NOT DESIGNATED FOR PUBLICATION

No. 113,493

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

LORENZO PULLIAM,
Appellant.

MEMORANDUM OPINION

Appeal from Wyandotte District Court; MICHAEL A. RUSSELL, judge. Opinion filed November 10, 2016. Affirmed.

Corrine E. Gunning, of Kansas Appellate Defender Office, for appellant.

Jennifer S. Tatum, assistant district attorney, *Jerome A. Gorman*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before BRUNS, P.J., POWELL, J., and STUTZMAN, S.J.

Per Curiam: A jury convicted Lorenzo M. Pulliam of three crimes: intentional second degree murder, a severity level 1 person felony; attempted voluntary manslaughter, a severity level 5 person felony; and criminal possession of a firearm by a convicted felon, a severity level 8 nonperson felony. The district court ordered Pulliam to serve a controlling sentence of 246 months in prison.

Pulliam has appealed, claiming five instances of error: (1) the district court denied him the right to present his defense by limiting the testimony of his expert witness; (2)

the district court erred in not instructing the jury on involuntary manslaughter as a lesser included offense; (3) the prosecutor engaged in misconduct that deprived him of the right to a fair trial; (4) the district court erred by denying his motion for new trial on the basis of ineffective assistance of trial counsel; and (5) the district court violated his rights under the Sixth and Fourteenth Amendments to the United States Constitution, as described in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), when it used his criminal history as a factor in determining his sentence without a jury finding that it was true beyond a reasonable doubt. We find no error and affirm.

FACTS AND PROCEDURAL BACKGROUND

Lorenzo Pulliam served in the U.S. Army and deployed four times, including assignments to Kuwait and Iraq where he was exposed to combat deaths. During his final deployment, he learned his wife had died in an accident. He later was transferred to Fort Leavenworth, where he was evaluated and diagnosed with post-traumatic stress disorder (PTSD). Following discharge from the Army, Pulliam returned to Wyandotte County. He resumed his friendship with Zach Eisdorfer, whom he had known since childhood.

On August 22, 2012, Pulliam received a call from Eisdorfer, asking him to come by Eisdorfer's house since he hadn't seen him for a few days. When Pulliam arrived, Kimberly Hetzler, also a childhood friend, was there with Eisdorfer, and the three of them talked and watched television. At some point Pulliam and Hetzler left Eisdorfer in the house and went outside.

In the early morning hours of August 23, a man unknown to Pulliam and Hetzler walked up to Eisdorfer's house carrying a gas can. The man was Zach Burton. According to Hetzler, Pulliam and Burton exchanged a greeting, and Burton went inside to Eisdorfer's room. Since she didn't know the man, Hetzler said she went in to get her purse and saw Burton buying drugs from Eisdorfer. After she went back outside, Pulliam went

in and, within 30 seconds to a minute of that entry, Hetzler said she heard five shots. Hetzler ran into the home and saw Burton on the floor with Eisdorfer standing over him, and Pulliam was not there.

Officer Keith Faulkner testified at trial that he responded to a call at Eisdorfer's house around 4 a.m. on August 23, 2012, where he encountered Eisdorfer outside of the home, bleeding from a wound and saying that Pulliam shot him. When he entered the house, Faulkner found Burton, deceased, lying face down on the floor. Officer Charles Stanturf was also called to the scene and spoke with Eisdorfer who told him his friend, Pulliam, showed up and without warning pulled a revolver and started shooting at him. Eisdorfer was wearing an empty holster and told Stanturf there was a gun on the floor in the dining room.

Pulliam had fled the scene and after several intervening stops turned himself in to the police, admitting that he had shot Eisdorfer and Burton. The State charged Pulliam with one count of second-degree murder (Burton), one count of attempted first-degree murder (Eisdorfer), and one count of unlawful possession of a firearm by a felon. We will consider Pulliam's five claims of error with additional facts where they are required.

ANALYSIS

By limiting the scope of expert testimony, did the district court deny Pulliam his fundamental right to present his theory of defense?

At trial, Pulliam contended he acted in self-defense, related to his PTSD diagnosis, and he testified about the circumstances that led to the shootings. Pulliam stated he had a gun with him because of safety concerns while he was remodeling some apartments and he took it to Eisdorfer's because it was already on him when Eisdorfer invited him over. Pulliam smoked methamphetamine while at the house, and he left the house with Hetzler at one point when he heard Eisdorfer cock his gun. He said he previously had told

Eisdorfer five or six times that he was uncomfortable with Eisdorfer messing with a gun around him. He remained outside with Hetzler for hours. It was while he was outside, around 3 or 4 a.m., that Pulliam saw Burton, whom he did not know, come to the house with a gas can and enter the house.

Pulliam testified that when he went into the house he saw Burton sitting in a chair and Eisdorfer standing near him. He asked Burton how he got to the house, to which Burton responded "checkmate." Pulliam said he believed that "checkmate" was a threat on his life in part because Eisdorfer used to talk about bringing people over to the house who would "be a good match" for him. He again asked Burton the same question, and Burton gave the same response.

Pulliam testified that after the second "checkmate," he got up and shook hands with Eisdorfer, and turned to leave, at which point he heard the cocking of a gun. He believed Eisdorfer was about to shoot him, so he turned around and shot at him twice. At that point, Burton rose and approached Pulliam, so Pulliam shot him, believing that Burton also meant to kill him. Pulliam then fled through the house, still firing at Eisdorfer.

In support of his defense, Pulliam offered testimony from Dr. William Logan, a psychiatrist with a background in treating veterans with PTSD. Logan testified generally as an expert on that disorder and particularly about how it affected Pulliam's actions in shooting Burton and Eisdorfer. He testified he evaluated Pulliam in April 2013, spoke with him about his experiences while deployed, and determined that Pulliam showed some symptoms of PTSD. He also described various symptoms of PTSD and suggested that while someone with PTSD would usually avoid a place he considered dangerous, the fact that a house belonged to a long-time friend might override that habit. Pulliam told him that Burton's "checkmate" statement made him apprehensive, and he also told him he heard an explosion on the television just as he turned to leave Eisdorfer and Burton.

Logan said he found that Pulliam suffered from PTSD, based in part on his paranoia and suspicion, and testified that hearing the explosion and a gun cock would have "kind of put him into overdrive."

After the close of the State's case but before Pulliam's and Logan's testimony, the district court ruled that Logan's testimony could include a discussion of the nature of PTSD, Logan's opinion that Pulliam suffered from the disorder, and his opinion that Pulliam's actions at the time of the shooting were consistent with someone with PTSD. Pulliam argued that Logan also should be allowed to testify to his opinion that, at the time of the shooting, Pulliam's belief that he needed to defend himself was consistent with someone suffering from PTSD given the circumstances at the time as Pulliam described them. It was there that the district court drew the line, reasoning that the additional testimony would amount to Logan offering an opinion on the credibility of Pulliam's self-defense claim. The State countered with its own expert in rebuttal, Dr. George Hough, who agreed with the PTSD diagnosis but felt Pulliam's actions during and after the shooting were intentional and purposeful.

Pulliam argues that the district court improperly prohibited Logan from providing his medical opinion about the reasonableness of Pulliam's belief regarding the need to defend himself. He contends the evidence was relevant to show his state of mind and the excluded testimony would not be an opinion on his credibility, although it would provide "circumstantial support" for his credibility in the same way expert testimony is sometimes used by the State in sex offense cases. Pulliam concludes that the district court denied him the right to present evidence in support of his theory of defense, which thereby denied him his right to a fair trial.

The State contends that relevant expert testimony can be excluded for a variety of reasons and courts consider necessity and helpfulness to the jury in addition to relevance when determining whether expert testimony is admissible. It argues that the jury would

not have been aided by the additional testimony from Logan since it already had heard evidence from him regarding the nature of PTSD, the PTSD symptoms Pulliam exhibited, and that Pulliam's conduct was consistent with someone suffering from PTSD. The State points to the established principle that a witness may not express an opinion on the credibility of another witness or, for that matter, on the guilt of a defendant.

The State focuses on the fact that the district court only prevented Logan from giving one sentence of testimony—additional testimony that would have intruded into the jury's obligation to make its own decision about Pulliam's self-defense claim. The State submits that if exclusion of that one sentence was erroneous, it was harmless.

When this court reviews a district court decision to admit or exclude evidence, it uses a multistep analysis. *State v. Shadden*, 290 Kan. 803, 817-818, 235 P.3d 436 (2010). For the first step, this court determines whether the evidence is relevant. 290 Kan. at 817. Evidence is relevant when it has "any tendency in reason to prove any material fact." K.S.A. 60-401(b). Accordingly, relevant evidence must be both probative and material. *State v. Martinez,* 290 Kan. 992, 1009, 236 P.3d 481 (2010). Whether evidence is probative is reviewed under an abuse of discretion standard; materiality is judged under a de novo standard. *Shadden,* 290 Kan. at 817.

Step two of the analysis requires this court to determine which rules of evidence or other legal principles apply. The district court's conclusion in this respect is reviewed de novo. 290 Kan. at 817.

At the third step, the district court must apply the applicable rule or principle. The standard of review is either for abuse of discretion or de novo, depending on the rule or principle being applied. Some rules and principles grant the district court discretion, while others raise matters of law. 290 Kan. at 817. Here, this court is asked to review the

partial exclusion of Logan's expert testimony, which is generally reviewed for abuse of discretion. See *State v. Cooperwood*, 282 Kan. 572, 576, 147 P.3d 125 (2006).

To the extent the district court's evidentiary exclusion infringed upon a defendant's constitutional right to present his or her theory of defense, as Pulliam alleges, this court exercises de novo review. See *State v. Pennington*, 281 Kan. 426, 434, 132 P.3d 902 (2006). "'[T]he exclusion of evidence that forms an integral part of the defendant's theory of the case violates the defendant's right to a fair trial.'" *State v. Gaona*, 293 Kan. 930, 953, 270 P.3d 1165 (2012) (quoting *State v. Evans*, 275 Kan. 95, 102, 62 P.3d 220 [2003]; see *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 [1973]). Our Supreme Court has also recognized, however, that the defendant's "'right to present a defense is subject to the rules of evidence and caselaw on the subject.'" *Gaona*, 293 Kan. at 953.

It is fundamental that "[a] witness may not express an opinion on the credibility of another witness. This is because the determination of the truthfulness of a witness is for the jury. [Citations omitted]." *State v. Albright*, 283 Kan. 418, 430-31, 153 P.3d 497 (2007). It is also improper for a witness to offer an opinion on the defendant's guilt. See *State v. Steadman*, 253 Kan. 297, 304, 855 P.2d 919 (1993) (police officer's testimony on opinion about defendant's guilt warranted new trial).

The one sentence from Logan's proposed testimony that the district judge excluded was: "His belief that he needed to defend himself is consistent with the diagnosis of PTSD, given the circumstances at the time as Mr. Pulliam described." That proffered evidence fails to clear the first hurdle of the multistep analysis. Logan's views concerning Pulliam's *belief*, as opposed to his comparison of Pulliam's *actions* with those expected from a person with PTSD, is not relevant. In his brief on appeal, Pulliam argues that the excluded evidence "was relevant to demonstrate Mr. Pulliam's state of mind at the time of the incident and whether he *honestly* believed he was in imminent danger of death."

(Emphasis added.) Pulliam's rendering of this argument shows the lack of space between an opinion on consistency of belief and an opinion on honesty of belief. Expressing an expert opinion on Pulliam's belief also enters the area of endorsing the validity of Pulliam's claim of self-defense—offering an opinion on guilt, or in this case, lack of guilt.

Approaching the question from a somewhat different angle, Pulliam also attempts to draw an analogy between Logan's excluded testimony and certain expert testimony in sexual abuse cases, such as that considered in *State v. McIntosh*, 274 Kan. 939, 58 P.3d 716 (2002). In *McIntosh*, the court found no error when the trial court allowed an expert witness to testify that when he interviewed the child who had accused McIntosh of various sex crimes, "he had observed behaviors that were 'consistent with' a child who had been sexually abused." 274 Kan. at 959. Our Supreme Court observed that in sex abuse cases, credibility of the accuser and the alleged perpetrator is often central to the case. That court found that this testimony "provided circumstantial support in favor of [the child accuser's] credibility by demonstrating that her behavior was not inconsistent with someone who had been sexually abused." 274 Kan. at 959. The *McIntosh* court pointedly noted that the expert did not testify that in his opinion the child had, in fact, been abused.

The problem with transferring this argument to Pulliam's issue is that he actually had the benefit of expert testimony that paralleled the opinion allowed in *McIntosh*. Just as the expert in *McIntosh* testified he observed behaviors in the child consistent with children who had been sexually abused, Logan was permitted to testify that Pulliam's actions were consistent with those of someone suffering from PTSD. The expert in *McIntosh* was not allowed to express an opinion about the ultimate question of whether the child actually had been abused, and Logan could not properly testify that Pulliam's beliefs were consistent with someone acting in self-defense, since that clearly would have been an outright endorsement of Pulliam's veracity in claiming that defense.

The responsibility for assessing any aspect of the validity of Pulliam's subjective beliefs or of his guilt lies exclusively with the jury. And, the jury already had before it Logan's testimony about the nature of PTSD, his opinion that Pulliam was correctly diagnosed with the disorder, and his opinion that Pulliam's acts were consistent with those of a person in that situation who suffered from PTSD.

Since the excluded part of Logan's opinion failed to offer anything of probative value, the district court's ruling is reviewed for abuse of discretion. "Judicial discretion can be abused in three ways: (1) if no reasonable person would have taken the view adopted by the trial court; (2) if the judicial action is based on an error of law; or (3) if the judicial action is based on an error of fact." *State v. Marshall*, 303 Kan. 438, Syl. ¶ 2, 362 P.3d 587 (2015). The district judge did not base his ruling either on an error of law or fact. He correctly identified the need to decide the legal question about whether there was a point at which Logan's testimony slipped from permitted expert opinion into an area reserved for the jury. We find the district judge's reasoning and ruling were well within the range of views that could be taken by a reasonable person and, consequently, we find no abuse of discretion.

We further find that the decision to exclude the single sentence from Logan's proposed testimony did not prevent Pulliam from exercising his right to present his defense. Pulliam was able to add Logan's opinions about his PTSD to all the rest of the evidence presented, including Pulliam's own testimony, to argue he acted in self-defense. The restriction on his defense that was imposed by the district court's exclusion of evidence did not improperly deny him his chance to make his case.

Did the district court err in failing to instruct the jury on involuntary manslaughter as a lesser included offense?

Pulliam next contends the district court erred in failing to give a lesser included offense instruction for involuntary manslaughter. In *State v. Cooper*, 303 Kan. 764, 366 P.3d 232 (2016), the court stated the established procedure for analyzing a claim of this type of error.

> "'When reviewing the failure to give a lesser included instruction, (1) first, the appellate court should consider the reviewability of the issue from both jurisdiction and preservation viewpoints, exercising an unlimited standard of review; (2) next, the court should use an unlimited review to determine whether the instruction was legally appropriate; (3) then, the court should determine whether there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, that would have supported the instruction; and (4) finally, if the district court erred, the appellate court must determine whether the error was harmless.'" *Cooper*, 303 Kan. at 769 (quoting *State v. Soto*, 301 Kan. 969, Syl. ¶ 9, 349 P.3d 1256 [2015]).

Pulliam acknowledges he did not ask the district court to instruct the jury on the lesser included offense of involuntary manslaughter. Our consideration of this issue, therefore, is limited.

> "When a defendant challenges the district court's failure to give a lesser included offense instruction for the first time on appeal, the reviewing court applies the clearly erroneous standard provided in K.S.A. 2014 Supp. 22-3414(3), requiring that the defendant demonstrate 'that the failure was clearly erroneous, *i.e.*, the defendant must firmly convince the appellate court that the giving of the instruction would have made a difference in the verdict.' *Soto*, 301 Kan. 969, Syl. ¶ 10." *Cooper*, 303 Kan. at 770.

Pulliam argues that, considering all of the evidence, there was some support for an instruction on involuntary manslaughter, noting that he expressed his belief that Burton was going to try to kill him and he did not testify that he intended to kill Burton. He

maintains the court's failure to give an instruction for involuntary manslaughter amounted to clear error because there was a reasonable probability that the jury could have found he was justified in defending himself but went too far in using deadly force, bringing his actions within the scope of one type of involuntary manslaughter.

The State acknowledges that this issue was preserved for review by virtue of K.S.A. 2015 Supp. 22-3414(3), which allows review to decide whether failure to give an unrequested instruction was clearly erroneous. The State further concedes that an involuntary manslaughter instruction would have been legally appropriate but rejects Pulliam's argument that there were facts in evidence that could have supported this instruction.

Pulliam contends that, as applied to this case, the elements of involuntary manslaughter would principally consist of a killing of Burton by Pulliam done during the commission of a lawful act in an unlawful manner. See K.S.A. 2015 Supp. 21-5405(a)(4). That contention is premised on the jury finding the killing was a "lawful act"—because it was done in self-defense—carried out in an unlawful manner because excessive force was used.

Our Supreme Court has specifically held that involuntary manslaughter as set out in subsection (a) of K.S.A. 2015 Supp. 21-5405 is a lesser included crime of second-degree murder. See *State v. Bridges*, 297 Kan. 989, 1021, 306 P.3d 244 (2013). This alone is not sufficient to require a court to give the lesser included instruction, however, as the court must determine whether the instructions are factually appropriate. See *State v. Brown*, 300 Kan. 565, 587-89, 331 P.3d 797 (2014) (legally appropriate lesser included instructions of second-degree reckless murder and involuntary manslaughter not factually appropriate where there is no evidence that would reasonably justify a conviction of the lesser offenses); *State v. Engelhardt*, 280 Kan. 113, 136, 119 P.3d 1148 (2005) (evidence insufficient in first-degree murder case to support lesser

included instructions for unintentional second-degree murder, voluntary manslaughter, or involuntary manslaughter).

In this case, the district court instructed the jury on intentional second-degree murder under K.S.A. 2012 Supp. 21-5403 as well as on the lesser offense of voluntary manslaughter. The jury convicted Pulliam of intentional second-degree murder. As it relates to this case, voluntary manslaughter is the knowing killing of a human being committed "upon an unreasonable but honest belief that circumstances existed that justified use of deadly force." K.S.A. 2012 Supp. 21-5404.

In *State v. Houston*, 289 Kan. 252, 276, 213 P.3d 728 (2009), the Supreme Court considered the error now asserted by Pulliam. At Houston's trial, the jury was instructed on second-degree intentional murder and also voluntary manslaughter and self-defense. Houston claimed the trial court erred when it failed to instruct on involuntary manslaughter as well, since the jury could have found he acted in lawful self-defense but did so in an unlawful manner because he used excessive force. The *Houston* court first noted the fundamental difference between voluntary and involuntary manslaughter, implicit in the titles—voluntary manslaughter is an intentional killing and involuntary manslaughter is an unintentional killing. See K.S.A. 2015 Supp. 21-5404; K.S.A. 2015 Supp. 21-5405. In that case, Houston shot the victim in the head with a 12-gauge shotgun from a distance estimated from 3 to 15 feet. From that, the Supreme Court concluded that: "Under these circumstances, we conclude that no rational jury in this state could have found that Houston did not intend to kill Johnson. Because involuntary manslaughter requires an unintentional killing, the evidence would not reasonably justify a conviction of that crime." *Houston*, 289 Kan. at 276. Accordingly, the court found no error in Houston's trial when the trial court refused to instruct on involuntary manslaughter as a lesser included offense of second-degree murder.

Here, as in *Houston*, Pulliam does not deny he shot Burton. There also was no question at the trial about the manner of Burton's death—gunshot to the head from close range. Dr. Eric Mitchell, a forensic pathologist, testified that he completed a postmortem exam on Burton, and he opined that the fatal shot to the left eye was fired within 2 to 3 feet of Burton. Pulliam contends he perceived a threat from Burton twice saying "checkmate," started to leave the room, heard a gun being cocked, thought Eisdorfer was going to shoot him, pulled his revolver, and shot at Eisdorfer twice and, as Burton stood up and began to move toward him—in his view, to attack and kill him—he shot Burton once.

Pulliam contends he believed his life to be in danger from Burton and that he had a right to exercise self-defense by shooting Burton in the head from close range. Upon these facts, we find no basis upon which a jury could have found that Pulliam *unintentionally* killed Burton. It would not have been factually appropriate to instruct on involuntary manslaughter as a lesser included offense of second-degree murder. As it was not supported by the facts, the absence of that instruction, which Pulliam challenges here for the first time, was not clearly erroneous.

In view of our holding, we need not consider the State's argument on the application of the skip rule.

Did prosecutor error deprive Pulliam of a fair trial?

Pulliam next contends that during argument at the close of trial, the prosecutor made statements that denied him his constitutional right to a fair trial. He presents four statements that he claims crossed the line into impropriety. Two of those involved the prosecutor emphasizing to the jurors how important it was for them to use their common sense and experience. The first of those two was in the principal segment of her argument, expressed as a general reference to the standard instruction telling jurors they

"have a right to use common knowledge and experience in regard to the matter about which a witness has testified." PIK Crim. 4th 51.060. The second statement was in the prosecutor's rebuttal argument when she asked the jury to use common sense and experience in evaluating Pulliam's statements and actions.

The other two statements were directed to Pulliam's self-defense claim, and he again asserts they were outside the broad scope given to prosecutors for discussion of the evidence in argument. The prosecutor suggested that in assessing the reasonableness of Pulliam's claim, the jurors needed to decide what a reasonable person would do, "and a reasonable person is you, ladies and gentlemen." The prosecutor also told the jury: "And a reasonable person is you making that decision. You are reasonable people, and [a] reasonable person is a person off the street." Pulliam characterizes these statements as "golden rule" arguments, inviting the jurors to put themselves in Pulliam's position.

Pulliam also argues that the prosecutor's statements amounted to a misstatement of the law on self-defense. The trial court instructed the jurors that "[r]easonable belief requires both a belief by defendant and the existence of facts that would persuade a reasonable person to that belief." PIK Crim. 4th 52.200. Pulliam asserts that by suggesting jurors should consider themselves to be reasonable people, the prosecutor altered the legal standard for a reasonable person by replacing a generalized, nonspecific "person" with the juror's own personal views.

The State responds that, taken in full context, the prosecutor's argument looks very different than it does in the excerpts selected by Pulliam to support his claim. In support of that, the State included in its statement of facts extensive portions of the prosecutor's closing argument.

Our Supreme Court recently refined the analytical process for considering claims of what was formerly (including in the briefs for this case) referred to as "prosecutorial

misconduct." For reasons not germane to this case, a claim of error of this type, made in a criminal appeal, is now referred to as prosecutorial error, rather than misconduct. The court set the analytical path we must follow in this case.

> "Appellate courts will continue to employ a two-step process to evaluate claims of prosecutorial error. These two steps can and should be simply described as error and prejudice. 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 prejudice, we simply adopt the traditional constitutional harmlessness inquiry demanded by *Chapman*. In other words, prosecutorial error is harmless if the State can demonstrate 'beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, where there is no reasonable possibility that the error contributed to the verdict.' *State v. Ward*, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594 (2012). We continue to acknowledge that the statutory harmlessness test also applies to prosecutorial error, but when 'analyzing both constitutional and nonconstitutional error, an appellate court need only address the higher standard of constitutional error.' *State v. Sprague*, 303 Kan. 418, 430, 362 P.3d 828 (2015)." *State v. Sherman*, 305 Kan. ___, 378 P.3d 1060, 1075 (2016).

First, we review for error by the prosecutor. Pulliam claims the prosecutor made what have been referred to as golden rule arguments. In using golden rule arguments, counsel ask jurors to put themselves in the position of parties, victims, or the families of victims.

> "'Golden rule' arguments are generally improper because they encourage the jury to decide the case based on personal interest or bias rather than neutrality. *State v. McHenry*, 276 Kan. 513, 523, 78 P.3d 403 (2003). Prosecutors should not make statements that inflame the passions or prejudices of the jury or distract the jury from its duty to make

> decisions based on the evidence and the controlling law. *State v. Tosh*, 278 Kan. 83, 90, 91 P.3d 1204 (2004)." *State v. Corbett*, 281 Kan. 294, 313, 130 P.3d 1179 (2006).

Pulliam contends that by telling jurors they were reasonable people who would decide the reasonability of Pulliam's self-defense claim the prosecutor employed a golden rule argument, asking the jurors to put themselves in Pulliam's place. Read in context, we are not persuaded that the prosecutor's argument was either a golden rule argument or otherwise improper. Before the challenged comment, the prosecutor presented to the jurors an accurate description of their task in considering the self-defense claim—telling them that "not only does the defendant have to believe it, but a reasonable person has to believe that the situation justified that." She continued: "And you just can't find that in this case. A reasonable person would never act in those conditions." Only after considerable further argument specifically related to the evidence and to Pulliam's various versions of events did the suggestion appear that the jurors were reasonable people for purposes of their analysis. These statements did not invite the jurors to let personal interest or bias replace their neutrality, and there was no apparent likelihood the statements would have inflamed passions or prejudices. Considered in full, along with the district court's instructions on deciding the self-defense claim, we find no error.

Pulliam next claims that the particularization of the reasonable person standard effected a misstatement of the law on self-defense. As mentioned above, to the contrary, the prosecutor adhered to the law in reminding the jurors that they not only had to be persuaded that Pulliam believed he needed to act in self-defense, but there was an objective component as well. We do not agree that the suggestion that jurors were reasonable people in this analysis altered or overrode the accurate statements of their duties by the prosecutor and the court's instructions. Again, we find no error.

Since we have found no prosecutorial error, we need not proceed to analysis of prejudice.

Did the district court err in denying the motion for new trial based on ineffective assistance of counsel?

Prior to sentencing, Pulliam filed a motion for new trial alleging that the district court erred by limiting Dr. Logan's testimony and failing to instruct the jury on voluntary intoxication and involuntary manslaughter. Afterward, Pulliam's trial counsel filed a motion to withdraw. The district court permitted the withdrawal of his trial counsel and appointed new counsel. Pulliam then filed a second motion for new trial alleging he had been denied the assistance of effective counsel at trial. Pulliam claimed his trial counsel was ineffective in two respects: (1) he failed to voir dire a juror who was seen sleeping during a morning session of the trial; and (2) he failed to object to improper statements by the prosecutor in argument.

The State responds that Kansas appellate courts have previously held that the purported sleeping of a juror did not warrant a mistrial, and here it was not clear whether the juror actually was sleeping. When the issue was raised after the fact, the district judge commented that he had watched through the afternoon and had not seen anyone sleeping. The State argues that Pulliam's trial counsel used a reasonable strategy to deal with the potentially sleeping juror by asking the judge to keep an eye on the jury and watching the juror himself through the rest of the trial. In addition to its earlier argument that no prosecutorial error occurred, the State notes that trial counsel objected three times during closing argument and Pulliam has otherwise failed to show any errors by counsel that constitute ineffective assistance.

We should first note that claims of ineffective assistance by trial counsel are not generally considered on direct appeal. "The merits of a claim of ineffective assistance of counsel ordinarily are not addressed for the first time on direct appeal. [Citations omitted]." *State v. Dull*, 298 Kan. 832, 839, 317 P.3d 104 (2014). In this case, however, after appointment of independent counsel for Pulliam, the district court held an

evidentiary hearing on the ineffective assistance issue. For that reason, we will consider his claim.

Our standard for review of an ineffective assistance of counsel claim is well-established. "Ineffective assistance of counsel claims involve mixed questions of law and fact. *State v. Cheatham*, 296 Kan. 417, 430, 292 P.3d 318 (2013) (citing *Boldridge v. State*, 289 Kan. 618, 622, 215 P.3d 585 [2009]). An appellate court reviews the district court's factual findings for substantial competent evidence and its legal conclusions de novo. *Cheatham*, 296 Kan. at 430; *Wilkins v. State*, 286 Kan. 971, 980, 190 P.3d 957 (2008)." *Miller v. State*, 298 Kan. 921, 928, 318 P.3d 155 (2014).

When a criminal defendant claims ineffective assistance of counsel based on deficient performance, the defendant first has to show that counsel's performance was actually deficient, and second that the deficient performance was sufficiently serious that it prejudiced the defendant and deprived him or her of a fair trial. 298 Kan. 921, Syl. ¶ 2. To support his ineffective assistance claim, Pulliam must meet that two-part test in the following way:

> "The first prong of the test for ineffective assistance of counsel based upon allegations of deficient performance requires a defendant to show counsel's representation fell below an objective standard of reasonableness, considering all the circumstances. Courts must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance.
>
> "Once a criminal defendant establishes counsel's deficient performance, the defendant must also establish prejudice by showing there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability in this context is a probability sufficient to undermine confidence in the outcome. A court hearing an ineffectiveness of counsel claim based on deficient performance must consider the totality of the evidence before the judge or jury." 298 Kan. 921, Syl. ¶¶ 3-4.

It is not clear from the evidence whether a juror actually was sleeping at any point during Pulliam's trial. Although one of the prosecutors reported seeing a juror sleep in the morning session on one day of the trial, there do not appear to have been others who had the same concern. The district judge commented that he had been watching the jury in the afternoon and had not seen anyone sleeping. Pulliam's counsel asked the court to keep an eye out and let them know if there were further concerns. The issue did not arise again, and Pulliam's trial counsel later testified that he had discussed the issue with Pulliam and both were of the opinion that it would be better to act if the problem appeared again, rather than make the juror uncomfortable by putting the juror on the spot at that time. Pulliam makes only a speculative argument about prejudice as he contends that failure to ask for the juror to be questioned may have allowed juror misconduct.

Pulliam fails to present anything that might overcome the strong presumption of reasonable professional assistance by his counsel. The incident with the "sleeping" juror was only thinly supported, and Pulliam's counsel consulted with him and made a tactical decision not to call out, and possibly alienate, a juror on the basis of the information available. There was no further incident, and Pulliam has nothing beyond conjecture to contribute to the prejudice requirement even if we were to find deficient performance. Pulliam's argument on this issue fails. His counsel's performance was not deficient.

Pulliam's second claim of ineffective assistance centers on his trial counsel's failure to object to statements by the prosecutor that he argues were improper golden rule comments. We have addressed that claim above and, finding the statements were not improper, there can be no deficient performance because of counsel's failure to object.

Did the district court violate Pulliam's constitutional rights by using his criminal history in determining his sentence without submitting that history to a jury?

Pulliam argues the district court improperly used his prior convictions to increase his sentence without requiring those convictions be proved to a jury. He admits his position is contrary to Kansas Supreme Court caselaw. He contends the cases adverse to his arguments were decided incorrectly and states he is raising the issue to preserve it for possible federal review.

In *State v. Ivory*, 273 Kan. 44, 46-48, 41 P.3d 781 (2002), our Supreme Court rejected the argument that this violates the defendant's rights under the Sixth and Fourteenth Amendments to the United States Constitution. We are duty bound to follow our Supreme Court precedent absent some indication that the court is departing from its earlier position. *State v. Belone*, 51 Kan. App. 2d 179, 211, 343 P.3d 128, *rev. denied* 302 Kan. 1012 (2015). The Supreme Court continues to follow its *Ivory* ruling. See *State v. Overman*, 301 Kan. 704, 716, 348 P.3d 516 (2015).

We find no error in the use of Pulliam's criminal history to determine his sentence without submitting the issue to a jury.

Affirmed.