: The State failed to make a sufficiently diligent effort to secure Wood's appearance at trial; and the lawyer representing Bunyard at the preliminary hearing labored under a conflict that kept him from adequately cross-examining Wood. We find neither basis warrants relief.

A criminal defendant has the right to confront (and, thus, to cross-examine) witnesses against him or her, as provided in the Sixth Amendment to the United States Constitution. If a witness is unavailable at trial, the State may substitute testimony from that witness given in an earlier hearing, so long as the defendant had a fair opportunity to cross-examine at the hearing. See *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); *State v. Reed*, 302 Kan. 227, 246, 352 P.3d 530 (2015). As defined in K.S.A. 60-459(g)(5), an unavailable witness is "absent from the place of hearing because the proponent of his or her statement does not know and with diligence has been unable to ascertain his or her whereabouts." Accordingly, the State had to show that it acted in good faith in making a diligent effort to find Wood and serve her with a subpoena or otherwise secure her attendance at the trial. *State v. Plunkett*, 261 Kan. 1024, 1034, 934 P.2d 113 (1997). The district court is to assess the sufficiency of the State's effort based on all of the circumstances. See *State v. Flournoy*, 272 Kan. 784, 800, 36 P.3d 273 (2001); *State v. Cook*, 259 Kan. 370, 376, 913 P.2d 97 (1996).

We, in turn, apply an abuse of discretion standard to the district court's call in allowing the State to substitute past testimony for a witness' in-person appearance at trial. *State v. Zamora*, 263 Kan. 340, 342, 949 P.2d 621 (1997); *State v. Dunerway*, No. 111,457, 2015 WL 5224703, at *5 (Kan. App. 2015) (unpublished opinion). A district court may be said to have abused its discretion if the result it reaches is "arbitrary, fanciful, or unreasonable." *Unruh v. Purina Mills*, 289 Kan. 1185, 1202, 221 P.3d 1130 (2009). That is, no reasonable judicial officer would have come to the same conclusion if presented with the same record evidence. An abuse of discretion may also occur if the district court fails to consider or to properly apply controlling legal standards. *State v. Woodward*, 288 Kan. 297, 299, 202 P.3d 15 (2009). A district court errs in that way when its decision "'goes outside the framework of or fails to properly consider statutory limitations or legal standards.'" 288 Kan. at 299 (quoting *State v. Shopteese*, 283 Kan. 331, 340, 153 P.3d 1208 [2007]). Finally, a district court may abuse its discretion if a factual predicate necessary for the challenged judicial decision lacks substantial support

in the record. *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 935, 296 P.3d 1106 (outlining all three bases for an abuse of discretion), *cert. denied* 134 S. Ct. 162 (2013); *State v. Ward*, 292 Kan. 541, Syl. ¶ 3, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594 (2012).

The hearing evidence showed the district attorney's office prepared a subpoena for Wood 3 weeks before the trial. The office's witness coordinator called the telephone number on file for Wood. A woman answered and after ascertaining the caller's purpose stated the number no longer belonged to Wood and hung up. The witness coordinator then gave the subpoena to an investigator with the district attorney's office, so he could find and serve Wood. The investigator called the phone number and had a similar conversation with the woman who answered. The investigator then went to the Wichita address the district attorney's office had for Wood. No one answered the door. But there was a car in the driveway, and the investigator believed he heard someone inside. He left a business card in the door. The investigator asked that a police officer attempt to contact Wood at the residence. An officer did so the same day. No one responded. The investigator received a call from a woman who identified herself only as the resident of the home. She told the investigator Wood no longer lived there.

Over the next 2 weeks or so, the investigator called the telephone number numerous times without making any contact. He visited several alternate addresses Wood had given as points of contact. Those efforts proved fruitless. At least a couple of times, police officers visited the residence but didn't find Wood.

Later when the investigator called the telephone number, a woman identifying herself as Jennifer answered. The woman then agreed to meet the investigator the next day to accept the subpoena. Wood did not show up at the agreed-upon meeting site. The investigator called the telephone number multiple times after that, but no one answered or responded to voicemail messages.

At the hearing, Bunyard's lawyer established that the investigator never contacted Wood's probation officer. The record does not affirmatively demonstrate that the probation officer would have had additional leads. But probation officers typically have employment information on the people they supervise, and Wood might have had a meeting scheduled with the officer in the 3 weeks before trial. Based on the hearing evidence, the investigator and others apparently did little to get in touch with Wood outside of normal business hours. They never "staked out" the house, waiting for the occupant, believed to be Wood, to leave or arrive.

But the State is not required to exhaust all possible means of finding witnesses. It is obligated to make a good-faith, diligent effort. Here, the district court found that to be the case. The district court understood the governing legal principles and what the district attorney's office did to find Wood. Bunyard does not argue otherwise. Rather, he contends the district attorney's office was less than diligent and, more precisely on appeal, that the district court abused its discretion in finding diligence.

We, therefore, ask whether no reasonable district court could come to that conclusion on the record evidence. We are not prepared to say the district court's conclusion was unreasonable in that way. The district attorney's office invested a fair amount of time and effort in trying to locate and serve Wood. Under the circumstances, a district court could, within its discretion, find the unsuccessful pursuit legally sufficient to declare Wood unavailable as a witness and to allow the use of her preliminary hearing testimony at trial. At the same time, however, the district attorney's office displayed neither exceptional industry nor remarkable creativity in searching for Wood. The effort seemed a lot like repeating the same experiment over and over in the hopes of getting a different result without any particularly good reason to think that would happen. The State could have done more. Be that as it may, the district court acted within its broad discretion in granting the request.

Alternatively, Bunyard contends Wood's preliminary hearing testimony should not have been admitted at trial because the lawyer representing him at the time of the hearing had a conflict of interest. Bunyard argues the ostensible conflict inhibited the lawyer from effectively cross-examining Wood during the preliminary hearing. Well before trial, the district court appointed substitute counsel for Bunyard. His trial counsel raised this issue with the district court in arguing against the use of Wood's preliminary hearing testimony. The district court found no actual conflict of interest and, thus, rejected the argument.

The record evidence regarding the purported conflict is quite limited. The lawyer did not testify in the district court. The lawyer wrote Bunyard a short letter explaining his withdrawal resulted from a conflict because he had previously represented an individual named in the letter. The letter is in the record. In arguing the issue to the district court, the lawyers agreed the individual had been identified as the victim of an aggravated assault by Bunyard. That incident led to a separate criminal case against Bunyard. Nothing in the record indicates Bunyard's previous lawyer represented that individual in connection with the assault. Nor does the record establish exactly when the lawyer represented the individual.

Criminal defendants are constitutionally entitled to be represented by lawyers who have no conflicts of interest that would divert them from fully advocating on their clients' behalf. *Sola-Morales v. State*, 300 Kan. 875, 883, 335 P.3d 1162 (2014); *State v. Bowen*, 299 Kan. 339, 343, 323 P.3d 853 (2014). Such a conflict imperils the Sixth Amendment right to counsel. *Mickens v. Taylor*, 535 U.S. 162, 166-67, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002). Relying on *Mickens*, the Kansas Supreme Court has recognized three categories of conflicting interests in criminal cases: (1) the district court permits a lawyer to represent multiple clients with antagonistic interests in the same proceeding despite an objection to the representation; (2) a lawyer represents multiple clients in the same proceeding but no objection has been lodged; and (3) the representation of the defendant conflicts either with a duty owed some other past or present client unconnected to the

defendant's case or with the lawyer's own personal or financial interests. *Sola-Morales*, 300 Kan. at 884.

Given the information in the record, we fail to see a genuine conflict of interest. The lawyer's duty to his other client would not be compromised in any obvious way through his representation of Bunyard in this case. Likewise, the other client would not benefit directly were the lawyer to afford Bunyard only a pallid defense. Conceivably, the lawyer might have some personal interest in seeing Bunyard punished in this case for what he purportedly did to the lawyer's other client. But there's no evidence to support that notion. We suppose the lawyer withdrew in this case in an abundance of caution—the sensible course to steer, so as to avoid even a hint of a problem.

Any conflict would be of the type described in the second part of the third category outlined in *Sola-Morales* implicating some personal interest of counsel. The court has referred to this type of conflict as a "*Mickens* reservation" claim because the *Mickens* decision does not identify the standard to be applied in determining whether a defendant should be granted relief. 300 Kan. at 884. The court has indicated that either of two standards could be applied but has not itself decided which governs. See *Fuller v. State*, 303 Kan. ___, 363 P.3d 373, 382-83 (2015); *Sola-Morales*, 300 Kan. at 884. The defendant must satisfy either the *Strickland* standard requiring a showing that but for the conflict the outcome at trial would have been different, see *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), or a more relaxed standard showing only that the quality of the legal representation was adversely affected by the conflict. *Fuller*, 363 P.3d at 382-83; *Sola-Morales*, 300 Kan. at 884.

For purposes of resolving this issue on appeal, we will assume there to have been a conflict (though we think otherwise) and will further assume the "adversely affected" standard to be appropriate simply because it is more favorable to Bunyard than the *Strickland* test. That is, we simply give him the benefit in dealing with the question left

unanswered in *Mickens*, *Sola-Morales*, and *Fuller* rather than attempting to fashion a substantive answer ourselves.

Even with those assumed advantages, Bunyard cannot show legal harm calling into question the jury's verdicts. On appeal, Bunyard faults the lawyer representing him at the preliminary hearing in several respects. First, he says the lawyer should have questioned Wood about her use of drugs and alcohol shortly before she was struck and her jaw broken. A witness' state of intoxication may bear on his or her ability to perceive and recall events. See *State v. Osby*, 246 Kan. 621, 626, 793 P.2d 243 (1990). Assuming the lawyer had a good-faith reason to believe Wood had ingested intoxicants before the incident, he could have asked her about the circumstances. See *State v. Tosh*, 278 Kan. 83, 88, 91 P.3d 1204 (2004) (good-faith basis to ask question). But Wood's mental acuity at the time of the incident doesn't seem to be an especially fertile field. Wood would not have been mistaken about who attacked her—she identified the man with whom she shared an extended romance, not some stranger on a darkened street. The State had indisputable medical evidence Wood suffered a broken jaw. Her ability to perceive the events would not change that evidence. Those are the essential ingredients of an aggravated battery case.[2]

[2]At trial, the defense drew in large part on the testimony of Andrea Kendall, the person Bunyard asked to give his letter to Wood. Apart from the circumstances surrounding the letter, Kendall testified that Wood's broken jaw actually resulted from a confrontation between the two of them. According to Kendall, Wood was jealous of her relationship with Bunyard, prompting the women to argue. Kendall told the jurors the dispute escalated when Wood physically attacked her and, in the resulting fight, fell into a table after Bunyard intervened to quiet things. Kendall's testimony really didn't call into question Wood's ability to accurately perceive and recall the events—misperception would make Wood's version an erroneous, if honest, account. Wood's testimony is entirely different and involves Bunyard aggressively beating her with no one else present. The only reasonable explanation for the starkly differing versions of the injury required a conclusion that either Kendall or Wood lied, *i.e.*, deliberately told a falsehood. The jurors quite apparently chose to believe Wood's account.

Bunyard also contends his lawyer should have impeached Wood at the preliminary hearing with her convictions for crimes of dishonesty. Again, we fail to see substantial prejudice to Bunyard. The record on appeal indicates Wood was on probation during that time, although the reason isn't especially clear. We accept Bunyard's premise that the crimes were ones involving dishonesty and, thus, could have been offered to attack Wood's credibility. See K.S.A. 60-421.

There would have been strategic reasons not to impeach Wood that way at the preliminary hearing. First, of course, introducing the convictions then would not have prevented Bunyard from being bound over for trial, since the district court must resolve all credibility issues in the State's favor at a preliminary hearing. *State v. Bell*, 268 Kan. 764, 764-65, 1 P.3d 325 (2000); *State v. Wilson*, 47 Kan. App. 2d 1, 6, 275 P.3d 51 (2008). Confronting Wood with the convictions at the preliminary hearing would have given her a dress rehearsal for the same questions at trial—and an opportunity to fashion a careful response. We have no idea why Bunyard's lawyer actually chose not to get into Wood's criminal history at the preliminary hearing. We, therefore, do not presume the decision to have been a tactical one taken for Bunyard's benefit.

Nonetheless, Bunyard cannot show material prejudice during the jury trial as a result. As provided in K.S.A. 60-421, Bunyard could have proved Wood's convictions for crimes of dishonesty at the trial through journal entries and other court documents. The convictions would have been admissible as bearing on Wood's credibility even though she did not testify in person and had not been questioned about the convictions at the preliminary hearing. Nothing in K.S.A. 60-421 requires that a witness whose credibility is challenged through past convictions be confronted with those convictions or questioned about them. The impeaching quality of crimes of dishonesty lies in the fact of the conviction itself—someone who would engage in behavior that is both illegal and dishonest is less worthy of belief than someone who has not. The circumstances of the criminal conduct, apart from the conviction, aren't generally relevant. *Cf. State v. Williams*, 196 Kan. 628, 634-35, 413 P.2d 1006 (1966) (defendant not permitted to

"explain" past conviction offered to prove plan, motive, or intent). In short, a witness' convictions may be established and admitted as impeachment evidence without cross-examining the witness about them. But Bunyard did not offer that evidence at trial.[3]

[3]Upon the proof of a past conviction to impeach a witness, some courts allow the witness to assert his or her innocence even though he or she had been convicted or to offer limited explanation mitigating the conviction. Other courts do not. See generally, Annot.,166 A.L.R. 211. The question appears to be an open one in Kansas. The answer really has no bearing here. If the Kansas courts were to permit some explanation, the rule would inure to the State's advantage in this case, since Wood was a principal witness *against* Bunyard. And any softening of the convictions would have enhanced Wood's credibility, bolstering the State's evidence. Bunyard actually would have benefited from Wood's absence at trial had the issue of her convictions for crimes of dishonesty been broached.

Finally, Bunyard contends he was denied the opportunity to confront Wood about the letter and the charges arising from it. But Wood's preliminary hearing testimony offered at trial had nothing directly to do with the letter, since the related charges were not filed until after the preliminary hearing. In that sense, Wood was not a witness against Bunyard as to those charges, triggering a Sixth Amendment confrontation right. To the extent Wood's testimony about the altercation with Bunyard provided background evidence establishing facts that would have supported a motive for him to discourage her continued involvement in the criminal prosecution, he had the opportunity to confront (and question) her about those facts during the preliminary hearing.

In summary, then, we conclude the district court acted within its discretion in finding the State took legally sufficient steps to secure Wood's presence as a witness at the trial. And having failed in those efforts, the State could use Wood's preliminary hearing testimony. Likewise, we see no error in the district court's conclusion that the lawyer appearing with Bunyard at the preliminary hearing had no conflicting interests that kept him from adequately representing Bunyard. In any event, Bunyard has not shown that the asserted conflict diminished his representation at trial or undermined the resulting verdicts.

Request for New Lawyer

Bunyard contends the district court erred in denying the motion he filed after trial and before sentencing for appointment of a new lawyer to represent him. Bunyard alleged he and the lawyer who represented him during the trial had a conflict of interest because he had filed both a legal malpractice action and an ethical complaint against the lawyer and had offered to provide information to the State adversely affecting other clients the lawyer then represented. The district court inquired into the circumstances of the purported conflict at a hearing and denied the motion.

We have already outlined the legal principles requiring that criminal defendants be afforded effective, conflict-free legal representation. See *State v. Brown*, 300 Kan. 565, 574-75, 331 P.3d 797 (2014); *State v. Cheatham*, 296 Kan. 417, 430, 292 P.3d 318 (2013); *State v. Galaviz*, 296 Kan. 168, 174, 291 P.3d 62 (2012). Criminal defendants unable to afford legal representation are entitled to appointed lawyers meeting that standard, but they do not have the right to personally approve or select a specific lawyer. *Brown*, 300 Kan. at 575; *Galaviz*, 296 Kan. at 174.

An indigent criminal defendant must demonstrate "justifiable dissatisfaction" with an appointed lawyer to warrant a change in legal representation—court appointment of replacement counsel. Justifiable dissatisfaction requires a demonstrable conflict of interest on the lawyer's part, an irreconcilable disagreement between the lawyer and defendant, or a complete breakdown in communication between them. *Brown*, 300 Kan. at 575; *State v. Burnett*, 300 Kan. 419, 449, 329 P.3d 1169 (2014). If a criminal defendant presents a colorable basis for a justifiable dissatisfaction, the district court is obligated to inquire further to assess the factual circumstances. *Brown*, 300 Kan. at 577.

Upon making a sufficient inquiry, the district court has broad discretion in deciding whether to appoint new counsel. The standard has commonly been expressed

this way: "As long as the trial court has a reasonable basis for believing the attorney-client relation has not deteriorated to a point where appointed counsel can no longer give effective aid in the fair presentation of a defense, the court is justified in refusing to appoint new counsel." *State v. Banks*, 216 Kan. 390, 394, 532 P.2d 1058 (1975); see also *Burnett*, 300 Kan. at 449 (quoting later iterations of the *Banks* formulation of the standard). An appellate court will reverse only if that judicial discretion has been abused. See *Burnett*, 300 Kan. at 449. We have already discussed our standard of review for abuse of discretion.

Measured against the pertinent case authority, Bunyard has failed to demonstrate any error in the district court's ruling. The situation Bunyard engineered did not create a genuine conflict of interest between him and his lawyer. First, as to the legal malpractice action, the Kansas Supreme Court has held that a criminal defendant must successfully obtain relief under K.S.A. 60-1507 before bringing a civil action for damages against his or her lawyer. *Canaan v. Bartee*, 276 Kan. 116, Syl. ¶ 2, 72 P.3d 911 (2003). Bunyard, of course, had not even begun to navigate a collateral attack on his convictions—he had not even been sentenced, let alone taken a direct appeal of the convictions. Any malpractice action was plainly premature and would have been subject to prompt dismissal, as provided in K.S.A. 2015 Supp. 60-212(b).

The record indicates that the disciplinary complaint had been dismissed without any action against the lawyer. The dismissed complaint could not have created a conflict of interest.

Finally, the prosecutor informed the district court that the district attorney's office viewed Bunyard as an unreliable source of information and had no intention of interviewing him with respect to his claimed knowledge about the lawyer's other clients. Again, Bunyard's actions in offering to be an informant would not, under those circumstances, have created a conflict of interest.

The district court did not abuse its discretion in denying Bunyard's motion. There was no substance to the claimed conflicts. Moreover, a criminal defendant's actions in filing a civil suit or ethical claim against an appointed lawyer do not, in and of themselves, create sufficient grounds to find a disqualifying conflict of interest. The same may be said of a defendant's threat to take some sort of adverse action against one or more of the lawyer's other clients. Were it otherwise, criminal defendants could unfairly manipulate (and essentially block) the disposition of their cases simply by serially filing baseless civil suits or ethical complaints or announcing empty offers to serve as informants. The judicial process cannot be held hostage through such games.

Pretrial Consolidation of Cases

Bunyard contends the district court erred in consolidating the charges arising from the beating of Wood with the charges arising from his later effort to communicate with her, contrary to the protective order, in an effort to influence her testimony. As we have said, the State originally filed separate criminal cases and then moved to consolidate them before trial.

Under K.S.A. 22-3203, a district court may order two criminal cases against a single defendant be tried together if the charges could have been filed in a single complaint or information. In turn, K.S.A. 22-3202(1) permits the joinder of multiple crimes in a single complaint or information if they "are based . . . on two or more transactions connected together[.]" For purposes of joinder, cases are sufficiently connected if they are factually linked insofar as some of the crimes precipitated the other crimes. *State v. Donaldson*, 279 Kan. 694, 699, 112 P.3d 99 (2005) ("connected together" language of K.S.A. 22-3202(1) satisfied "when some of the charges are precipitated by other charges"). What the *Donaldson* court characterized as a broad construction of the joinder statutes, 279 Kan. at 699, reflects the longstanding rule. See *State v. Smith-Parker*, 301 Kan. 132, 159, 340 P.3d 485 (2014) (recognizing rule); *State v. Dreiling*, 274 Kan. 518, 555, 54 P.3d 475 (2002) (applying rule to affirm joinder of murder charges

with charges for conspiracy to commit perjury because the perjury sought to conceal the motive for the murder); *State v. Moore*, 226 Kan. 747, 749, 602 P.2d 1359 (1979) (charges of aggravated robbery and kidnapping sufficiently connected to charges of corruptly influencing a witness because the latter entailed efforts to thwart the former).

Assuming one of the statutory bases for joinder exists, the district court's ultimate ruling on a motion to consolidate is reviewed for abuse of discretion. *Smith-Parker*, 301 Kan. 132, 160; *State v. Gaither*, 283 Kan. 671, 685, 156 P.3d 602 (2007). The record reflects the district court understood the legal standards governing consolidation, and the facts demonstrate an appropriate connection between the charges arising from the physical assault and the charges arising from Bunyard's effort to then communicate with Wood. The circumstances fit within the legal pattern of *Dreiling* and *Moore*. Bunyard ostensibly intended the letter to keep Wood from aiding the State in prosecuting the battery charges against him. In reviewing for abuse of discretion, we are then left to ask whether no other district court would have ruled the same way. We safely conclude others would have granted the motion.

Bunyard suggests consolidation was improper because the letter to Wood was "flattering" rather than threatening. Even accepting that characterization of the letter, however, the argument is a non sequitur. The protective order prohibited all communication between Bunyard and Wood, not just overt threats. Likewise, K.S.A. 2015 Supp. 21-5909 criminalizes, among other things, "attempting to prevent or dissuade . . . [with] an intent to thwart or interfere in any manner with the orderly administration of justice . . . [a]ny witness or victim from attending or giving testimony at any civil or criminal trial[.]" Although the crime is commonly referred to as "intimidation of a witness," the elements encompass broader action intended to keep witnesses or victims from participating in the judicial process. The prohibited means of dissuasion are not confined to threats or other forms of intimidation and include flattery, cajolery, and similarly sweet representations or promises designed to influence. The tenor of the letter made no legal difference with respect to consolidation of the two cases.

Bunyard also argues the consolidation was unduly prejudicial because evidence about the beating would not have been relevant to the charges arising from his later efforts to communicate with Wood had the cases been tried separately. And, he says, the letter would not have been admissible in a separate trial on the battery charges. Bunyard is mistaken.

As to the battery charges, the letter would be relevant to demonstrate Bunyard's effort as a criminal defendant to cause Wood as a key witness against him to change her testimony. In turn, that sort of action is properly treated as circumstantial evidence of a guilty mind. See *United States v. Poulsen*, 655 F.3d 492, 508 (6th Cir. 2011); *United States v. Reaves*, 649 F.3d 862, 867-68 (8th Cir. 2011). As to the charges for violating the protective order and influencing a witness, the beating Bunyard gave Wood and the resulting prosecution would demonstrate a motive for the communication. See K.S.A. 60-455 (other crimes evidence may be offered to prove motive). Although motive is not an element of most criminal offenses, the State may, nonetheless, present evidence showing why a defendant committed the charged crime. See *State v. Carapezza*, 286 Kan. 992, 999, 191 P.3d 256 (2008). We find Bunyard's position unpersuasive.

Disclosure of Exculpatory Evidence

Bunyard contends the State failed to turn over exculpatory evidence but does not identify with particularity that evidence or how it would, in fact, be exculpatory. Even so, Bunyard argues his convictions should be set aside. We disagree.

The issue arises in a peculiar factual and procedural context. The Wichita police apparently secured a search warrant to seize Bunyard's computers and cellphones in connection with an investigation unrelated to any of the charges in this case. After seizing computers and phones from Bunyard's residence, the police did not examine the electronically stored information in the devices and never sought search warrants for that

purpose. The police, however, continued to retain possession of the devices and apparently intended to do so more or less indefinitely.

Bunyard personally drafted and filed a motion to preserve evidence contained in the computers and phones. The morning of trial the district court took up the motion. Bunyard's lawyer submitted the devices might contain exculpatory evidence in the form of electronic communication from Wood. But he cited no concrete examples of such communication, although Bunyard presumably had some idea of what communications he had received and retained.

The district court declined to turn over the computers and phones to Bunyard or his lawyer, ostensibly because they had been seized in connection with another case. The prosecutor represented the police or other government agents would not search the devices without Bunyard's consent and had no intention of getting search warrants in the absence of his consent. The district court, however, did offer to continue the trial to allow Bunyard's lawyer to examine the information stored on the computers and the phones, so long as the police retained custody of the items. Bunyard declined that offer and asserted his right to a speedy trial.

As a result of that standoff, neither Bunyard's lawyer nor any government representative reviewed the information stored on the computers or the phones before the trial. And, obviously, nothing was turned over to Bunyard for his use in preparing for trial or presenting his case during trial.

The State has a constitutional duty to turn over exculpatory evidence to a criminal defendant. See *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *State v. Francis*, 282 Kan. 120, 150, 145 P.3d 48 (2006). Evidence is exculpatory if it tends to disprove a fact in issue that is material to guilt or punishment or if it may be used to impeach inculpatory evidence or witnesses of the prosecution. See *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); *State v. Lackey*, 295

Kan. 816, 823, 286 P.3d 859 (2012). A *Brady* violation, then, requires: (1) evidence favorable to the defendant either because it is exculpatory or impeaching; (2) the State's willful or inadvertent suppression of that evidence; and (3) prejudice to the defendant based on the materiality of the withheld evidence. *State v. Warrior*, 294 Kan. 484, 506, 277 P.3d 1111 (2012). In this context, withheld evidence is material if its disclosure would have created a reasonable probability of a different result at trial. 294 Kan. at 507.

An appellate court exercises unlimited review in assessing an asserted *Brady* violation, subject to a district court's relevant findings of fact supported with substantial competent evidence. 294 Kan. at 510.

The test for a *Brady* violation presupposes the identification of specific evidence that has been withheld from the defense. Usefulness and materiality cannot be measured if the characteristics of the evidence are unknown. See *United States v. Shields*, 789 F.3d 733, 747 (7th Cir. 2015) ("[A] bare assertion that the prosecution suppressed evidence, without more, is not sufficient to prove a *Brady* violation"; the claim fails when the defendant "does not point to any specific evidence that was suppressed[.]"); *United States v. Caro*, 597 F.3d 608, 619 (4th Cir. 2010); *United States v. Erickson*, 561 F.3d 1150, 1163 (10th Cir. 2009) ("A *Brady* claim fails if the existence of favorable evidence is merely suspected."). Here, Bunyard identified for the district court no specific evidence he believed the State had in its possession and simply argued generically that his computers and cellphones might have communications from Wood that possibly could be useful to him. Such broad assertions amount to speculation insufficient to establish a *Brady* violation. Bunyard offers nothing more on appeal.

If a defendant outlines a legitimate basis to believe government agents may have *Brady* or *Giglio* evidence—for example, information that might be used to impeach a law enforcement officer likely to be a trial witness—a court may make an in camera inspection of personnel records or similar files to identify and release such information. See *Shields*, 789 F.3d at 747-48; *United States v. Williams*, 576 F.3d 1149, 1163 (10th

Cir. 2009). Bunyard, however, passed up at least an equivalent, if not more generous, opportunity when he declined the district court's offer to allow his lawyer to inspect the information contained in the computers and phones—an opportunity that would have necessitated a continuance of the trial, something he opted against. On appeal, Bunyard does not specifically request a court review of the content of those devices as a possible remedy, so we don't consider it. In short, Bunyard has failed to establish a *Brady* violation.[4]

[4]We question whether the State could have continued to hold the computers and cellphones indefinitely without seeking warrants to search them. Such an extended detention of property, even initiated with a warrant authorizing the seizure, would seem to tilt toward unreasonable under the Fourth Amendment to the United States Constitution. Government agents may seize property for a reasonable time to secure a warrant to search from a judge. *United States v. Place*, 462 U.S. 696, 701, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983). The duration of a constitutionally acceptable seizure depends on the circumstances, including the owner's need for the property and ability to make use of it, the time needed to get a warrant, and the government's interest in the particular property. *Cf. United States v. Sullivan*, 797 F.3d 623, 633-35 (9th Cir. 2015) (seizure of computer by parole officer coupled with delay in obtaining warrant to search device); *United States v. Mitchell*, 565 F.3d 1347, 1350-53 (11th Cir. 2009) (seizure of property lawful at inception may become constitutionally unreasonable when government agents delay in obtaining warrant to search property). If a cellphone or a computer were evidence of a crime without regard to any stored electronic data or were the fruit of a crime, the government presumably could retain the device without getting a warrant to search its contents. We do not understand the prosecutor to have been making such an argument here. But Bunyard has not asserted a Fourth Amendment right to the computers and cellphones. Again, we consider neither the merits of such a claim nor the proper procedural vehicle for presenting it.

Determination of Criminal History

In the district court, Bunyard disputed the calculation of his criminal history and argued that six misdemeanor battery convictions should not be scored because they had been expunged. The district court rejected the argument and counted the convictions. On appeal, Bunyard has challenged the ruling.

The factual circumstances appear to be undisputed. Everyone agreed both that Bunyard had the six convictions and that they had been duly expunged. If the convictions were appropriately scored, they would aggregate to two person felonies, placing Bunyard in criminal history category B. If they were excluded from his criminal history, Bunyard would be in category I. In the higher category, Bunyard's presumptive sentencing range on the aggravated battery conviction was 144 to 162 months. In the lower category, it would have been 38 to 43 months.[5]

[5]As the parties discussed at the sentencing hearing, Bunyard had been convicted of rape in a jury trial years earlier. The Kansas Supreme Court reversed the conviction and remanded for a new trial. See *State v. Bunyard*, 281 Kan. 392, 133 P.3d 14 (2006). Rather than retry the case, the State and Bunyard entered into an agreement calling for the dismissal of the rape charge in exchange for his plea to six counts of misdemeanor battery.

Because the relevant facts are undisputed, the argument about Bunyard's correct criminal history score presents a question of law over which we exercise unlimited review. See *State v. Bennett*, 51 Kan. App. 2d 356, 361, 347 P.3d 229 (2015). The issue requires us to construe statutes governing sentencing in criminal cases and the effect of expunging a conviction. The interpretation of statutory language also presents a question of law. *State v. Keel*, 302 Kan. 560, 571, 357 P.3d 251 (2015).

In making his argument, Bunyard contrasts two parts of K.S.A. 2015 Supp. 21-6810 setting out what should be scored in determining a defendant's criminal history. As provided in K.S.A. 2015 Supp. 21-6810(d)(2), "[a]ll prior adult felony convictions, *including expungements*, will be considered and scored." (Emphasis added.) But K.S.A. 2015 Supp. 21-6810(d)(5) states: "All person misdemeanors, class A nonperson misdemeanors and class B select nonperson misdemeanors, and all municipal ordinance and county resolution violations comparable to such misdemeanors, shall be considered and scored." Bunyard submits that omission of the phrase "including expungements" from the subsection on misdemeanors signals legislative intent to exclude expunged misdemeanor convictions from a defendant's criminal history, especially when the phrase

has been incorporated in the subsection on felony convictions. In other words, Bunyard says that had the legislature wanted expunged misdemeanors to be scored, it would have added the phrase to subsection (d)(5).

In construing a comprehensive statutory scheme such as the sentencing provisions of the Kansas Criminal Code, an appellate court must, as a first priority, attempt to honor the legislative intent and purpose. *In re Marriage of Traster*, 301 Kan. 88, 98, 339 P.3d 778 (2014). The court should look initially to the words of the statutes to discern legislative intent. *Bussman v. Safeco Ins. Co. of America*, 298 Kan. 700, 725-26, 317 P.3d 70 (2014). If particular language is open to more than one reasonable interpretation, a court may consider the overall statutory purpose and favor a reading that comes to a "consistent, harmonious, and sensible" result effectuating that purpose. *In re Marriage of Traster*, 301 Kan. at 98; see *John M. Denman Oil Co. v. Kansas Corporation Comm'n*, 51 Kan. App. 2d 98, 104, 342 P.3d 958 (2015) (statute reasonably construed to impose joint and several liability on parties responsible for plugged or abandoned oil wells as "support[ing] the obvious statutory purpose of avoiding [water] pollution"). Judicial interpretation should not add something to the statutory language or take away something already there. *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, Syl. ¶ 6, 154 P.3d 494 (2007).

Bunyard's argument runs counter to what otherwise seems to be clear legislative intent that expunged convictions, whether for felonies or misdemeanors, be scored for criminal history purposes. The language in K.S.A. 2015 Supp. 21-6810(a) certainly indicates that misdemeanor battery convictions should be counted without regard to expungement. That section lists the type of convictions to be counted and specifically includes some misdemeanors and excludes others but makes no mention of expungements. The definitions of "criminal history" and "criminal history score" in K.S.A. 2015 Supp. 21-6803(c) and (d) are conspicuously silent about expungements, when the legislature presumably would have offered some indication there if it meant to exclude expunged misdemeanors. Even more significantly, K.S.A. 2015 Supp. 21-

6614f(i)(1) provides: "Upon conviction for any subsequent crime, the conviction that was expunged may be considered as a prior conviction in determining the sentence to be imposed[.]" That language in the criminal code section dealing with expungements could not be much clearer. The legislature plainly intended that an expunged conviction be scored for criminal history purposes in the same manner as any other conviction. The directive is explicit and categorical.

In light of those statutory expressions, we have no doubt both expunged misdemeanors and expunged felonies must be taken into account in determining a defendant's criminal history. We are obligated to afford primacy to that legislative message. *Degollado v. Gallegos*, 260 Kan. 169, 172, 917 P.2d 823 (1996) ("The first and a cardinal rule of construction" requires courts to effect "the intent of the legislature . . . if that intent can be ascertained."). Likewise, as we have indicated, the canon of in pari materia calls for related statutes to be construed in a harmonious way, reconciling apparent conflicts, if possible, to effectuate legislative intent. See *Neighbor v. Westar Energy, Inc.*, 301 Kan. 916, 919, 349 P.3d 469 (2015); *Friends of Bethany Place v. City of Topeka*, 297 Kan. 1112, 1123, 307 P.3d 1255 (2013).

Given the clarity of that legislative purpose, we must admit the phrase "including expungements" in K.S.A. 2015 Supp. 21-6810(d)(2) appears to do no statutory work. And that runs counter to a canon of construction recognizing parts of a statute should not be rendered meaningless or vestigial if possible. See *State v. Van Hoet*, 277 Kan. 815, 826-27, 89 P.3d 606 (2004) ("The court should avoid interpreting a statute in such a way that part of it becomes surplusage."). Ultimately, the no-surplusage rule of construction is a secondary one that generally must yield to otherwise obvious legislative intent and purpose. See *State v. Schreiner*, 46 Kan. App. 2d 778, 784, 264 P.3d 1033 (2011), *rev. denied* 296 Kan. 1135 (2013). This is such a case. Accordingly, the district court properly scored Bunyard's expunged misdemeanor convictions in determining his criminal history. Accordingly, the district court imposed a proper controlling sentence on Bunyard.

Conclusion

We have carefully considered each of the points Bunyard has presented on appeal. None demonstrates error or requires relief.

Affirmed.

* * *

GARDNER, J., concurring: I concur in the result.