OFFICIALLY SELECTED
CASES ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF THE

STATE OF KANSAS

Reporter:
SARA R. STRATTON

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JUDGES AND OFFICERS OF THE KANSAS
COURT OF APPEALS

CHIEF JUDGE:

HON. KAREN ARNOLD-BURGER ..... Overland Park

JUDGES:

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HON. THOMAS E. MALONE ..... Wichita
HON. STEPHEN D. HILL ..... Paola
HON. MICHAEL B. BUSER ..... Overland Park
HON. G. GORDON ATCHESON ..... Westwood
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HON. KATHRYN A. GARDNER ..... Topeka
HON. SARAH E. WARNER ..... Lenexa
HON. AMY FELLOWS CLINE ..... Valley Center
HON. LESLEY ANN ISHERWOOD[1] ..... Hutchinson

[1]Sworn in April 30, 2021

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No. 122,665

STATE OF KANSAS, *Appellee*, v. JUSTIN MICHEAL MCFARLAND, *Appellant.*

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Intentional Criminal Threat—Intent to Place Another in Fear.* Intentional criminal threat is a threat to commit violence communicated with intent to place another in fear.

2. SAME—*Statutory Definition of "Another."* K.S.A. 2020 Supp. 21-5111(b) defines "another" as a person or persons as defined in the Kansas Criminal Code other than the person whose act is claimed to be criminal. Although a threat against "another" is a material element of criminal threat, the case-specific person who falls into that group is not.

3. SAME—*Criminal Threat is Threat to Commit Violence Under Statute.* K.S.A. 2020 Supp. 21-5415(a)(1) explicitly states a criminal threat is a threat to commit violence. A simple threat is not enough. Otherwise any person who intentionally threatens another with an intent to place another in fear, no matter the nature of the threat, could be guilty of criminal threat.

4. SAME—*Threat to Commit Violence—Application.* A threat to commit violence is a very broad category and can involve ordinary, spoken or written words or gestures that simply describe the threatened act of violence. It need not be in any particular form or in any particular words, it may be made by innuendo or suggestion, and it need not be made directly to the intended victim.

5. SAME—*Threat to Kill Another—Specific Explanation Not Necessary.* A threat to kill another need not include an explanation of the method of killing because ending someone's life is an inherent act of violence.

Appeal from Shawnee District Court; STEVEN R. EBBERTS, judge. Opinion filed April 2, 2021. Affirmed.

Rick Kittel, of Kansas Appellate Defender Office, for appellant.

Steven J. Obermeier, assistant solicitor general, and *Derek Schmidt*, attorney general, for appellee.

Before POWELL, P.J., GREEN and HILL, JJ.

POWELL, J.: Justin Micheal McFarland was convicted by a jury of his peers of intentional criminal threat. He now appeals that conviction, arguing the jury instruction on the elements of

criminal threat was clearly erroneous and the evidence was insufficient to support his conviction. After a review of the record, we disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On April 30, 2018, Chelsea McFarland was lying on her bed and scrolling through Facebook when she received a message from a stranger asking if she knew Justin McFarland. Justin is Chelsea's ex-husband, and, at that time, they had been divorced for five years. Attached to the message was a photo of a post by Justin on his Facebook wall. The post read:

"I'm soo sick and [tired] of my ex wife Chelsea Mcfarland, I'm going to kill her and that isn't a joke that is a promise. So everyone better watch the news in the next few days for a missing person from Topeka, ks"

Chelsea did not see the post on Justin's Facebook wall herself because he had blocked her from seeing his posts. Chelsea also received several messages from others about Justin's post.

About 10 minutes after seeing the post, Chelsea went to the police station to report the threat. Detective Michael Blood with the Special Victims Unit of the Topeka Police Department followed up with Chelsea. Blood also contacted Justin and interviewed him at the Topeka Police Department. Justin admitted to Blood he had posted the Facebook message and, while he had no intention of harming Chelsea, conceded he had hoped Chelsea would see it and the post would scare her.

The State charged Justin with criminal threat under K.S.A. 2017 Supp. 21-5415(a)(1). Although the complaint charged Justin with committing criminal threat intentionally or recklessly, the jury was only instructed on intentional criminal threat, and it found him guilty. The district court sentenced Justin to 13 months' imprisonment but placed him on probation from that sentence for 12 months.

Justin timely appeals.

I. WAS THE ELEMENTS INSTRUCTION FOR CRIMINAL THREAT ERRONEOUS?

Justin argues the jury instruction setting forth the elements of criminal threat was clearly erroneous because, while the complaint claimed Justin intended to place Chelsea in fear, the jury instruction only said the State had to prove he intended to place "another" in fear. The State responds that the instruction comports with the language of K.S.A. 2020 Supp. 21-5415(a)(1), which only requires the defendant to place "another" in fear, not a specific person. Alternatively, the State argues that even if we conclude the instruction was in error, it was not clearly erroneous as to require a new trial because both the evidence and the arguments of the parties focused only on how Justin intended to place Chelsea in fear.

Standard of Review

"'For jury instruction issues, the progression of analysis and corresponding standards of review on appeal are: (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, utilizing the test and degree of certainty set forth in *State v. Ward*, 292 Kan. 541, 256 P.3d 801 (2011), *cert. denied* 565 U.S. 1221 (2012).'" *State v. Woods*, 301 Kan. 852, 876, 348 P.3d 583 (2015).

The first and last step are interrelated because whether a party has preserved a jury instruction issue affects the reversibility inquiry. *State v. Bolze-Sann*, 302 Kan. 198, 209, 352 P.3d 511 (2015).

When a party fails to object to a jury instruction before the district court, we review the instruction to determine if it was clearly erroneous. K.S.A. 2020 Supp. 22-3414(3). For a jury instruction to be clearly erroneous, the instruction must be legally or factually inappropriate and we must be firmly convinced the jury would have reached a different verdict if the erroneous instruction had not been given. The party claiming clear error has

the burden to show both error and prejudice. *State v. McLinn*, 307 Kan. 307, 318, 409 P.3d 1 (2018).

Analysis

Justin was charged with criminal threat under K.S.A. 2017 Supp. 21-5415(a)(1). The complaint stated:

"On or about the 30th day of April, 2018 in the State of Kansas and County of Shawnee, JUSTIN M MCFARLAND, did, then and there, unlawfully, feloniously, and knowingly, communicate a threat to commit violence, with the intent to place another in fear or in reckless disregard of the risk of causing such fear, to-wit: Chelsea McFarland, contrary to the form of the statutes in such case made and provided and against the peace and dignity of the State of Kansas."

At trial, the elements instruction for criminal threat, jury instruction No. 9, instructed the jury as follows:

"1. The defendant threatened to commit violence and communicated the threat with the intent to place another in fear.

"2. This act occurred on or about the 30th day of April, 2018, in Shawnee County, Kansas.

"The State must prove that the defendant committed the crime intentionally.

"A defendant acts intentionally when it is the defendant's desire or conscious objective to do the act complained about by the State."

Justin complains the elements instruction was erroneous because the complaint alleged that he intended to place Chelsea in fear but the jury instruction informed the jury it only had to find he intended to place "another" in fear. Justin did not object to this language below. Thus, to obtain a new trial, Justin must establish that the jury instruction was not legally or factually appropriate and, if so, he must convince us the jury would have reached a different verdict without the erroneous instruction.

To determine if a jury instruction is legally appropriate, we review whether the instruction properly and fairly stated the law as applied to the case's facts and whether it could have reasonably misled the jury. *State v. Bernhardt*, 304 Kan. 460, 469, 372 P.3d 1161 (2016). "A trial court has the duty to 'define the offense charged in the jury instructions . . .' and 'inform the jury of every essential element of the crime that is charged.'" *State v. Butler*, 307 Kan. 831, 847, 416 P.3d 116 (2018).

Here, Justin was charged with intentional criminal threat. Intentional criminal threat is a threat to "[c]ommit violence communicated with intent to place another in fear." K.S.A. 2020 Supp. 21-5415(a)(1). Justin takes issue with "Chelsea" in the complaint being replaced with "another" in the elements instruction. Although his brief does not specifically allege the instruction was legally inappropriate, implicit in his argument is an assumption that the use of the word "another" in the jury instruction was not legally appropriate because the complaint specifically charged him with intending to place Chelsea in fear. The Kansas Criminal Code defines "'[a]nother'" as "a person or persons as defined in this code other than the person whose act is claimed to be criminal." K.S.A. 2020 Supp. 21-5111(b).

Our research has not found a case which directly addresses the situation where the complaint listed the specific person the threat intended to place in fear but the jury instruction did not. Other cases have addressed what K.S.A. 2020 Supp. 21-5415(a)(1) means by "to place another in fear."

In *State v. Williams*, 303 Kan. 750, 368 P.3d 1065 (2016), Williams was charged with criminal threat for threatening a district judge and his assistant. Williams argued there was insufficient evidence to support his criminal threat conviction because there was no evidence he threatened the assistant. Both the complaint and the jury instructions charged Williams with intentionally threatening the district judge and his assistant. After analyzing the criminal threat statute and the definition of "another" in the Kansas Criminal Code, our Supreme Court explained the use of "another" in the criminal threat statute meant criminal threat can be committed by communicating the threat to one person or a thousand. The court held it did not matter if some jurors believed Williams threatened the judge while others believed he threatened the judge's assistant, so long as the jury agreed Williams threatened another. 303 Kan. at 757. Our Supreme Court found: "[T]here did not need to be sufficient evidence to support a threat against each identified victim. Although a threat against 'another' is a material element of criminal threat, the case-specific person who falls into that group is not." 303 Kan. at 757-58.

Although *Williams* involved a criminal threat with two possible victims and the jury instruction did not separate them, it is instructive here. As the case explains, the State is not required to prove the defendant intended to place a specific person in fear, so long as it proves the defendant intended to place "another" in fear. 303 Kan. at 757.

A further example of this principle can be found in *State v. Wright*, 259 Kan. 117, 911 P.2d 166 (1996). Wright claimed the criminal threat complaint failed to allege that he knew the victim would be informed of the threat. Our Supreme Court held the defendant did not have to show the defendant knew the threat would be communicated to the victim so long as there was an intent to place another person in fear. 259 Kan. at 122.

In an aggravated robbery case, *State v. Jaghoori*, No. 112,920, 2016 WL 4262485 (Kan. App. 2016) (unpublished opinion), another panel of our court addressed whether the jury instruction could permissibly be more general than the complaint. The complaint described the property Jaghoori took as a black 1996 Volkswagen Jetta car. The jury instruction identified the property taken simply as "property." Jaghoori objected and, on appeal, argued the jury instruction broadened the basis of his conviction by allowing the jury to convict him based on the taking of any of the victim's property. The panel found the elements jury instruction matched the statutory language and, therefore, was not broader than the complaint because both alleged aggravated robbery exclusively under the applicable statutory elements. 2016 WL 4262485, at *4.

Here, the complaint and the elements instruction both alleged intentional criminal threat and used the language of K.S.A. 2017 Supp. 21-5415(a)(1). The jury instruction was not broader than the complaint and accurately reflected the applicable law. The elements instruction for criminal threat, jury instruction No. 9, was legally appropriate.

When analyzing whether an instruction was factually appropriate, we determine whether sufficient evidence viewed in the light most favorable to the requesting party supports the instruction. *State v. Davis*, 306 Kan. 400, 418-19, 394 P.3d 817 (2017). We have no trouble concluding that the elements instruction was factually appropriate because sufficient evidence supported it. As

previously discussed, the State had to prove Justin intended to place another in fear. It did so by putting on evidence that Justin intended to place Chelsea in fear.

Because the elements instruction was both legally and factually appropriate, the district court did not err in giving it, and Justin cannot claim he was prejudiced by the instruction.

II. WAS THERE SUFFICIENT EVIDENCE TO PROVE JUSTIN COMMUNICATED A THREAT TO COMMIT VIOLENCE?

Justin also contends the evidence was insufficient to support his criminal threat conviction. Justin focuses on the language of K.S.A. 2020 Supp. 21-5415(a)(1), which states a criminal threat is a threat to "[c]ommit violence" with the "intent to place another in fear." Justin argues the State did not provide any evidence that his threat was one to commit violence because his Facebook post stating he was going to kill his ex-wife did not contain any reference to the manner by which he would kill her; therefore, nothing in the post referred to violence. The State argues nothing in K.S.A. 2020 Supp. 21-5415(a)(1) requires proof of the means contemplated to carry out the threat to kill and any threat to kidnap and kill someone is a threat to commit violence.

Standard of Review

At the start, there is a dispute over the appropriate standard of review. Justin states the standard of review is for sufficiency of the evidence because he is alleging there was insufficient evidence to prove he communicated a threat to commit violence. The State argues the standard of review is a question of law because Justin is claiming there is an additional element of the crime. The State claims proving that the means contemplated to kill Chelsea constituted violence is not an element of criminal threat.

K.S.A. 2020 Supp. 21-5415(a)(1) explicitly states a criminal threat is a threat to "[c]ommit violence." A simple threat is not enough. It must be a threat to commit violence; otherwise any person who intentionally threatens another with an intent to place another in fear, no matter the nature of the threat, could be guilty of criminal threat. The communicated threat of violence is the actus reus of the crime; it is a necessary part of the crime. See *State v.*

Denton, No. 111,085, 2015 WL 5036669, at *4 (Kan. App. 2015) (unpublished opinion). Therefore, the State must prove Justin's threat was a threat to commit violence, and the sufficiency of the evidence standard of review applies. But the State is correct that what constitutes violence under the statute is a question of statutory interpretation and is a legal question subject to de novo review. See *State v. Alvarez*, 309 Kan. 203, 205, 432 P.3d 1015 (2019).

When a criminal defendant challenges the sufficiency of the evidence, the proper standard of review is "'whether, after reviewing all the evidence in a light most favorable to the prosecution, the appellate court is convinced a rational factfinder could have found the defendant guilty beyond a reasonable doubt. Appellate courts do not reweigh evidence, resolve evidentiary conflicts, or make witness credibility determinations.' [Citation omitted.]" *State v. Chandler*, 307 Kan. 657, 668, 414 P.3d 713 (2018). A guilty verdict will be reversed "only in rare cases when the court determines that evidence was so incredulous no reasonable factfinder could find guilt beyond a reasonable doubt." *State v. Torres*, 308 Kan. 476, 488, 421 P.3d 733 (2018). Circumstantial evidence may sustain a conviction of even the gravest offense if there is evidence to support a finding that each element of the charged crime was met. *State v. Richardson*, 289 Kan. 118, 127, 209 P.3d 696 (2009).

Analysis

Justin posted on Facebook that he was going to kill Chelsea:

"I'm soo sick and [tired] of my ex wife Chelsea Mcfarland, I'm going to kill her and that isn't a joke that is a promise. So everyone better watch the news in the next few days for a missing person from Topeka, ks."

"Due process requires the State to prove every element of the charged crime." *State v. Banks*, 306 Kan. 854, 858, 397 P.3d 1195 (2017). "To determine what [elements] the State [must] prove, we look to the statute." *Torres*, 308 Kan. at 488.

Under K.S.A. 2020 Supp. 21-5415(a)(1), intentional criminal threat is any threat to "[c]ommit violence communicated with intent to place another in fear." A threat is "a communicated intent to inflict physical or other harm on any person or on property."

K.S.A. 2020 Supp. 21-5111(ff). Justin only alleges there was insufficient evidence his threat was one to commit violence. Violence is not defined in Kansas statute or caselaw.

Our courts have explained that a threat to commit violence is a very broad category and can involve "ordinary, spoken or written words or gestures that simply described the threatened act of violence." See *State v. Stawski*, 47 Kan. App. 2d 172, 178-79, 271 P.3d 1282 (2012) (collecting cases). A threat to commit violence does not need to "'be in any particular form or in any particular words, and it may be made by innuendo or suggestion, and need not be made directly to the intended victim.' . . . All circumstances surrounding the communication, including the relationship between the parties, must be considered." *State v. Miller*, 6 Kan. App. 2d 432, 435, 629 P.2d 748 (1981). Because all circumstances surrounding the parties must be considered, whether a threat is one to commit violence is a question properly for the jury. *In re B.S.*, No. 107,093, 2012 WL 3172095, at *4 (Kan. App. 2012) (unpublished opinion). Here, the issue was submitted to the jury, and it determined Justin's threat to kill his ex-wife was a threat to commit violence.

Justin argues there was insufficient evidence his threat was a threat to commit violence because his post did not explain the method by which he intended to kill Chelsea. We disagree. Justin threatened to kill his ex-wife. The intentional taking of a person's life is inherently a violent act. No matter the method used or contemplated, ending someone's life is an inherent act of violence against that person. So, threatening to end the life of a person is, by its very nature, a threat to commit violence against that person.

An unpublished case from another panel of our court illustrates this principle. In *State v. Jaeger*, No. 104,119, 2011 WL 6382749, at *7 (Kan. App. 2011) (unpublished opinion), the defendant threatened to kill the victim—saying, "'You're fucking dead'"— without specifying the way he would do so. The panel found sufficient evidence in the record existed to find the defendant threatened to commit violence and to support his conviction for criminal threat. 2011 WL 6382749, at *7.

Similarly, here, Justin threatened on Facebook to kill Chelsea, without specifying the way he would kill her. We hold Justin's

threat was sufficient evidence, when viewed in the light most favorable to the State, to support his criminal threat conviction.

Affirmed.

No. 120,996

STATE OF KANSAS, *Appellee*, v. PAIGE HATFIELD, *Appellant*.

SYLLABUS BY THE COURT

1. TRIAL—*Expert Testimony—Admissibility*. Expert testimony may be admissible when scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or determine a fact in issue.

2. SAME—*Expert Testimony—Determination of Admissibility*. The benchmark for determining whether expert testimony is admissible is not whether that testimony is scientific but whether it involves information outside the common realm of human experience—and obtained through reliable methods—that could meaningfully assist the jury in its deliberations.

2. SAME—*Expert Testimony—Qualification of Expert—Determination by Court.* A person may testify as an expert if the person is *qualified* and if his or her opinions result from *reliable* methods or principles. A person is qualified when he or she has the requisite knowledge, skill, experience, training, or education to provide helpful insight on a matter that would benefit from expert opinion. Courts assess reliability by determining whether a person's testimony is based on sufficient facts or data and results from reliable principles and methods, as well as whether the witness has reliably applied the principles and methods to the facts of the case.

3. SAME—*Expert Testimony—Reliability of Expert Testimony—Soundness of Methodology.* The touchstone for reliability of expert testimony is not the correctness of the expert's conclusions but the soundness of his or her methodology.

5. EVIDENCE—*Admissibility of Expert Testimony—Court's Discretion*. The district court, as evidentiary gatekeeper, has broad discretion to determine whether proposed expert testimony is admissible. And a district court has considerable leeway in deciding how to go about determining whether particular expert testimony is reliable. A court only abuses that discretion when no reasonable person would take the view it adopted or when it bases its decision on an error of law or fact.

6. SAME—*Expert Testimony—Rejection of Testimony is Exception*. The rejection of expert testimony is the exception rather than the rule. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof remain the traditional and appropriate means of attacking shaky but admissible evidence.

7. SAME—*Objection to Evidence under K.S.A. 60-404—Preserves Issue on Appeal*. K.S.A. 60-404 requires a party to raise a timely and specific objection to evidence in order for it to be considered on appeal. This requirement ensures that a district court has the opportunity to act as the evidentiary gatekeeper at trial.

8. TRIAL—*Use of Expert Testimony—Admissibility*. Expert testimony is not objectionable merely because it embraces an issue to be decided by the trier of fact. Such evidence may be admissible if it will aid the jury in the interpretation of technical facts or when it will assist the jury in understanding the material in evidence.

9. SAME—*Admissibility of Expert Testimony—Pretrial Hearing at Court's Discretion.* The decision whether to hold a pretrial hearing to determine the admissibility of expert-opinion testimony is a question entrusted to the district court's discretion. The purpose of such a hearing is to determine whether a witness qualifies as an expert and whether the witness' testimony satisfies the requirements of K.S.A. 2020 Supp. 60-456(b).

10. SAME—*Prosecutors Have Wide Latitude—Comments During Closing Arguments.* Prosecutors have considerable latitude in crafting arguments. But a prosecutor's comments during closing argument must accurately reflect the evidence and accurately state the law. And those comments cannot be intended to inflame the passions or prejudices of the jury or to divert the jury from its duty to decide the case based on the evidence and the controlling law.

11. SAME—*Prosecutor's Statements—Closing Argument.* It is improper for a prosecutor to make statements during closing argument that attempt to shift this burden of proof to the defendant. But there is a difference between the prosecutor shifting the burden of proof—asserting the defense must prove a crime was *not* committed—and pointing out the absence of evidence to support the defense argument that there are holes in the State's case.

12. EVIDENCE—*Sufficiency of Evidence Challenge—Appellate Review*. When a defendant challenges the sufficiency of the evidence, an appellate court reviews the evidence in a light most favorable to the State to determine whether a rational fact-finder could find the defendant guilty beyond a reasonable doubt. The court does not reweigh the evidence, resolve evidentiary conflicts, or reassess witness credibility.

Appeal from Johnson District Court; BRENDA M. CAMERON, judge. Opinion filed April 9, 2021. Affirmed.

Stacey L. Schlimmer, of Olathe, for appellant.

Jacob M. Gontesky, assistant district attorney, *Stephen M. Howe*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before WARNER, P.J., POWELL, J., and MCANANY, S.J.

WARNER, J.: K.G., a four-month-old child, developed difficulty breathing and exhibited seizure-like symptoms several hours after he was dropped off at Paige Hatfield's in-home daycare. After reviewing K.G.'s history and symptoms—multiple subdural hematomas, retinal hemorrhaging, and retinoschisis—doctors diagnosed him with abusive head trauma. The State charged Hatfield with aggravated battery and operating an unlicensed daycare, and a jury convicted her of both charges. She now appeals, challenging multiple aspects of the evidence and arguments presented during her trial. After carefully and thoroughly reviewing the record before us, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

K.G. was born in September 2016. Because both his parents worked, K.G.'s Mother enrolled him in Hatfield's Haven, an unlicensed daycare operated by Hatfield out of her Olathe home. K.G. began attending daycare in early January 2017 (after K.G.'s Mother's maternity leave expired).

On January 31—the twelfth day K.G. attended Hatfield's Haven—Mother dropped K.G. off at daycare at around 7:30 a.m. A little before 1 p.m., Hatfield took a picture of K.G., swaddled and smiling, and sent it to Mother. About 30 minutes later, Hatfield called 911 because K.G.'s eyes had rolled back in his head and he would not make eye contact. Paramedics found he was not breathing properly and, based on his posturing, may have experienced a seizure. An ambulance transported K.G. to Overland Park Regional Medical Center, where a computerized tomography (CT) scan revealed three acute subdural hematomas (recent bleeding between certain membranes between the skull and brain), including bilateral subdural hematomas (bleeding on both the left and right sides of the head). K.G. was transferred to the pediatric intensive care unit at Children's Mercy Hospital later that afternoon.

Over the next several days, doctors examined K.G. for other injuries. K.G.'s injuries were largely internal; apart from soft tissue swelling on the top of his head, K.G. had no external injuries. But along with the subdural hematomas, K.G. had a subarachnoid hematoma (bleeding between deeper membranes between the

skull and brain). K.G. also suffered from severe retinal hemorrhaging and vitreous hemorrhaging in both eyes. And doctors observed retinoschisis (a separation of the retina's layers) in both eyes. As a result of these injuries, K.G. has experienced developmental delays, loss of brain volume, and partial, if not complete, blindness.

Each of K.G.'s injuries—a subarachnoid and multiple subdural hematomas, retinal hemorrhaging, and retinoschisis—could stem from a medical condition, trauma, or an unknown cause. Trauma can be either accidental or nonaccidental. Because bilateral subdural hematomas and retinoschisis are often the result of significant force, doctors at Children's Mercy contacted the hospital's child-abuse section while Detective Brian Peters of the Olathe Police Department followed up on the 911 call.

Detective Peters interviewed Hatfield after K.G. was admitted to the hospital. Hatfield stated that she had not hurt K.G. and that there had been no accident. According to Hatfield, K.G. developed a wet cough after he fell asleep. When Hatfield tipped K.G. back, he spit up, and she called 911 after he would not make eye contact. Mother and Father also denied hurting K.G. or that an accident occurred to injure him.

At the same time, doctors attempted to determine the cause of K.G.'s injuries. Testing did not reveal an underlying medical condition. Mother related three earlier incidents since K.G.'s birth that had caused her concern:

- In early October 2016, K.G. fell off a bed while laying on Mother. Mother took him to Children's Mercy, and a CT scan showed no injuries.
- Later that month, Mother's car was rear-ended when K.G. was in a rear-facing car seat. Mother took K.G. to see his doctor, who concluded K.G. was a normal baby with no injuries.
- In mid-January 2017, K.G. was hospitalized for gastroenteritis at Children's Mercy; he was discharged January 26—five days before the incident that gave rise to the in-

> vestigation. On January 27, Mother texted Hatfield, explaining K.G. had wiggled and fallen out of his Bumbo seat (a play-seat for infants).

The doctors determined none of these past incidents contributed to K.G.'s injuries. Given the severity of these injuries and because they were not caused by a medical condition or accidental trauma, Dr. James Anderst, head of the Children's Mercy child-abuse investigative unit, diagnosed K.G. with abusive head trauma—the nonaccidental infliction of head trauma by another. Based on Dr. Anderst's diagnosis and Detective Peters' investigation, the State charged Hatfield with aggravated battery and unlawfully operating a childcare facility.

Before trial, Hatfield filed a motion to exclude Dr. Anderst, who testified at the preliminary hearing, from testifying as an expert at trial. She argued his testimony was unreliable because it stemmed from a faulty differential diagnosis—meaning, his conclusions were based on excluding various potential causes (such as medical conditions and accidental trauma) rather than deriving his findings from observations of K.G. or interpreting the tests performed on him. The court denied Hatfield's motion, finding Dr. Anderst was qualified through his education and experience and his methods for reaching his opinion and diagnosis were generally accepted in his field and supported by substantial documentation.

The case proceeded to a multiple-day jury trial. There, the State presented testimony from six doctors from a variety of disciplines, including Dr. Anderst, who treated K.G. All the doctors concluded K.G. presented acute symptoms consistent with a nonaccidental injury, though they differed as to when the underlying injury occurred. Dr. David Nielsen, a pediatric neuroradiologist, dated the blood on K.G.'s January 31 CT scan to be between 12 hours and a few days old. Dr. Christian Kaufman, a pediatric neurosurgeon, dated the same blood between 0 and 72 hours old, though he noted K.G. was more likely to have exhibited symptoms closer to when the injury occurred. And Dr. Anderst explained that blood cannot always be accurately aged using a CT scan because active clots, a combination of old and new trauma, and the

blood's mixture with spinal fluid can affect the estimate. Dr. Anderst stated he believed K.G. was immediately symptomatic after whatever trauma he suffered occurred.

As part of her defense, Hatfield called Dr. Joseph Scheller to testify as an expert. Dr. Scheller, a pediatric neurologist with a subspecialty in neuroimaging, agreed that the blood on K.G.'s CT scan was acute—of recent origin—but suggested an alternative theory to explain K.G.'s injuries. He explained a minor injury from several months earlier likely allowed fluid to accumulate in K.G.'s skull; this fluid increased the pressure on K.G.'s brain, eventually tearing blood vessels and resulting in his injuries. In other words, Dr. Scheller believed K.G.'s injuries were a new manifestation of a chronic condition.

The jury found Hatfield guilty of both crimes charged. They also found that two aggravating factors—K.G.'s age and Hatfield's position of trust—warranted a sentencing departure. The district court thus imposed an 86-month prison sentence for the aggravated-battery conviction and a nominal fine for the unlicensed-childcare-facility conviction. Hatfield now appeals her conviction for aggravated battery.

DISCUSSION

Hatfield challenges multiple aspects of the trial. She argues that the district court abused its discretion when it ruled on several evidentiary questions, ranging from allowing Dr. Anderst to testify as an expert witness to making cautionary statements while Hatfield's attorney questioned Detective Peters. She also alleges that the prosecutor committed multiple errors during closing argument and that these errors, individually or in combination, deprived her of a fair trial. And she claims there was not sufficient evidence presented to support her conviction for aggravated battery.

After carefully considering Hatfield's arguments, we find only one error, as the prosecutor misstated the nature of K.G.'s injuries by saying he suffered a neck contusion (not a contusion on the top of his head). But we are convinced that this misstatement did not change the outcome of the trial. We therefore affirm Hatfield's conviction.

1. *The district court did not err when it allowed Dr. Anderst to testify as an expert witness.*

Hatfield challenges three aspects of the expert testimony of Dr. Anderst—the head physician at the Children's Mercy child-abuse investigative unit who investigated K.G.'s injuries and ultimately diagnosed him with abusive head trauma. Hatfield argues that the district court erred when it allowed Dr. Anderst to provide expert-opinion testimony, claiming the doctor employed unreliable methods to reach his diagnosis. She also asserts that Dr. Anderst's testimony that K.G.'s injuries were caused by nonaccidental abusive head trauma usurped the role of the jury by opining on the question of intent. And she argues that the district court's decision to allow Dr. Anderst to testify as an expert witness without first conducting a dedicated hearing on that point (often called a *Daubert* hearing) deprived her of an opportunity to cross-examine him before trial and infringed her right to confront witnesses against her.

1.1. *Dr. Anderst's testimony was based on and applied reliable methods and principles.*

Hatfield challenges multiple aspects of Dr. Anderst's expert testimony. She points out that Dr. Anderst's conclusions regarding the aging of the blood on K.G.'s CT scans conflicted with the opinions of other experts. She argues that the methodology Dr. Anderst employed—excluding potential causes of injury through investigation and then determining whether the remaining cause (here, nonaccidental head trauma) was consistent with K.G.'s medical documentation—was forensic in nature rather than medical or scientific. And she asserts that some of Dr. Anderst's opinions are inconsistent with medical literature and studies regarding abusive head trauma.

K.S.A. 2020 Supp. 60-456(b) governs the admissibility of expert-opinion testimony. Broadly speaking, expert testimony may be admissible when "scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or determine a fact in issue." K.S.A. 2020 Supp. 60-456(b).

Since 2014, Kansas courts have employed a standard to determine whether proposed testimony will aid the jury that is "substantively identical" to Federal Rule of Evidence 702 and consistent with the discussion of that rule in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). *State v. Lyman*, 311 Kan. 1, 21, 455 P.3d 393, *cert. denied* 141 S. Ct. 174 (2020). A person may testify about his or her specialized—or expert—opinions if the person is *qualified* and if his or her opinions result from *reliable* methods or principles. A person is qualified when he or she has the requisite "knowledge, skill, experience, training or education" to provide helpful insight on a matter that would benefit from expert opinion. K.S.A. 2020 Supp. 60-456(b). And courts assess reliability by determining whether a person's testimony is "based on sufficient facts or data" and results from "reliable principles and methods," as well as whether "the witness has reliably applied the principles and methods to the facts of the case." K.S.A. 2020 Supp. 60-456(b).

The district court, as evidentiary gatekeeper, has broad discretion to determine whether proposed expert testimony meets this threshold. See *In re Cone*, 309 Kan. 321, 327, 435 P.3d 45 (2019). A court only abuses that discretion when no reasonable person would take the view it adopted or when it bases its decision on an error of law or fact. *State v. Marshall*, 303 Kan. 438, 445, 362 P.3d 587 (2015). Nevertheless, the "'rejection of expert testimony is the exception rather than the rule.'" *Smart v. BNSF Railway Co.*, 52 Kan. App. 2d 486, 496, 369 P.3d 966 (2016). "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" remain "the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596.

Hatfield does not challenge Dr. Anderst's qualifications as an expert—he is not only a medical doctor but also leads Children's Mercy's child-abuse investigation unit. Instead, she argues that his testimony was unreliable because it was inconsistent with other experts and employed a different methodology than strictly reading and interpreting K.G.'s medical documentation.

The touchstone for reliability under K.S.A. 2020 Supp. 60-456(b) is "'not the correctness of the expert's conclusions but the soundness of his [or her] methodology.'" *Lyman*, 311 Kan. at 28

(quoting *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1318 [9th Cir. 1995]). To underscore this point, our Kansas Supreme Court has explained that the "overarching subject" of the expert inquiry is "the evidentiary relevance and *reliability of the principles that underlie* a proposed expert submission." (Emphasis added.) *Lyman*, 311 Kan. at 28. In other words, the "'focus . . . must be solely on principles and methodology, not on the conclusions that they generate.'" 311 Kan. at 28 (quoting *Daubert*, 509 U.S. at 595)

Just as district courts have broad discretion generally to determine whether to admit expert-opinion testimony, courts have "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999); see also *Lyman*, 311 Kan. at 22 (reliability is a flexible inquiry that "must be tied to the particular circumstances of the particular case"). And reliability can be demonstrated in a number of ways. *Daubert*, for example, discussed a nonexhaustive list of factors that a district court may consider when assessing the soundness of the scientific or technical method an expert employs: Has the method been tested? Has it been subjected to publication and peer review? Is there a known error rate or margin? Is the position generally accepted within the scientific or technical community? See 509 U.S. at 592-94. And the reliability of an expert's approach can also be demonstrated based on the expert's personal knowledge or experience, coupled with an explanation as to "'how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts.'" *Smart*, 52 Kan. App. 2d at 495.

Applying these principles here, our review of the record shows the district court did not err when it allowed Dr. Anderst to testify as an expert. At both the preliminary hearing and the trial, Dr. Anderst testified about the methods employed by medical professionals who investigate potential child abuse—observing a child's manifested injuries, investigating and ruling out potential causes of those injuries (such as medical conditions or accidents), and comparing any remaining sources of the injury with the child's

medical and personal documentation. He also explained how he applied those methods to the specific facts and medical documentation in this case to reach his conclusion that K.G.'s injuries were caused by abusive head trauma.

Though Hatfield challenges numerous aspects of Dr. Anderst's opinions on appeal, many of her arguments are concerned with the credibility of the doctor's ultimate conclusions, not the methodologies he employed. For example, Hatfield points out that other witnesses (including two who testified for the State) indicated that K.G.'s CT scan showed blood that could (or potentially would) predate a January 31 injury at the daycare. Yet Dr. Anderst testified that in his experience, efforts to determine the age of blood through CT scans can be misleading and polluted by factors irrelevant to a child's immediate injury; for this reason, he looked to when the child started experiencing symptoms. Hatfield raises similar challenges to Dr. Anderst's statement that the soft-tissue swelling on the top of K.G.'s head could have been caused by blunt-force trauma—a statement potentially at odds with testimony from the medical professional who initially treated K.G. As the district court noted, this is a matter which Hatfield could—and did—explore through "thorough cross-examination." But this difference of opinion does not mean that the methods Dr. Anderst employed were unreliable.

Hatfield also points out several perceived deficiencies or inconsistencies in Dr. Anderst's testimony, arguing that these areas demonstrate that his opinions were not sufficiently rooted in the facts of the case or were based on unsound analysis. She asserts, for instance, that Dr. Anderst could not recall during cross-examination whether he consulted with social workers or detectives on the case to make sure he had all the facts necessary to render his opinion and could not recall the name of the person who described the blood initially drawn from K.G.'s subdural hematoma. She notes that Dr. Anderst could not recollect two authors' names when he was asked about various studies during cross-examination or how the circumstances of other studies could be applied to the facts of this case. And she argues that one law review article cited by Dr. Anderst relating to differential diagnoses—the approach he applied—can be read to question his method of analysis.

But these argued inconsistencies, while fair discussion for cross-examination or presentation of contrary opinions, do not render the district court's reliability finding unreasonable. Indeed, scientific inquiry by its very nature can lead to disagreement and evolving analysis. Accord *Daubert*, 509 U.S. at 596-97 (noting that "open debate is an essential part of both legal and scientific analyses," though "[s]cientific conclusions are subject to perpetual revision"). The fact that Dr. Anderst could potentially have done more during his investigation or could not remember specific details of a study during his testimony may affect the jury's assessment of his credibility, but it does not render his testimony inadmissible.

Finally, Hatfield argues that Dr. Anderst's deductive method of analysis—often called a "differential" diagnosis—is unreliable as a matter of course. According to Hatfield, Dr. Anderst used a forensic approach focused on eliminating potential causes of injury, not a technical or scientific analysis of the CT scan or K.G.'s other medical documentation. Hatfield raised this argument to the district court, both in her initial request for a pretrial *Daubert* hearing and at trial, emphasizing the difference between Dr. Anderst's analysis and that of a radiologist or other specialist. The district court disagreed, finding that Dr. Anderst had testified about "his methodology, his findings, the facts he used, [and] all the data he used" and that the methods and principles he relied upon were reliable.

As a starting point, we observe that the subject of expert-opinion testimony need not be "scientific" to be admitted. K.S.A. 2020 Supp. 60-456(b) recognizes that a jury's understanding may benefit from "scientific, technical or *other specialized knowledge*." (Emphasis added.) The benchmark for determining whether expert testimony is admissible is not whether that testimony is "scientific" but whether it involves information outside the common realm of human experience—and obtained through reliable methods—that could meaningfully assist the jury in its deliberations.

That said, there is significant medical and legal literature documenting differential diagnosis as a manner of ascertaining whether a child has suffered abusive head trauma. See Dr. Sandeep Narang, M.D., J.D., *A Daubert Analysis of Abusive Head Trauma/ Shaken*

Baby Syndrome, 11 Hous. J. Health L. & Pol'y 505 (2011) (aggregating studies). Dr. Anderst's explanation of his methodology and his application of those principles was consistent with this literature. See 11 Hous. J. Health L. & Pol'y at 571-74. After reviewing K.G.'s injuries, he inquired as to K.G.'s medical history and family history to determine whether either could have caused his present condition. When he was confident he could exclude a preexisting medical condition and accidental injury as causes, Dr. Anderst reviewed all of K.G.'s medical documentation and any other information available to determine whether those were consistent with a nonaccidental injury—i.e. abusive head trauma. This approach was not, as Hatfield asserts, merely one of negation of other possible causes; it required a scientific reconciliation of K.G.'s medical tests and conditions to determine whether they could have resulted from traumatic abuse. Nor does the record show—as Hatfield argues—that Dr. Anderst's diagnosis was based solely on the presence of K.G.'s subdural hematomas, retinal hemorrhages, and altered mental state (often called the "triad" of injuries surrounding abusive head trauma); the doctor testified in detail about the analytic steps that led to his opinion of what caused K.G.'s injuries.

In considering whether Dr. Anderst could testify as an expert, the district court reviewed his testimony from the preliminary hearing. The court concluded that Dr. Anderst's approach to diagnose abusive head trauma was generally accepted in the medical community and that he adequately explained his methodology and findings to render his testimony reliable. The court did not abuse its discretion when it allowed Dr. Anderst to present expert-opinion testimony.

1.2. *Dr. Anderst's testimony did not impermissibly invade the province of the jury when he testified that K.G.'s injuries were nonaccidental.*

Hatfield also argues that the district court erred in allowing Dr. Anderst to testify because his opinions that K.G.'s injuries were nonaccidental and the result of abusive head trauma were improper legal conclusions that usurped the role of the jury. We do not find this argument persuasive for several reasons.

First, though Hatfield objected to the reliability of Dr. Anderst's expert testimony, she does not appear to have raised this particular question—whether his abusive-head-trauma diagnosis invaded the role of the jury—at trial. K.S.A. 60-404 requires a party to raise a timely and specific objection to evidence in order for it to be considered on appeal. See *State v. King*, 288 Kan. 333, 336, 204 P.3d 585 (2009) (compliance with K.S.A. 60-404 is required to preserve evidentiary issues for appellate review). This requirement ensures that a district court has the opportunity to act as the evidentiary gatekeeper—a role particularly important in issues involving the admission of expert testimony. See *Smart*, 52 Kan. App. 2d at 496. We are not convinced that Hatfield's general objection to Dr. Anderst's testimony allowed the district court to evaluate the admissibility of this evidence in light of the challenge Hatfield now asserts on appeal.

The fact that Hatfield's brief fails to address and acknowledge this preservation question is similarly problematic. Kansas Supreme Court Rule 6.02(a)(5) (2020 Kan. S. Ct. R. 35) requires an appellant to cite "a pinpoint reference to the location in the record on appeal where the issue was raised and ruled on" in the district court. Or "[i]f the issue was not raised below," the brief must include "an explanation why the issue is properly before the court." (2020 Kan. S. Ct. R. 35.) Here, Hatfield merely cites to her general arguments regarding whether Dr. Anderst may testify as an expert; she does not point to an instance where she raised this particular challenge or explain why this court can (or should) consider the question for the first time on appeal. See *Ellie v. State*, 312 Kan. 835, 481 P.3d 1208 (2021) (declining to consider an argument when the State's briefing did not comply with Rule 6.02[a][5]).

Third, even if Hatfield's general objection were sufficient to preserve the present question for our review, Hatfield's argument would lack merit. Kansas law has long recognized that expert testimony is not objectionable merely because it embraces an issue to be decided by the trier of fact. See K.S.A. 2020 Supp. 60-456(d); *State v. Smallwood*, 264 Kan. 69, Syl. ¶ 4, 955 P.2d 1209 (1998). Rather, such evidence may be admissible if it "will aid the jury in the interpretation of technical facts or when it will assist

the jury in understanding the material in evidence." *State v. Steadman*, 253 Kan. 297, 304, 855 P.2d 919 (1993).

The Kansas Supreme Court applied this principle in *State v. Struzik*, 269 Kan. 95, 100-01, 5 P.3d 502 (2000), where it held that a district court did not err when it allowed an expert to testify in a felony murder case that medical evidence contradicted the defendant's argument that the victim's injuries were accidental. The court found that the "defining point" in its analysis was that the expert's testimony was "based on medical evidence involving the character and severity of [the victim's] injuries," not the expert's opinion of "Struzik's veracity or credibility." 269 Kan. at 101. Similarly, Dr. Anderst's testimony focused on the nature of his investigation and on K.G.'s injuries. The fact that he concluded those injuries were nonaccidental and the result of abusive head trauma does not render his opinions inadmissible. In short, Hatfield has not shown any error by the district court in allowing Dr. Anderst to testify.

1.3. *The court did not violate Hatfield's constitutional right to confront witnesses when it denied her request for a pretrial* Daubert *hearing.*

In her final argument regarding Dr. Anderst's testimony, Hatfield contends the district court's decision not to allow the doctor to testify without first holding a pretrial "*Daubert* hearing" violated the Confrontation Clause of the Sixth Amendment to the United States Constitution. She argues that because she was not given an opportunity to discuss the studies on which Dr. Anderst based his approach at a previous hearing, she was deprived of a meaningful opportunity for cross-examination on these issues.

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI; *State v. Henderson*, 284 Kan. 267, Syl. ¶ 1, 160 P.3d 776 (2007); see also Kan. Const. Bill of Rights, § 10 (in criminal prosecutions, providing the accused the right "to meet the witness face to face"). This right to confront witnesses ensures that the defendant has the opportunity to cross-examine and thus test the credibility of the prosecution's witnesses. *State v. Friday*, 297 Kan. 1023, Syl. ¶ 19, 306 P.3d 265 (2013); see also *State v. Noah*, 284 Kan. 608, Syl. ¶ 5, 162 P.3d 799 (2007) (Confrontation Clause "guarantees an opportunity for

effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish").

The district court's decision did not impair Hatfield's right to effectively cross-examine Dr. Anderst. The decision whether to hold a pretrial hearing to determine the admissibility of expert-opinion testimony is a question entrusted to the district court's discretion. See K.S.A. 2020 Supp. 60-457(b). The purpose of such a hearing is "to determine whether [a] witness qualifies as an expert and whether the witness's testimony satisfies the requirements" of K.S.A. 2020 Supp. 60-456(b). K.S.A. 2020 Supp. 60-457(b). It is not intended to serve as a fishing expedition for testing every aspect of the witness' knowledge or a dry-run for defense counsel's cross-examination at trial. Accord *Daubert*, 509 U.S. at 596 (emphasizing that expert admissibility procedures were never intended to replace "[v]igorous cross-examination" at trial). Here, the district court concluded that Dr. Anderst's testimony during Hatfield's preliminary hearing—a hearing, we note, where Hatfield was present and cross-examined Dr. Anderst—rendered a separate hearing unnecessary.

And our review of the record demonstrates that Hatfield had an opportunity to effectively cross-examine Dr. Anderst when he testified at trial. Hatfield's counsel questioned Dr. Anderst extensively about his background, the studies on which he based his opinions, and the methods he used in his analysis. While she may not have known the exact articles Dr. Anderst relied on until that point, the lack of a separate pretrial *Daubert* hearing did not impair Hatfield's ability to generally examine and ask about the types of studies he used. Her challenge under the Confrontation Clause is without merit.

2. *The district court did not err when it cautioned Hatfield that certain questioning could open the door to admitting evidence of other crimes or civil wrongs.*

Hatfield next argues that the district court overstepped its judicial role and violated her constitutional right to present a defense when the court cautioned her that a question she asked Detective Peters during cross-examination might open the door to otherwise

inadmissible evidence of other crimes and civil wrongs under K.S.A. 2020 Supp. 60-455.

Some further background is necessary for context. Detective Peters was assigned to investigate K.G.'s injuries. Late on the day K.G. was taken to the hospital, Peters interviewed Hatfield at her house before going to Children's Mercy to interview K.G.'s parents and discuss K.G.'s injuries with hospital staff. Over the next week, Peters executed search warrants for Hatfield's house and cell phone. He continued his investigation by researching Hatfield's and the parents' employment history, collecting K.G.'s medical records and reports, and speaking with Dr. Anderst.

During trial, Detective Peters described this investigation, explaining that he relied on all available evidence when determining whether a crime had occurred. In an effort to neutralize this testimony during cross-examination, Hatfield attempted to show that the detective's investigation relied too heavily on Dr. Anderst's diagnosis. To emphasize this point, she asked Peters to set aside Dr. Anderst's conclusions and specify "[w]hat incriminating evidence do you have, would you consider to be incriminating during those interviews of Ms. Hatfield[?]"

The State then interrupted and noted that Hatfield's question might elicit unfavorable information. Outside the jury's presence, the State elaborated that Detective Peters might respond by mentioning two prior instances that raised concerns about how Hatfield cared for children. Hatfield asserted these instances either did not occur or were brought to light later in the investigation, and she only asked Peters about the January 31 interview. After considering both positions, the court cautioned Hatfield that if she decided to "go down that path any further," she "might open the door for this other information to come in."

Hatfield argues that this warning impermissibly limited her ability to shape and present her defense. We disagree. The court did not prevent her from asking any questions. She was free to engage in her defense strategy but apparently chose not to pursue her original line of questioning in case Detective Peters provided incriminating information. The district court did not err when it cautioned her about potential consequences of those earlier questions. See *State v. Boothby*, 310 Kan. 619, Syl. ¶ 1, 448 P.3d 416 (2019).

3. *The prosecutor did not commit reversible error during closing argument.*

In addition to the evidentiary matters we have previously discussed, Hatfield argues she was deprived of a fair trial because the prosecutor veered outside the acceptable bounds of conduct in multiple ways during closing argument. We analyze claims of prosecutorial error through a two-step process. *State v. Chandler*, 307 Kan. 657, Syl. ¶ 5, 414 P.3d 713 (2018). First, we determine whether a prosecutor's actions fall outside the latitude afforded to attorneys arguing at trial. If a prosecutor engaged in impermissible conduct (that is, if the prosecutor erred), we proceed to the second step and consider whether the error is reversible—whether the prosecutor's actions prejudiced the defendant's right to a fair trial under the constitutional harmless-error standard provided in *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). *Chandler*, 307 Kan. 657, Syl. ¶¶ 6-7.

Prosecutors have considerable latitude in crafting arguments. See *State v. Longoria*, 301 Kan. 489, 524, 343 P.3d 1128 (2015). But the permissible scope of argument, though broad, is not unbounded. A prosecutor's comments during closing argument must "accurately reflect the evidence" and "accurately state the law." *State v. Raskie*, 293 Kan. 906, 917, 269 P.3d 1268 (2012). And those comments "cannot be 'intended to inflame the passions or prejudices of the jury or to divert the jury from its duty to decide the case based on the evidence and the controlling law.'" 293 Kan. at 917.

Hatfield asserts that the prosecutor committed numerous errors in virtually every aspect of his argument, from attempting to shift the State's burden of proof to appealing to jurors' sympathies to misrepresenting the evidence. We address each of these allegations in turn. After thoroughly reviewing the parties' closing arguments and comparing them to the evidentiary record, we conclude that Hatfield has shown only one circumstance when the prosecutor's comments deviated from the scope of acceptable argument—when he mistakenly stated on two occasions that K.G. suffered a neck contusion instead of a contusion on the top of his head. But

we are convinced beyond a reasonable doubt that these misstatements, which were passing references and not the focus of any discussion, did not affect the outcome of Hatfield's trial.

3.1. *The prosecutor did not attempt to shift the State's burden of proof.*

Hatfield asserts that the prosecutor devoted much of his closing argument to addressing the defense's theories as to what occurred with K.G. rather than discussing the State's evidence. She contends that this discussion effectively shifted the State's burden of proof to the defendant, implying that Hatfield needed to rebut the State's evidence in order to avoid a conviction.

Before the State can convict a person of a crime, and thus deprive him or her of liberty, it must prove the elements of that crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *Miller v. State*, 298 Kan. 921, 935, 318 P.3d 155 (2014). Thus, Kansas courts have long held that it is improper for a prosecutor to make statements during closing argument that attempt to shift this burden of proof to the defendant. See *State v. Pribble*, 304 Kan. 824, 837, 375 P.3d 966 (2016). But courts have also routinely held that when the jury has been properly instructed that the prosecution bears the burden of proof, a prosecutor may argue inferences based on the balance or lack of evidence. See *State v. McKinney*, 272 Kan. 331, 346, 33 P.3d 234 (2001), *overruled on other grounds by State v. Davis*, 283 Kan. 569, 158 P.3d 317 (2007). This is because there is a difference between the prosecutor shifting the burden of proof—asserting the defense must prove a crime was *not* committed—and "pointing out the absence of evidence to support the defense argument that there are holes in the State's case." *Pribble*, 304 Kan. at 837.

In his closing argument, the prosecutor began his discussion of the aggravated-battery charge by discussing "the evidence to support" that charge, focusing on the "medical evidence" and "the doctors' testimony." The prosecutor discussed K.G.'s injuries, noting the subdural and subarachnoid hematomas, the retinal hemorrhaging, and retinoschisis. The prosecutor noted that this last injury—the tearing of 8 to 10 layers of the retina—would result from "violent trauma" and "great force." Yet Hatfield had indicated that

when K.G. arrived at her home on January 31, he was making eye contact and was able to see her.

The prosecutor then turned to the defense's theories as to what may have occurred. He prefaced his argument by noting that "the defense, their job is to point out to you other theories, other reasons why there may be doubt, and they are going to point those out, and we're going to talk about them here." The prosecutor continued, arguing that the jury "ha[d] to consider, is what they are telling you reasonable? Does it actually cast doubt on what the doctors have told you?" The prosecutor then went on to discuss the various explanations for K.G.'s injuries that the defense had proffered throughout the course of the trial. The prosecutor concluded by again discussing the treating doctors' trauma diagnoses.

Viewed in this context, the prosecutor's statements did not shift the burden of proof to Hatfield. Instead, they considered whether any of these explanations or theories constituted reasonable doubt as to the explanation offered by the doctors at Children's Mercy—that K.G. had suffered abusive head trauma. These comments were thus within the bounds of permissible argument.

3.2. *The State did not err by showing the jury photographs of K.G. that had previously been admitted as evidence.*

During his rebuttal argument, the prosecutor offered two pictures of K.G.—one taken by Hatfield around 1 p.m. on January 31 and the other of K.G. intubated in a hospital bed at Children's Mercy—to demonstrate the marked difference in the child's condition during the day he spent at Hatfield's home. As he held the pictures, the prosecutor argued:

> "[K.G.] went to [Hatfield's] house like this. He was smiling. He was happy. He was making eye contact, and [the defense] want[s] you to believe that he went to this from nothing that she did, even though your common sense and your experience tells you that's not the case. You don't get those kind of head injuries, those kind of serious injuries to your eye and not have the results he did immediately."

Hatfield argues that these pictures were shown to deliberately invoke the sympathies of the jury and invite them to be persuaded by their emotions, not the facts of the case.

Though a prosecutor has wide latitude during closing argument, arguments must be based on the evidence. And emotions are not facts. A prosecutor thus errs when he or she makes statements to inflame the emotions of the jury or distract the jury from its duty to decide the case based on the evidence and the law. *Longoria*, 301 Kan. at 524.

The Kansas Supreme Court recently discussed the problems associated with purely emotional appeals in *State v. Thomas*, 311 Kan. 905, 468 P.3d 323 (2020). There, the defendant was charged with child abuse and other related crimes. During closing arguments, the prosecutor showed the jury photographs of the child's injuries, arguing the jury should acquit the defendant if they thought such conduct was permissible. The court found this argument impermissibly invited the jurors to make an "emotional assessment about what was okay" instead of deciding the case on the law and facts. 311 Kan. at 913.

The prosecutor's comments in this case are distinguishable from the prosecutor's arguments in *Thomas*, however. Instead of appealing solely to the jurors' emotions, the prosecutor here offered the pictures to show the difference in K.G.'s condition over the course of a short period of time, arguing that Hatfield (who was caring for K.G.) must be responsible for the change. These arguments were offered after Hatfield's attorney's closing argument, which emphasized Dr. Scheller's theory that K.G.'s injuries were a delayed manifestation of previous injury.

Courts analyze claims of prosecutorial error based on the specific facts and particulars of each case. See *State v. Sherman*, 305 Kan. 88, 110-11, 378 P.3d 1060 (2016). Though the prosecutor's use of the photographs during rebuttal may have had a powerful impact, the prejudicial nature of evidence does not render it off-limits for argument. After all, relevant evidence by its very nature is prejudicial. Both photographs the prosecutor showed here had previously been admitted for the jury's consideration. And the photographs were offered in the context of arguing critical facts of the case. The prosecutor's actions were within the scope of acceptable argument.

3.3. *The prosecutor did not commit reversible error by mischaracterizing or misstating the evidence.*

As we have discussed, prosecutors (and attorneys generally) enjoy considerable leeway to explore and explain the evidence during closing argument. This leeway includes broad discretion to decide "the language and the manner" of the prosecutor's presentation. *State v. Hall*, 292 Kan. 841, Syl. ¶ 4, 257 P.3d 272 (2011). But the prosecutor's statements must remain within the parameters of the evidence presented. Thus, a prosecutor may "draw reasonable inferences from the evidence" but may not "comment upon facts outside the evidence." 292 Kan. at 848. A prosecutor may argue the evidence presented, emphasizing the strengths of the State's case and the weaknesses of the defendant's arguments. *Pribble*, 304 Kan. at 837-38. But the prosecutor may not misstate the evidence or argue facts that were never presented or established. See *Chandler*, 307 Kan. at 675-79. In short, the prosecutor's comments must remain "consistent with the evidence." *Hall*, 292 Kan. 841, Syl. ¶ 4.

Hatfield asserts the prosecutor made numerous comments during closing argument that were unsupported by or mischaracterized the evidence. Because these statements require discussions of particular facts and inferences, we discuss each allegation before considering whether the prosecutor's actions deprived Hatfield of a fair trial.

"Suddenly blind"

Hatfield asserts that the prosecutor erred when he described K.G. as being rendered "suddenly blind" as a result of his injuries. This statement arose during the prosecutor's discussion of K.G.'s retinoschisis—tears in the retinal layers, which Dr. Anderst described as being caused by significant violent force—and Hatfield's theory, provided by Dr. Scheller, that this condition was caused by gradually increasing intracranial pressure. The prosecutor argued:

"The problem for the defense is that Ms. Hatfield has already told you that morning that [K.G. is] looking at her, he's making eye contact, he's able to see

her, and then she clearly described during her care *he's not able to see her* because his eye has been torn apart by that violent action that all the experts agree occurs, with the exception of [Hatfield's expert]." (Emphasis added.)

The prosecutor continued this line of discussion when noting the implausibility that K.G.'s injuries occurred several hours earlier while he was in Mother's care, arguing the jurors should "[u]se your own experience and knowledge" and compare Hatfield's theory with the fact K.G. is "just *suddenly blind*, and he suddenly has a subdural hematoma, and he suddenly is unconscious, and he suddenly is having seizures. Is that reasonable?" (Emphasis added.)

Hatfield argues these statements are unsupported by the evidence, as no medical evidence indicated that K.G. left her house blind. Rather, K.G. was first diagnosed with retinoschisis and retinal hemorrhages about a week after his admittance to Children's Mercy, and doctors never pinpointed exactly when K.G. became blind. Hatfield points out that she only informed the detective and medical professionals that K.G. did not make eye contact, not that he was unable to see.

But Hatfield interprets the prosecutor's argument too literally. The prosecutor was arguing the difference between K.G.'s condition early in the afternoon on January 31 and shortly thereafter when he was taken to the hospital, asking the jurors to consider the likely cause for such a drastic change. The prosecutor's statements did not mischaracterize or misstate the evidence.

Multiple medical opinions that K.G. suffered abusive head trauma

Hatfield claims the prosecutor misled the jury when he indicated that K.G. had been diagnosed by multiple doctors with abusive head trauma. As background, K.G. received treatment at a minimum of three hospitals for his injuries: Overland Park Regional Medical Center, Children's Mercy, and Madonna Hospital in Nebraska. Though doctors at multiple institutions treated K.G., Dr. Scheller—Hatfield's expert—expressed concern that K.G. never received a second opinion to verify his abusive head trauma diagnosis. Instead, Dr. Scheller believed the physicians did not question K.G.'s diagnosis once it was made. Hatfield's attorney emphasized this concern during her closing argument.

During rebuttal, the prosecutor sought to address this concern by indicating that these three hospitals treated K.G. for abusive head trauma. The prosecutor argued:

"[Defense attorney] talked to you about second opinions. There is no second opinion here.

"Look at the evidence. He went to Overland Park Regional. The impression: Acute abusive head trauma.

"He went to Children's Mercy. The impression: Acute abusive head trauma.

"He went to Madonna Hospital in Nebraska, an acute abusive head trauma.

"The same thing as Saint Luke's. [K.G. is] blind, he cannot walk, and he had all that brain damage due to what happened at [Hatfield's] home. That is the evidence."

Hatfield argues these statements were misleading because there was no evidence that Overland Park Regional, Children's Mercy, and Madonna Hospital performed independent diagnoses. But again, she interprets the prosecutor's statements too narrowly. The prosecutor did not argue that doctors at each facility diagnosed K.G. independently. Instead, he pointed out that all three facilities agreed that K.G.'s injuries were consistent with abusive head trauma. The prosecutor did not misstate the facts.

Mother's texts concerning the Bumbo seat

At trial, Hatfield argued the possibility that K.G.'s injuries were caused when he wiggled out of the Bumbo seat on January 27—four days before he was taken to the hospital—and that Mother's texts to Hatfield about the incident were an effort to cover up his injuries. During closing argument, the prosecutor addressed that theory, asking the jurors whether it was reasonable to interpret Mother's texts in such a way. The prosecutor then pointed out that despite these texts, which the prosecutor interpreted as cautioning Hatfield against keeping K.G. in an infant seat, Hatfield sent Mother a picture a few days later with him in a Bumbo seat—a picture, the prosecutor argued, where it was not clear if K.G. was strapped in correctly. The prosecutor noted that this did not really matter—it was a "red herring"—though he implied that it undermined Hatfield's position that she would never do something to put K.G. in harm's way. Accord *State v. Hachmeister*, 311

Kan. 504, 514-15, 464 P.3d 947 (2020) (recognizing that evidence, and inferences from that evidence, may be referenced for limited purposes during closing argument).

This line of discussion was perhaps inartfully crafted. But it was not, as Hatfield asserts, an attempt to convict Hatfield through stacking of inferences or innuendo. Instead, it was a permissible—albeit convoluted—analysis of a defense theory in light of witnesses' testimony.

Comments regarding the testimony of Dr. Nielsen and Dr. Scheller

Hatfield also argues that the prosecutor mischaracterized the testimony of two witnesses—Dr. Nielsen (who testified as an expert for the State) and Dr. Scheller (who testified as an expert for the defense). Dr. Nielsen, the pediatric neuroradiologist at Children's Mercy, estimated that K.G.'s January 31 CT scan showed blood between approximately 12 hours and a couple of days old. During closing arguments, the prosecutor described Dr. Nielson's testimony as finding the blood was "about 12 hours" old. The prosecutor then contrasted Dr. Nielsen's isolated analysis with Dr. Anderst's explanation for why determining the age of blood through CT scans can often be misleading. While the prosecutor's summary of Dr. Nielsen's analysis could have been more comprehensive, a prosecutor is not required (nor is there time) to summarize every aspect of a witness' testimony during closing argument. The prosecutor's statement that Dr. Nielsen concluded the blood in K.G.'s CT scan was "about 12 hours" old was consistent with the doctor's testimony.

And the prosecutor's arguments regarding Hatfield's expert witness, Dr. Scheller, were also permissible. Dr. Scheller's testimony at trial extended over the course of two days, with Hatfield's direct examination of the witness beginning one afternoon and the State's cross-examination beginning the next morning. During Dr. Scheller's direct examination, he testified that he believed K.G.'s subdural hemorrhaging was a "recent, very recent" development that had occurred on January 30 or 31, and he did not believe the CT scan showed "old blood."

The State asked the court reporter to prepare a transcript of Dr. Scheller's testimony before it cross-examined him the following day. During cross-examination, Dr. Scheller clarified that he believed K.G. had suffered an injury sometime in "October, November, [or] December" to cause separation of the layers covering K.G.'s brain, even if the actual separation was very recent. The State used the transcript to ask Dr. Scheller about inconsistencies with his testimony the previous day. Hatfield asked to see a copy of the transcript the State was using but did not otherwise object to this line of questioning.

During closing argument, the prosecutor again pointed to what he believed were inconsistencies in Dr. Scheller's testimony, implying the doctor may have altered his position after talking with Hatfield's attorney following his direct examination. Contrary to Hatfield's assertions, this discussion was fair argument based on the record and did not mischaracterize Dr. Scheller's testimony or impermissibly comment on his credibility.

Neck contusion

Lastly, Hatfield argues that the prosecutor misstated the facts, and thus misled the jury, when he incorrectly stated that K.G.'s injuries included a neck contusion instead of a contusion on the top of his head. We agree that the prosecutor's comments were not supported by the evidence. But we do not find that these comments, when viewed in context and in light of the trial as a whole, affected the outcome of the case.

When he was taken to Children's Mercy, K.G. was treated for numerous injuries, including subdural and subarachnoid hematomas, retinal and vitreous hemorrhaging in both eyes, and retinoschisis. One of the only external manifestations of these injuries, other than K.G.'s eyesight, was a contusion (i.e. swelling) on the top of his head. When the prosecutor initially asked Dr. Anderst about these injuries during direct examination, the attorney confused this top-of-the-head contusion with a neck contusion, asking with reference to K.G.'s external symptoms, "If my recollection serves me, he didn't have anything other than maybe a contusion on his neck?" Dr. Anderst responded, "That was on top of his head." Hatfield did not object to this exchange.

During closing argument, the prosecutor twice more indicated that K.G. suffered a neck contusion (not a contusion on the top of his head). During the initial phase of the prosecutor's closing argument, he summarized K.G.'s injuries, stating:

"The findings were that [K.G.] presented to Overland Park Regional with a subdural hematoma. He had bleeding on the brain, and every medical professional that got up there in front of you over the course of this week said, 'That is not normal.' 'That is not supposed to happen.'

"Not only did [K.G.] have one subdural hematoma, he had three. He had one on each side, and he had one on the rear of his head. *He also had a contusion on the back of his neck.*

"[K.G.] had retinal hemorrhaging. Again, an injury that's serious. [K.G.] had hemorrhaging in the vitreous fluid of his eye, a serious injury.

"The most serious of all, [K.G.] had retinoschisis. That is tearing of those eight to ten layers of the retina, which caused a cavity in both of his eyes, and that's significant. Even the defense expert says, 'That's a big deal.'" (Emphasis added.)

The prosecutor then continued to discuss the retinoschisis, emphasizing the degree of force necessary to cause that injury.

Hatfield's defense attorney did not mention the State's reference to a neck contusion during her closing argument. And the prosecutor did not explain or reference the supposed neck contusion again until his short rebuttal argument, when he again summarized K.G.'s injuries, saying:

"Look at your notes, and you will see the evidence is clear. [K.G.] had a subarachnoid hemorrhage. It's a serious internal hemorrhage. He had a subdural hematoma. He had retinal hemorrhaging. He had vitreous hemorrhaging. *He had a neck contusion*, and most importantly he had a retinoschisis." (Emphasis added.)

Upon reviewing the context of these comments, we are confident they were merely misstatements based on the prosecutor's mistaken recollection rather than intentional efforts to mislead the jury. The prosecutor did not emphasize or even discuss the swelling on K.G.'s neck (or head) beyond these two passing references. The prosecutor's comments in this case are thus markedly different from the problematic statements in *Chandler*, where the prosecutor misstated the facts and then argued multiple inferences from her erroneous factual statements. See 307 Kan. at 675-77.

Yet there can be little question that the prosecutor erred. There was no evidence that K.G. suffered swelling on his neck—a symp-

tom common when an infant has been shaken. And even unintentional errors can color a jury's evaluation of the evidence. We thus must consider whether the prosecutor's statements affected the outcome of the trial. See 307 Kan. 657, Syl. ¶¶ 6-7.

We conclude they did not. The issue at Hatfield's trial was not what injuries K.G. suffered or whether they were inflicted by shaking, but rather when K.G.'s injuries arose and who inflicted them. Indeed, everyone agreed that K.G. had a subarachnoid and subdural hematomas, retinal and vitreous hemorrhages, and retinoschisis. The defense's theory, which the jury apparently did not believe, was that these injuries were either the result of a recent injury when K.G. was not at the daycare or a delayed manifestation of an injury that occurred weeks or even months before. The prosecutor's erroneous statement that K.G. had swelling on his neck rather than the top of his head had no bearing on that question. We are convinced beyond a reasonable doubt that the prosecutor's misstatements did not contribute to the jury's verdict.

4. *Hatfield has not shown multiple errors that would give rise to a claim of cumulative error.*

Hatfield argues that even if these alleged errors are not individually reversible, their combination deprived her of a fair trial. See *State v. Harris*, 310 Kan. 1026, 1041, 453 P.3d 1172 (2019). But in cases where no error or only a single error is found, there are no errors to accumulate and therefore no basis to reverse a conviction. See *State v. Gonzalez*, 307 Kan. 575, 598, 412 P.3d 968 (2018); *State v. Haberlein*, 296 Kan. 195, 212, 290 P.3d 640 (2012). We have found only one error in this case—the prosecutor's mistaken reference to a neck contusion (instead of a contusion on the top of his head). As we have already explained, that error does not cause us to lose confidence in the jury's verdict. Because we have found no other errors in our review, Hatfield's allegation of cumulative error is without merit.

5. *Sufficient evidence supports Hatfield's aggravated-battery conviction.*

Lastly, Hatfield argues that the evidence presented at trial was insufficient to support her aggravated-battery conviction. When a

defendant challenges the sufficiency of the evidence, an appellate court reviews the evidence "in a light most favorable to the State to determine whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt." *State v. Rosa*, 304 Kan. 429, Syl. ¶ 1, 371 P.3d 915 (2016). The court does not reweigh the evidence, resolve evidentiary conflicts, or reassess witness credibility. *State v. Keel*, 302 Kan. 560, 566, 357 P.3d 251 (2015).

As Hatfield's impassioned argument on this point demonstrates, this was not a clear case. Hatfield correctly notes that K.G. had little to no external symptoms of abuse, and the various experts who testified disagreed when K.G.'s injuries occurred and whether they were accidental or intentional. But the jury considered this evidence and concluded that the State had shown beyond a reasonable doubt that Hatfield committed aggravated battery. It is not the role of an appellate court to reweigh that evidence or second-guess the jury's findings as long as there is evidence in the record supporting each element of the crimes charged. See *State v. Dobbs*, 297 Kan. 1225, 1238, 308 P.3d 1258 (2013).

To prove aggravated battery, the State was required to show that Hatfield knowingly caused K.G. great bodily harm. K.S.A. 2020 Supp. 21-5413(b)(1)(A). There is no question that K.G. suffered great bodily harm. Multiple experts testified that the nature of K.G.'s injuries showed they were not accidental, but rather the result of abusive trauma—in other words, that they were knowingly inflicted. And Dr. Anderst testified that he believed K.G.'s symptoms presented themselves immediately after he had been injured—when he was in Hatfield's care. When viewed in a light most favorable to the State, sufficient evidence supports Hatfield's conviction.

Affirmed.

No. 122,680

STATE OF KANSAS, *Appellee*, v. ROBERT GLENN TERRELL, *Appellant*.

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Illegal Sentencing—Question of Law—Appellate Review*. Appellate courts exercise unlimited review on whether a sentence is illegal within the meaning of K.S.A. 22-3504 because it is a question of law.

2. STATUTES—*Construction—Legislative Intent—Appellate Review.* An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language, and it should refrain from reading something into the statute that is not readily found in its words.

3. COURTS—*Construction of Statutes—Avoid Unreasonable Results*. Courts must construe statutes to avoid unreasonable or absurd results and presume the Legislature does not intend to enact meaningless legislation.

4. SAME—*Legislature—Presumption of Existing Law and Statutes*. Appellate courts presume the Legislature acted with full knowledge of existing law and statutory subject matter, including judicial opinions interpreting Kansas statutes.

5. CRIMINAL LAW—*Kansas Sentencing Guidelines Act—Convictions Based on Classification at Time of Conviction.* The reasonable and sensible application of the revised Kansas Sentencing Guidelines Act (KSGA), K.S.A. 2020 Supp. 21-6801 et seq., is for post-KSGA Kansas convictions to be classified based on the classification in effect at the time of the prior conviction.

Appeal from Cowley District Court; NICHOLAS M. ST. PETER, judge. Opinion filed April 9, 2021. Sentence vacated and case remanded with directions.

Kristen B. Patty, of Wichita, for appellant, and *Robert Glenn Terrell*, appellant pro se.

Ian T. Otte, deputy county attorney, and *Derek Schmidt*, attorney general, for appellee.

Before SCHROEDER, P.J., MALONE, J., and MCANANY, S.J.

SCHROEDER, J.: The sentencing scheme in Kansas is controlled by the revised Kansas Sentencing Guidelines Act (KSGA), K.S.A. 2020 Supp. 21-6801 et seq. Robert Glenn Terrell appeals the district court's denial of his motion to correct an illegal sentence, claiming the district court erred by reclassifying his 2004 conviction for failure to register under the Kansas Offender Registration Act (KORA), K.S.A. 22-4901 et seq.—defined in 2004 as a nonperson felony under the KSGA—from a nonperson felony to a person felony. After careful review of the record and the KSGA, we find the district court erred in reclassifying Terrell's 2004 KORA violation conviction from a nonperson felony to a person felony for purposes of determining his criminal history. Therefore, we vacate the sentence and remand with directions.

FACTS

In November 2018, Terrell pled guilty to one count of aggravated escape from custody. Prior to sentencing, Terrell filed a motion for downward durational departure. At sentencing, the district court reclassified his 2004 KORA violation conviction from a nonperson felony to a person felony based on the statutory change in 2016 which made a KORA violation a person felony if the crime requiring the offender to register was a person felony. Terrell was required to register based on a 2002 rape conviction—a person felony—so the district court scored his 2004 KORA violation conviction as a person felony. This scoring resulted in Terrell's criminal history score moving from C to B.

Terrell objected to the inclusion of his 2004 conviction for violation of KORA in his criminal history score as a person felony. Terrell did not dispute the existence of the conviction; rather, he argued it should be scored as a nonperson felony because at the time of the prior conviction it was classified as such. See K.S.A. 2004 Supp. 22-4903. The district court overruled Terrell's objection to his criminal history score but granted his motion for downward durational departure, sentencing him to 40 months' imprisonment with 24 months' postrelease supervision.

Terrell initially filed a notice of appeal but withdrew it. He then filed several motions to correct an illegal sentence, which the

district court denied. In denying his motions to correct illegal sentence, the district court held Terrell's 2004 KORA violation conviction was properly scored as a person felony under *State v. Keel*, 302 Kan. 560, 357 P.3d 251 (2015). Terrell now appeals.

ANALYSIS

Standard of Review

We exercise unlimited review on whether a sentence is illegal within the meaning of K.S.A. 22-3504 because it is a question of law. *State v. Lee*, 304 Kan. 416, 417, 372 P.3d 415 (2016). Interpretation of a sentencing statute is likewise a question of law subject to unlimited review. *State v. Warren*, 307 Kan. 609, 612, 412 P.3d 993 (2018). "'The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained.'" *State v. Jordan*, 303 Kan. 1017, 1019, 370 P.3d 417 (2016).

"'An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. When a statute is plain and unambiguous, an appellate court does not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it. Where there is no ambiguity, the court need not resort to statutory construction. Only if the statute's language or text is unclear or ambiguous does the court use canons of construction or legislative history or other background considerations to construe the legislature's intent.' [Citations omitted." *State v. Barlow*, 303 Kan. 804, 813, 368 P.3d 331 (2016).

"[W]hen construing statutes to determine legislative intent, appellate courts must consider various provisions of an act in pari materia, with a view toward reconciling and bringing the provisions into workable harmony if possible. [Citation omitted.]" *Keel*, 302 Kan. at 573-74.

Courts must construe statutes "to avoid absurd or unreasonable results." *State v. Frierson*, 298 Kan. 1005, 1013, 319 P.3d 515 (2014). We presume the Legislature acted with full knowledge of existing law and statutory subject matter, including judicial opinions interpreting Kansas statutes. *State v. Kershaw*, 302 Kan. 772, 782, 359 P.3d 52 (2015); see *State v. Quested*, 302 Kan. 262, 279, 352 P.3d 553 (2015) (acquiescence to appellate decisions may indicate legislative intent). We further presume the Legislature does

not intend to enact meaningless legislation; therefore, by amending statutory language, the Legislature intends to alter or amend existing law. See *State v. Snellings*, 294 Kan. 149, 157, 273 P.3d 739 (2012).

As a general rule, criminal statutes are strictly construed in favor of the accused. That rule is constrained, however, by the rule that interpretation of a statute must be reasonable and sensible to effect the legislative design and intent of the law. See *Barlow*, 303 Kan. at 813. The rule of lenity arises only when there is any reasonable doubt of the statute's meaning. *State v. Williams*, 303 Kan. 750, 760-61, 368 P.3d 1065 (2016).

Discussion

Terrell argues the district court erred in scoring his 2004 KORA violation conviction as a person felony. At the time of Terrell's 2004 KORA violation, K.S.A. 2004 Supp. 22-4903 provided: "Any person who is required to register as provided in this act who violates any of the provisions of this act . . . is guilty of a severity level 10, nonperson felony." The statute was amended in 2016 to read that a KORA violation "shall be designated as a person or nonperson crime in accordance with the designation assigned to the underlying crime for which the offender is required to be registered under the Kansas offender registration act." K.S.A. 2016 Supp. 22- 4903(c)(1). Because Terrell was required to register under KORA based on a prior rape conviction—a person felony under K.S.A. 21-3502(c)—the district court scored his 2004 KORA violation conviction as a person felony.

The State asserts, without discussion or elaboration, the district court properly scored Terrell's KORA violation conviction as a person felony based on the reasoning in *Keel*; *State v. Lyon*, 58 Kan. App. 2d 474, 471 P.3d 716, *rev. denied* 312 Kan. 898 (2020); and *State v. Patrick*, No. 116,660, 2018 WL 4373053 (Kan. App. 2018) (unpublished opinion), *rev. denied* 309 Kan. 1352 (2019). The State's reliance on these cases is misplaced.

In *Keel*, the issue was how to classify pre-KSGA Kansas felony convictions not designated as either person or nonperson crimes when calculating a criminal history score for sentencing of post-KSGA crimes. 302 Kan. at 571. In its discussion, the *Keel* court noted many pre-KSGA criminal offenses continued to exist

under the same statutes after the enactment of the KSGA, the pertinent distinction being the post-KSGA classification of those offenses as person or nonperson crimes. 302 Kan. at 579-80. *Keel* concluded, based on the language in K.S.A. 21-4710(d)(9)—now K.S.A. 2020 Supp. 21-6810(d)(8): "The clear implication is that if the statute has not been repealed, then the crime is scored using the classification in the statute at the time of the current crime of conviction." 302 Kan. at 580.

In *Patrick*, the issue was whether Patrick's 1999 conviction for driving as a habitual violator—then a nonperson felony—should have been scored as a nonperson misdemeanor based on the offense having changed to a nonperson misdemeanor under the 2015 version of the statute. See K.S.A. 2015 Supp. 8-287. On appeal, the State agreed it should have been classified as a nonperson misdemeanor. The *Patrick* panel agreed, relying on *Keel*'s discussion of the language in K.S.A. 21-4710(d)(9). 2018 WL 4373053, at *11.

Patrick is easily distinguishable insofar as there was no issue over the classification of the prior post-KSGA offense as person or nonperson; it was a nonperson offense in both 1999 and 2015. The only distinction was whether the offense was a felony or misdemeanor. 2018 WL 4373053, at *11. Patrick did not raise the issue in his petition for review, and our Supreme Court denied his petition, which raised other issues.

In *Lyon*, the issue was whether Lyon's 2010 aggravated burglary conviction should still be scored as a person felony because the elements of the 2010 conviction were broader than the language of the 2017 version of the statute. Compare K.S.A. 2010 Supp. 21-3716 to K.S.A. 2017 Supp. 21-5807. Essentially, Lyon was trying to use the language of K.S.A. 2017 Supp. 21-6810(d)(8) as a means of applying the identical-to-or-narrower-than elements-based comparison in *State v. Wetrich*, 307 Kan. 552, 412 P.3d 984 (2018), to post-KSGA in-state felony convictions. The *Lyon* panel accepted the reasoning of the *Patrick* panel, but *Lyon*'s discussion of *Patrick* was largely tangential as the panel soundly concluded Lyon was not entitled to relief because his prior aggravated burglary offense was a person felony both at the time of the prior conviction and the date of the current crime of

conviction. 58 Kan. App. 2d at 492-93. *Lyon* is distinguishable because aggravated burglary was always a person felony as applied to Lyon; thus, no comparison was warranted.

Although Lyon raised the issue in his petition for review, he framed it as a question of first impression—whether *Wetrich*'s identical-to-or-narrower-than approach applied to the scoring of in-state post-KSGA felony convictions. Our Supreme Court denied review. We discern no guidance from our Supreme Court's denial of review in *Patrick* and *Lyon.*

Terrell asserts the principle of statutory construction known as *expressio unius est exclusio alterius*, i.e., the inclusion of one thing implies the exclusion of another, reflects a legislative intent to exclude post-KSGA in-state convictions from a comparability analysis. See *City of Dodge City v. Webb*, 305 Kan. 351, 361, 381 P.3d 464 (2016) (Johnson, J., dissenting). Terrell's argument is persuasive. He correctly points out the Legislature has provided four distinct times where the KSGA specifically directs a sentencing court to compare the prior conviction to the comparable in-state offense as of the date of the current crime of conviction in order to classify it as a person or nonperson offense:

- pre-KSGA Kansas adult felony convictions under K.S.A. 2020 Supp. 21-6810(d)(2);
- pre-KSGA juvenile felony adjudications under K.S.A. 2020 Supp. 21-6810(d)(3)(B);
- pre-KSGA Kansas adult misdemeanor convictions under K.S.A. 2020 Supp. 21-6810(d)(6); and
- prior out-of-state convictions and juvenile adjudications under K.S.A. 2020 Supp. 21-6811(e)(3).

However, none of those directives apply here. We do not have to do a comparative analysis on Terrell's crime since it is the same—a KORA violation—with the only change being the reclassification in 2016 from a nonperson felony to a person felony if the underlying conviction requiring registration was a person felony.

Here, we are tasked with answering how to score a post-KSGA conviction from 2004—which was designated as a nonperson felony but which the Legislature changed in 2016 to a person felony if the underlying crime requiring the person to register was

a person felony—for a current crime of conviction. In other words, do we apply the classification at the time of the prior conviction or the classification as of the date of the current crime of conviction? The KSGA is silent as to how a sentencing court should classify a post-KSGA in-state conviction or adjudication if the person/nonperson designation was modified after July 1, 1993.

Under K.S.A. 2020 Supp. 21-6810(d)(8): "Prior convictions of a crime defined by a statute *that has since been repealed* shall be scored using the classification assigned at the time of such conviction." (Emphasis added.) We observe no reason why this same directive should not be used for a change in a crime's designation from nonperson to person after the crime was committed. We recognize the instruction from *Keel* is analogous but not controlling because *Keel* addressed the scoring of pre-KSGA convictions, not changes in how a post-KSGA conviction should be scored if the person/nonperson designation for scoring purposes is modified from a nonperson to a person designation after the prior conviction. We believe *Keel*'s conclusion is dicta as it applies to scoring post-KSGA convictions and should not be applied to the facts of this case.

However, unlike unclassified offenses, convictions under subsequently repealed statutes are not automatically classified as nonperson offenses, nor are they excluded from the offender's criminal history. "Unless otherwise provided by law, unclassified felonies and misdemeanors shall be considered and scored as nonperson crimes for the purpose of determining criminal history." K.S.A. 2020 Supp. 21-6810(d)(7). "Prior convictions of a crime defined by a statute that has since been determined unconstitutional by an appellate court shall not be used for criminal history scoring purposes." K.S.A. 2020 Supp. 21-6810(d)(9). Looking at K.S.A. 2020 Supp. 21-6810(d)(7)-(9) as a whole, subsection (d)(8) cannot be logically construed as implicitly providing for prospective *reclassification* of post-KSGA convictions under still-existing statutes. Rather, it simply precludes blanket classification or exclusion of convictions under subsequently repealed statutes.

Our concern with the analysis in *Patrick* and its adoption in *Lyon* is that it effectively takes in isolation *Keel*'s discussion of a single statutory provision within a much broader in pari materia

analysis. But a court should not view statutory provisions in isolation. See *Keel*, 302 Kan. at 573-74. And *Keel*'s analysis of the complex interplay between the prior statutory provisions no longer appears necessary in light of subsequent legislative amendments.

The explicit statutory directions in K.S.A. 2020 Supp. 21-6810(d)(2), (d)(3)(B), and (d)(6), and K.S.A. 2020 Supp. 21-6811(e)(3) refer only to *pre-KSGA* in-state and out-of-state convictions or adjudications. The common thread of such convictions is they did not occur under the KSGA and, as such, had no Kansas person or nonperson classification. However, the post-KSGA Kansas Criminal Code generally classifies criminal offenses as person or nonperson. See K.S.A. 2020 Supp. 21-5101 et seq. While there is an obvious need to compare out-of-state convictions and pre-KSGA in-state convictions to current Kansas statutes for classification purposes, there is no such need for post-KSGA in-state convictions; the Kansas Criminal Code generally provides the classification at the time of the crime and related conviction. It seems tenuous at best to believe the Legislature, having provided clear, *explicit* guidance for pre-KSGA offenses under K.S.A. 2020 Supp. 21-6810(d)(2), (d)(3)(B), and (d)(6), and K.S.A. 2020 Supp. 21-6811(e)(3), would only *implicitly* provide for classification of post-KSGA offenses under K.S.A. 2020 Supp. 21-6810(d)(8).

But, if there is any reasonable doubt as to the meaning of K.S.A. 2020 Supp. 21-6810(d)(8), it must be strictly construed in Terrell's favor. The rule of lenity, however, is subordinate to reasonably and sensibly interpreting statutes consistent with the Legislature's apparent intent and purpose. See *Barlow*, 303 Kan. at 813; *Williams*, 303 Kan. at 760. When read as a whole, K.S.A. 2020 Supp. 21-6810(d)(2), (d)(3)(B), (d)(6), (d)(7)-(9), and K.S.A. 2020 Supp. 21-6811(e)(3) reflect a legislative intent to classify pre-KSGA in-state and out-of-state convictions and adjudications by comparing the elements of the prior offense with the comparable Kansas offense as of the date of the current crime of conviction. The reasonable and sensible application of the KSGA is for post-KSGA Kansas convictions to be classified based on the classification in effect at the time of the prior crime of conviction.

A reasonable interpretation of K.S.A. 2020 Supp. 21-6810(d)(8) reflects a legislative intent to classify in-state convictions under subsequently repealed statutes as person or nonperson offenses based on the classification in effect at the time of the prior conviction. But we find nothing in the KSGA reflecting a legislative intent to *reclassify* prior post-KSGA convictions based on subsequent amendments to existing statutes. Compare K.S.A. 2020 Supp. 21-6810(d)(8) with K.S.A. 2020 Supp. 21-6810(d)(2), (d)(3)(B), (d)(6), and K.S.A. 2020 Supp. 21-6811(e)(3).

In 2004, when Terrell was convicted of a KORA violation, the intent of the Legislature was for that violation to be classified as a nonperson felony. The district court erred and imposed an illegal sentence when it reclassified Terrell's 2004 KORA violation conviction from a nonperson felony to a person felony for purposes of determining his criminal history score at sentencing in 2018. We therefore vacate Terrell's sentence and remand to the district court for resentencing.

Sentence vacated and case remanded with directions.

No. 122,253

STATE OF KANSAS, *Appellee*, v. ROBERT CASH SCHEUERMAN, *Appellant.*

SYLLABUS BY THE COURT

1. CONSTITUTIONAL LAW—*Fourth Amendment Right—Reasonable Expectation of Privacy Requirement.* The Fourth Amendment to the United States Constitution protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. However, a defendant must have a reasonable expectation of privacy in the place searched before determining whether such defendant's Fourth Amendment rights were violated.

2. SEARCH AND SEIZURE—*Lack of Ownership—No Legitimate Expectation of Privacy*. A person who lacks an ownership or possessory interest in the property searched lacks a legitimate expectation of privacy in that property.

3. EVIDENCE—*Sufficiency of Evidence Challenge on Stipulated Facts—Appellate Review.* When the sufficiency of the evidence is challenged in a case decided on stipulated facts, an appellate court's review is unlimited, but the facts are still viewed in the light most favorable to the State when testing their sufficiency. Moreover, a defendant is precluded from challenging factual evidence within a stipulation by entering into a stipulation of facts, but a defendant can still challenge the legal effect of the stipulated facts.

4. CRIMINAL LAW—*Lesser Included Offenses—Definition under Statute*. K.S.A. 2020 Supp. 21-5109(b) defines lesser included offenses as including not only offenses in which the elements of the lesser crime are identical to some of the elements of the crime charged, but also lesser degrees of the same crime.

5. SAME—*Lesser Included Offense—Sufficiency of Evidence—Application*. If the facts are sufficient to convict the defendant of the charged crime, those same facts are also sufficient to convict on any lesser included offense, provided all the elements of the lesser included offense are identical to some of the elements of the crime charged. This is not so where the lesser included offense is a lesser degree of the charged crime and all its elements are not identical to some of the elements of the charged crime.

6. SAME—*Lesser Included Offense—Possession of Methamphetamine*. Possession of methamphetamine with intent to distribute contrary to K.S.A. 2020 Supp. 21-5705(d)(3)(B), a severity level 3 drug felony, is a lesser included offense of possession of methamphetamine with intent to distribute contrary to K.S.A. 2020 Supp. 21-5705(d)(3)(C), a severity level 2 drug felony, because it is a lesser degree of the same crime.

7. SAME—*Possession of Methamphetamine—Evidence of Quantity Element Must Be Sufficient.* Evidence establishing that a defendant possessed at least 3.5 grams but less than 100 grams of methamphetamine is insufficient to satisfy the quantity element of possessing methamphetamine with intent to distribute contrary to K.S.A. 2020 Supp. 21-5705(d)(3)(B) because the quantity of drugs possessed is outside the element requiring possession of at least 1 gram but less than 3.5 grams.

Appeal from Barton District Court; CAREY L. HIPP, judge. Opinion filed April 16, 2021. Affirmed in part, conviction reversed, and sentence vacated.

Randall L. Hodgkinson, of Kansas Appellate Defender Office, for appellant.

J. Colin Reynolds, assistant county attorney, *M. Levi Morris*, county attorney, and *Derek Schmidt*, attorney general, for appellee.

Before POWELL, P.J., GREEN and HILL, JJ.

POWELL, J.: Robert Cash Scheuerman was charged, inter alia, with possession of methamphetamines with intent to distribute following a traffic stop and search of the vehicle he was riding in. Scheuerman sought to suppress the evidence from the search, but the district court denied the motion. Following a bench trial on stipulated facts, the district court found Scheuerman guilty of a less severe version of possession of methamphetamine with intent to distribute.

Scheuerman now appeals both the district court's denial of his suppression motion and its guilty finding. For reasons more fully explained below, we find Scheuerman lacks standing to challenge the legality of the search because he lacked a reasonable expectation of privacy in the automobile. But we agree with Scheuerman that insufficient evidence supports his conviction for the less severe version of possession of methamphetamine with intent to distribute because the quantity of methamphetamines he stipulated to possessing does not satisfy the quantity element of the crime. Thus, we affirm the district court's denial of Scheuerman's motion to suppress, but we reverse his conviction and vacate his sentence.

FACTUAL AND PROCEDURAL BACKGROUND

On August 8, 2016, Detective David Paden of the Barton County Sheriff's Office was on the lookout for Scheuerman, who had an active arrest warrant. Paden saw a silver Chrysler, which he associated with Scheuerman, drive past him. Paden pulled alongside the car and identified Scheuerman as the passenger, prompting him to initiate a traffic stop. Paden radioed for backup because he

had information that Scheuerman would not allow himself to "go peaceably."

Paden ordered the driver and owner of the car, Gwen Finnigan—Scheuerman's girlfriend—out of the vehicle. As Paden and Sergeant Lloyd Lewis approached the vehicle, they noticed Scheuerman holding a gun to his temple. In accordance with the Sheriff's Office policy, Finnigan was taken to the county jail because Scheuerman had a gun. Following a stand-off lasting over an hour, Scheuerman finally put the gun down, got out of the car, and surrendered to the officers. While being placed in Paden's patrol vehicle, Scheuerman told Paden any "dope" in the car belonged to him, not Finnigan. During the stand-off, Finnigan remained detained at the jail until the situation was resolved.

The Sheriff's Office decided to impound the car because it was blocking traffic. Lewis first retrieved the gun from the car and then performed an inventory search. During the search, Lewis found methamphetamine in a black backpack, which also held a holster and a magazine for the gun.

These events prompted the State to charge Scheuerman with possession of methamphetamine with intent to distribute at least 3.5 grams but less than 100 grams, criminal possession of a firearm, interference with law enforcement, possession of drug paraphernalia, and no drug tax stamp.

Scheuerman sought to suppress the evidence obtained from the search of the car, alleging the officers lacked probable cause to stop the car initially or to search it. Following an evidentiary hearing, the district court denied the motion.

Scheuerman agreed to a bench trial based on stipulated facts to preserve his objection to the denial of his suppression motion. In exchange for his admission to certain incriminating facts, the State agreed to amend the first count to the lesser charge of possession of methamphetamine with intent to distribute at least 1 gram but less than 3.5 grams. It also agreed to dismiss all the other charges against Scheuerman.

The district court found Scheuerman guilty of the amended charge and sentenced him to 73 months in prison with 36 months' postrelease supervision.

Scheuerman timely appeals.

III. DID THE DISTRICT COURT ERR BY DENYING SCHEUERMAN'S SUPPRESSION MOTION?

Scheuerman argues the district court erred when it denied his motion to suppress the evidence from the search. Scheuerman asserts the inventory search was illegal because the police did not have a reason to impound the car; instead, they should have asked Finnigan what she wanted done with the car.

The State responds first by arguing Scheuerman lacked the standing to challenge the search because he did not own the car. Alternatively, it also argues law enforcement had probable cause to search the car and there was nothing improper about the inventory search.

Standard of Review

We apply a bifurcated standard of review when reviewing a district court's decision on a motion to suppress. We review the district court's factual findings to determine whether they are supported by substantial competent evidence, but the ultimate legal conclusion is reviewed de novo. *State v. Hanke*, 307 Kan. 823, 827, 415 P.3d 966 (2018). "'Substantial competent evidence is legal and relevant evidence a reasonable person could accept to support a conclusion.'" *State v. Talkington*, 301 Kan. 453, 461, 345 P.3d 258 (2015). We do not reweigh evidence or assess witness credibility. When the facts supporting the district court's decision are not disputed, the ultimate question of suppression is a legal one subject to our unlimited review. The State bears the burden to establish the lawfulness of a warrantless search or seizure. *Hanke*, 307 Kan. at 827.

Analysis

"The Fourth Amendment to the United States Constitution protects the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" *Talkington*, 301 Kan. at 461. However, a defendant must have a reasonable expectation of privacy in the place searched before determining whether such defendant's Fourth Amendment rights were violated. 301 Kan. at 461-62; see *Katz v. United States*,

389 U.S. 347, 361, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring).

The State argues Scheuerman lacks standing to challenge the search of the car because Finnigan owned the car, not Scheuerman. The State made this argument at the suppression hearing, but the district court rejected it on the grounds that somehow the State could not assert both that Scheuerman lacked standing to object to the search and rely on his admission there were drugs in the car.

The term "standing" is typically used to determine whether someone's personal rights have been violated. However, in the context of searches and seizures, standing is more properly placed in substantive Fourth Amendment law than within traditional standing. See *Rakas v. Illinois*, 439 U.S. 128, 140, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978); *Talkington*, 301 Kan. at 473. But see *State v. Richard*, 300 Kan. 715, 727-28, 333 P.3d 179 (2014) ("Nevertheless, standing to challenge a search is 'a component of subject matter jurisdiction, which may be raised for the first time on appeal.'").

"'[A] defendant cannot object to the seizure of evidence without proper standing to challenge the validity of the search. On the issue of standing, the burden is on the defendant to show an expectation of privacy in the property searched.' *State v. Gonzalez*, 32 Kan. App. 2d 590, 593, 85 P.3d 711 (2004)." *Talkington*, 301 Kan. at 476. "Fourth Amendment rights are personal rights that may not be vicariously asserted." 301 Kan. at 476. "A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. . . . [Only] defendants whose Fourth Amendment rights have been violated" may challenge the search. *Rakas*, 439 U.S. at 134.

As we have stated, a person must have a personal expectation of privacy in the place searched to have standing to challenge the search. To demonstrate a legitimate expectation of privacy, a defendant must show "a subjective expectation of privacy in the area searched and that the expectation was objectively reasonable." *Talkington*, 301 Kan. at 477. A person who lacks an ownership or possessory interest in the property searched lacks a legitimate expectation of privacy in that property. This lack of ownership or

possessory interest is dispositive. *State v. Wickliffe*, 16 Kan. App. 2d 424, 429, 826 P.2d 522 (1992).

Although a passenger in a car does not generally have standing to challenge the search of a car that does not belong to the passenger, the passenger can challenge the search if it results from an illegal stop. *State v. Maybin*, 27 Kan. App. 2d 189, 200, 2 P.3d 179 (2000). While Scheuerman challenged the legality of the stop before the district court, he does not challenge before us the district court's refusal to suppress the evidence on this basis.

Scheuerman does not dispute he was not the car's owner. Although he gave Finnigan the money to buy the car, the car was registered in her name. Because Scheuerman lacks any ownership or possessory interest in the car, he lacks the standing to challenge the search of the car. And, as he did not challenge the search of the backpack containing the methamphetamine before the district court, he cannot now claim he had a possessory interest in the backpack.

The district court's reasoning that the State could not have it "both ways" by both challenging Scheuerman's standing to challenge the search and relying on his admission that the drugs were his is incorrect; the issue of the admissibility of Scheuerman's statements concerning the drugs is a different legal issue from whether he can challenge the search. However, the district court correctly denied the motion to suppress as Scheuerman could not challenge the search because the car belonged to Finnigan. Thus, we affirm the district court's denial of Scheuerman's motion to suppress as being correct for the wrong reason. See *State v. Overman*, 301 Kan. 704, 712, 348 P.3d 516 (2015) (holding if district court reaches correct result, its decision will be upheld even if it relied on wrong ground).

IV. WAS THERE SUFFICIENT EVIDENCE TO SUPPORT SCHEUERMAN'S CONVICTION FOR POSSESSION OF METHAMPHETAMINE WITH INTENT TO DISTRIBUTE?

Scheuerman also argues the evidence was insufficient to support his conviction for possession of methamphetamine with intent to distribute because he was convicted of possessing at least

1 gram of methamphetamine but less than 3.5 grams, but he stipulated to possessing at least 3.5 grams of methamphetamine. Scheuerman asserts the different severity levels for possession of methamphetamine with intent to distribute are mutually exclusive. Because the State did not provide any evidence Scheuerman possessed less than 3.5 grams of methamphetamine, Scheuerman claims there was no evidence to find him guilty of the amended charge. Scheuerman also argues that because the district court found him guilty of possessing less than 3.5 grams of methamphetamine, there is no evidence of intent to distribute. See K.S.A. 2020 Supp. 21-5705(e)(2) (creating rebuttable presumption of intent to distribute upon finding possession of at least 3.5 grams of methamphetamine).

The State argues the root of Scheuerman's argument is not sufficiency of the evidence but whether the drug severity levels are separate or lesser included offenses. The State argues the lower drug severity levels are lesser included offenses of the higher drug severity levels of the same crime, meaning it had the authority to charge a lower severity level in exchange for Scheuerman agreeing to a trial by stipulated facts.

Standard of Review

Scheuerman argues the appropriate standard of review is for sufficiency of the evidence. The State counters that both the sufficiency of the evidence standard and the statutory interpretation standard apply. We agree. Scheuerman argues the fact he stipulated to possessing at least 3.5 grams of methamphetamine does not prove he possessed at least 1 gram but less than 3.5 grams of methamphetamine. Ultimately, this is a sufficiency of an evidence argument. But whether the evidence of possession of a greater amount of methamphetamine is sufficient to support a conviction of a lesser amount does require statutory interpretation, and statutory interpretation is a legal question subject to de novo review. *State v. Alvarez*, 309 Kan. 203, 205, 432 P.3d 1015 (2019).

In general, our standard of review when a criminal defendant challenges the sufficiency of the evidence supporting his or her conviction is "'whether, after reviewing all the evidence in a light most favorable to the prosecution, the appellate court is convinced a rational factfinder could have found the defendant guilty beyond

a reasonable doubt. Appellate courts do not reweigh evidence, resolve evidentiary conflicts, or make witness credibility determinations.' [Citation omitted.]" *State v. Chandler*, 307 Kan. 657, 668, 414 P.3d 713 (2018).

However, when the sufficiency of the evidence is challenged in a case decided on stipulated facts, our review is unlimited, but the facts are still "viewed in the light most favorable to the State when testing their sufficiency." *State v. Darrow*, 304 Kan. 710, 715, 374 P.3d 673 (2016). Moreover, a defendant is precluded from challenging factual evidence within a stipulation by entering into a stipulation of facts. *State v. Bogguess*, 293 Kan. 743, 745, 268 P.3d 481 (2012). But a defendant can still challenge the legal effect of the stipulated facts. See *State v. Weber*, 297 Kan. 805, 814, 304 P.3d 1262 (2013).

Analysis

"Due process requires the State to prove every element of the charged crime." *State v. Banks*, 306 Kan. 854, 858, 397 P.3d 1195 (2017). To determine what elements the State must prove, we look to the statute. *State v. Torres*, 308 Kan. 476, 488, 421 P.3d 733 (2018).

K.S.A. 2020 Supp. 21-5705(a)(1) proscribes a person from possessing methamphetamine with the intent to distribute. The State originally charged Scheuerman with possessing at least 3.5 grams but less than 100 grams, a severity level 2 drug felony. See K.S.A. 2016 Supp. 21-5705(d)(3)(C). As part of its agreement with Scheuerman to try the case on stipulated facts, the State amended the charge to possessing at least 1 gram but less than 3.5 grams of methamphetamine, a severity level 3 drug felony. See K.S.A. 2016 Supp. 21-5705(d)(3)(B). Additionally, a rebuttable presumption of an intent to distribute is created if a defendant possesses 3.5 grams or more of methamphetamine. K.S.A. 2016 Supp. 21-5705(e)(2).

Scheuerman argues his stipulation to the fact that he possessed at least 3.5 grams of methamphetamine means he cannot be convicted of possessing at least 1 gram but less than 3.5 grams of methamphetamine. The State argues he can because the crime of

possessing at least 1 gram but less than 3.5 grams of methamphetamine is a lesser included offense of the crime of possessing of at least 3.5 grams of methamphetamine. In other words, if Scheuerman stipulated to facts sufficient to find him guilty of the original offense, there is also sufficient evidence to convict him of a lesser included offense. For reasons we will explain, we must disagree.

As it relates to lesser included offenses whose elements are wholly contained within the originally charged crime, the State is correct that if the facts are sufficient to convict of the charged crime, the facts are also sufficient to convict of a lesser included crime. "If a lesser offense is to be considered a lesser included offense under the law, all elements necessary to prove the lesser offense must be present and be required to establish the elements of the greater offense charged." *State v. Woods*, 214 Kan. 739, 744, 522 P.2d 967 (1974), *disapproved of on other grounds by Wilbanks v. State*, 224 Kan. 66, 579 P.2d 132 (1978). But our statute defining lesser included offenses is broader and includes not only offenses in which the elements of the lesser crime are identical to some of the elements of the crime charged, but also lesser degrees of the same crime. Compare K.S.A. 2020 Supp. 21-5109(b)(1) (lesser degree of same crime) with K.S.A. 2020 Supp. 21-5109(b)(2) (all elements of lesser crime identical to some elements of charged crime). This means the elements of a lesser included offense under Kansas law may not all be included within the charged crime. Thus, if the facts establish guilt of the charged crime, they do not always mean guilt of a lesser included offense.

The fatal flaw in the State's argument here is that not all elements of the amended charge of which Scheuerman was convicted are contained within the originally charged crime. Scheuerman was originally charged with possessing with intent to distribute at least 3.5 grams but less than 100 grams of methamphetamine, a severity level 2 drug felony under K.S.A. 2016 Supp. 21-5705(d)(3)(C). The amended charge was possessing with intent to distribute at least 1 gram but less than 3.5 grams of methamphetamine, a severity level 3 drug felony under K.S.A. 2016 Supp. 21-5705(d)(3)(B). Given that the amended charge is the lesser degree of the originally charged crime—severity level 3 drug felony versus severity level 2 drug felony—the amended charge is clearly a lesser included offense of the originally charged crime. But the

amended charge's elements are not all contained within the originally charged crime. The amended charge's quantity element requires possessing at least 1 gram but less than 3.5 grams of methamphetamine, while the originally charged crime requires possessing at least 3.5 grams but less than 100 grams.

Scheuerman stipulated to possessing a quantity of methamphetamines of *at least* 3.5 grams but less than 100 grams. But the plain language of the amended charge required the State to prove a quantity of at least 1 gram but *less than* 3.5 grams. See K.S.A. 2016 Supp. 21-5705(d)(3)(B); PIK Crim. 4th 57.020 (2014 Supp.) (elements of possession with intent to distribute controlled substance). Scheuerman's stipulation to possessing at least 3.5 grams of methamphetamines cannot provide a factual basis to satisfy the quantity element of his crime of conviction.

Two cases previously decided by our court support our conclusion that proof of possessing a higher quantity of drugs in this context does not establish the proof necessary to convict a defendant of possessing a lesser amount. While the cases address the appropriateness of a lesser included jury instruction, they are helpful because one of the steps in determining whether a lesser included jury instruction should have been given is whether the instruction was factually appropriate. See *State v. McLinn*, 307 Kan. 307, 318, 409 P.3d 1 (2018). An instruction is factually appropriate if "there is some evidence which would reasonably justify a conviction of the lesser included offense." *State v. Brown*, 300 Kan. 565, 585, 331 P.3d 797 (2014).

Most on point is a case relied upon by the State, *State v. Palmer*, No. 111,624, 2015 WL 802733 (Kan. App. 2015) (unpublished opinion). In *Palmer*, the defendant was convicted of possession with intent to distribute at least 3.5 grams of methamphetamine. On appeal, Palmer argued the jury should have been instructed on the lesser included offenses of possessing less than 3.5 grams. Another panel of our court held that while lower severity levels of possession of methamphetamine are lesser included offenses of the higher severity levels, it was factually inappropriate to instruct on the lesser included offense because it was undisputed that the defendant possessed 10.26 grams of methamphetamine. 2015 WL 802733, at *7. Put another way, because it was

undisputed that Palmer possessed 10.26 grams, there was no evidence that would support a conviction of possessing amounts less than 3.5 grams.

In *State v. Winn*, No. 111,474, 2016 WL 1169422 (Kan. App. 2016) (unpublished opinion), the defendant was charged with a severity level 2 drug felony of possession of marijuana with intent to distribute. Winn claimed the district court should have sua sponte instructed the jury on the lesser severity level 3 and level 4 offenses of the crime. The panel noted the obvious difference in the statutory alternatives was the weight of the marijuana the defendant possessed, but each alternative required the defendant have the intent to distribute. 2016 WL 1169422, at *6. While the panel held the lower severity levels were lesser degrees of the crime of possession of marijuana with intent to distribute, and thus lesser included offenses, it concluded that the lesser included offense instructions sought by Winn were not factually appropriate because Winn did not challenge the evidence that he possessed a weight of marijuana greater than the rebuttable presumption of intent to distribute. 2016 WL 1169422, at *8.

Our court has also held in the context of theft—which, like drug possession crimes, differs in severity depending on the amount of property taken—a defendant cannot be convicted of the lesser offense when the evidence only establishes the more severe charged crime. See K.S.A. 2020 Supp. 21-5801 (theft statute); *State v. Bryant*, 22 Kan. App. 2d 732, Syl. ¶ 4, 922 P.2d 1118 (1996) (despite misdemeanor theft being lesser included offense of felony theft, no lesser jury included instruction required when "unrefuted" evidence established value of goods stolen over felony limit); *State v. Perry*, No. 97,052, 2008 WL 3367544, at *6 (Kan. App. 2008) (unpublished opinion) (same).

We can extrapolate from *Winn* and *Palmer* that possession of methamphetamine in amounts of at least 3.5 grams cannot support a conviction for possession of methamphetamine in an amount less than 3.5 grams. While Scheuerman's stipulation to possessing at least 3.5 grams and less than 100 grams is sufficient to prove the possession with intent to distribute element given the statutory presumption, see K.S.A. 2016 Supp. 21-5705(e)(2), it cannot prove the quantity element. The less severe charge of possession of methamphetamine with intent to distribute required the State to

prove Scheuerman possessed at least 1 gram *but less than* 3.5 grams of methamphetamine. Scheuerman's stipulation to possessing at least 3.5 grams of methamphetamine is insufficient evidence to support a conviction of this charge because the quantity of drugs he possessed is in excess of the charged amount.

Scheuerman's conviction of possession of methamphetamine with intent to distribute contrary to K.S.A. 2016 Supp. 21-5705(d)(3)(B) is reversed, and the corresponding sentence is vacated.

Affirmed in part, conviction reversed, and sentence vacated.

No. 122,818

STATE OF KANSAS, *Appellee*, v. JEFFREY ALLEN RANKIN, *Appellant*.

SYLLABUS BY THE COURT

1. APPEAL AND ERROR—*Challenge to Criminal History—Illegal Sentence Can be Corrected Any Time.* A criminal defendant can challenge his or her criminal history for the first time on appeal because the misclassification of a prior conviction results in an illegal sentence that can be corrected at any time.

2. *SAME—Challenge to Criminal History—Unconstitutional Statute Not Used for Criminal History Scoring*. Prior convictions of a crime defined by a statute that has since been determined unconstitutional by an appellate court shall not be used for criminal history scoring purposes.

3. SAME—*Direct Appeal of Criminal Defendant—Change in Law Applicable.* A criminal defendant will receive the benefit of any change in the law that occurs while the defendant's direct appeal is pending.

4. CRIMINAL LAW—*Criminal History of Defendant—Burden of Proof on State.* The State has the burden to prove a defendant's criminal history.

5. TRIAL—*Judicial Notice After Trial Under K.S.A. 60-412(d)—Affords Parties Opportunity to Present Relevant Information.* Under K.S.A. 60-412(d), a court taking judicial notice in proceedings after trial shall afford the parties reasonable opportunity to present information relevant to the propriety of taking such judicial notice and to the tenor of the matter to be noticed.

6. COURTS—*Appellate Courts—Factual Findings.* Generally, appellate courts do not make factual findings.

Appeal from Barton District Court; RICHARD M. SMITH, judge. Opinion filed April 30, 2021. Remanded with directions.

Michelle A. Davis, of Kansas Appellate Defender Office, for appellant.

Douglas A. Matthews, assistant county attorney, *M. Levi Morris*, county attorney, and *Derek Schmidt*, attorney general, for appellee.

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

MALONE, J.: Jeffrey Allen Rankin appeals his sentence following his convictions of two counts of sexual exploitation of a

child. For the first time in this direct appeal, Rankin challenges his criminal history score, which included a juvenile adjudication for terroristic threat. Because the record at sentencing did not reflect whether his adjudication for terroristic threat stemmed from intentional or reckless conduct, Rankin asserts he may have a right to relief under the holding in *State v. Boettger*, 310 Kan. 800, 822, 450 Kan. 805 (2019), *cert. denied* 140 S. Ct. 1956 (2020).

The State recognizes that remand is generally the remedy in this situation, but it asks this court to take judicial notice of the complaint from Rankin's terroristic threat adjudication and determine that he was adjudicated of the intentional version of the statute. For the reasons stated in this opinion, we decline the State's request to take judicial notice of any document from the district court and to make factual findings to determine Rankin's criminal history score, and we remand the case to district court to make the appropriate findings.

FACTS

On February 1, 2018, Rankin pled guilty to two counts of sexual exploitation of a child in exchange for dismissal of other charges. The presentence investigation (PSI) report revealed that Rankin had a criminal history score of B, based in part on a 1983 Barton County juvenile person adjudication for terroristic threat. The presumptive sentence for Rankin's primary offense was 114-120-128 months' imprisonment.

At the sentencing hearing on April 24, 2018, Rankin did not object to his criminal history score. The district court sentenced Rankin to 128 months' imprisonment for his primary offense and a consecutive term of 34 months' imprisonment on the other count for a controlling sentence of 162 months' imprisonment with lifetime postrelease supervision. Rankin timely appealed his sentence. There was a delay in appointing appellate counsel and the appeal was not docketed until April 2020.

ANALYSIS

Rankin claims, for the first time on appeal, that the district court erred in calculating his criminal history score. Rankin correctly asserts that he can raise a challenge to his criminal history

score for the first time on appeal. See *State v. Dickey*, 305 Kan. 217, 220, 380 P.3d 230 (2016) (stating the misclassification of a prior conviction results in an illegal sentence that can be corrected at any time).

Under the revised Kansas Sentencing Guidelines Act (KSGA), a defendant's sentence depends on the crime of conviction and the defendant's criminal history score. K.S.A. 2020 Supp. 21-6804(d). "Prior convictions of a crime defined by a statute that has since been determined unconstitutional by an appellate court shall not be used for criminal history scoring purposes." K.S.A. 2020 Supp. 21-6810(d)(9). In October 2019, while Rankins' direct appeal was pending, the Kansas Supreme Court held "the portion of K.S.A. 2018 Supp. 21-5415(a)(1) allowing for a conviction if a threat of violence is made in reckless disregard for causing fear causes the statute to be unconstitutionally overbroad because it can apply to statements made without the intent to cause fear of violence." *Boettger*, 310 Kan. at 822.

Citing these rules, Rankin argues that because his criminal history score included a 1983 juvenile adjudication for terroristic threat, which he claims is a prior version of the criminal threat statute, and the PSI does not show whether the adjudication stemmed from the intentional or wanton disregard version of the offense, his case must be remanded for resentencing. The State agrees with Rankin's summary of the applicable rules and his assertion that *Boettger* applies but disagrees that remand is necessary.

Classification of prior convictions for criminal history purposes involves statutory interpretation of the KSGA. Statutory interpretation is a question of law subject to unlimited review. *State v. Wetrich*, 307 Kan. 552, 555, 412 P.3d 984 (2018).

Rankin is correct that he may receive the benefit of *Boettger*, a change in the law, because it occurred while his direct appeal was pending. See *State v. Murdock*, 309 Kan. 585, 591, 439 P.3d 307 (2019) (stating that in a direct appeal, a defendant will receive the benefit of any change in the law that occurs while the direct appeal is pending). Rankin also correctly asserts that although he was adjudicated for "terroristic threat," the crime was later renamed "criminal threat" using almost the exact language as the crime of terroristic threat. Compare K.S.A. 1992 Supp. 21-3419

(defining terroristic threat) with K.S.A. 1993 Supp. 21-3419 (defining criminal threat).

Boettger's holding applies to Rankin's adjudication for terroristic threat if he was adjudicated of the reckless or wanton version of the statute. Resolution of this issue might affect Rankin's sentence. If Rankin's adjudication for terroristic threat is based on the unconstitutional version of the statute and is removed from his criminal history, he will have a criminal history score of C, with a presumptive sentence for the primary offense of 53-57-60 months' imprisonment.

The State has the burden to prove a defendant's criminal history. K.S.A. 2020 Supp. 21-6814(c); *State v. Obregon*, 309 Kan. 1267, 1275, 444 P.3d 331 (2019). When the district court sentenced Rankin in April 2018, *Boettger* had yet to be decided, and there was no dispute over whether Rankin was adjudicated of the intentional or reckless version of terroristic threat. As a result, the State did not prove which version of the crime applied to Rankin. Because the PSI does not provide the answer, this court would generally remand for resentencing, directing the district court to apply the "'modified categorical approach'"—which allows the examination of "'charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms'"—to determine which statutory alternative was the basis for conviction. *Obregon*, 309 Kan. at 1274 (discussing the modified categorical approach in relation to classifying out-of-state crimes).

The State recognizes that remand is generally the remedy in this situation. But the State asks this court to take judicial notice of the complaint from Rankin's terroristic threat adjudication in Barton County case No. 83JV61, which it included in the record on appeal, and determine that he was adjudicated of the intentional version of the statute "to avoid an unnecessary remand and a waste of judicial resources." The State points to a copy of the complaint that charged Rankin with terroristic threat and alleged that he acted "willfully" with the "intent to cause the evacuation of a building."

K.S.A. 60-409(b)(4) provides that a court may take judicial notice of "specific facts and propositions of generalized knowledge which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy." Under this statute, a district court has the power to take judicial notice of its

own records. *State v. Lowe*, 238 Kan. 755, 759, 715 P.2d 404 (1986). Thus, the Barton County District Court that sentenced Rankin can take judicial notice of the records in his 1983 Barton County juvenile case. K.S.A. 60-412(c) states that a reviewing court in its discretion "may take judicial notice of any matter specified in K.S.A. 60-409 whether or not judicially noticed by the judge." Thus, this court can take judicial notice of a matter not noticed below. But in taking judicial notice in proceedings after trial, a court "shall afford the parties reasonable opportunity to present information relevant to the propriety of taking such judicial notice and to the tenor of the matter to be noticed." K.S.A. 60-412(d).

The State does not acknowledge K.S.A. 60-412(d) or point to any authority that would support this court taking judicial notice of a complaint in support of a criminal history determination for the first time on appeal. Our independent research reveals that in the few instances when an appellate court has taken judicial notice under K.S.A. 60-412, the parties either were given a chance to address the propriety of the court taking judicial notice or both parties requested the fact be judicially noticed. See, e.g., *Gannon v. State*, 305 Kan. 850, 903, 390 P.3d 461 (2017) (taking judicial notice after both parties requested such in their briefs and at oral arguments); *State v. Schad*, 41 Kan. App. 2d 805, 821, 206 P.3d 22 (2009) (stating that before taking judicial notice, the court afforded both parties reasonable opportunity to respond and neither side objected).

The State is essentially asking this court to serve as fact-finder to resolve whether Rankin's juvenile adjudication for terroristic threat stemmed from intentional or reckless conduct. "Generally, appellate courts do not make factual findings." *State v. Yazell*, 311 Kan. 625, 627, 465 P.3d 1147 (2020). In *Yazell*, our Supreme Court acknowledged that an appellate court must sometimes make factual findings necessary to confirm a change in circumstances that a party has alleged renders an appeal moot. 311 Kan. at 628. Even in those circumstances, "appellate courts must carefully scrutinize the reliability of evidence before making the rare finding of fact." 311 Kan. at 628.

Here, the State is asking this court to make factual findings beyond what is necessary to resolve a mootness issue. Although

this court *can* take judicial notice of the original complaint in Barton County case No. 83JV61, we observe that this evidence alone does not necessarily resolve whether Rankin's juvenile adjudication for terroristic threat was based on the intentional or reckless version of the statute; the original complaint may have been amended later in the proceedings. Rankin should receive a full hearing in district court to resolve the issue. At such a hearing the district court should consider all available records in case No. 83JV61 including the original and any amended charging documents, any plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and the journal entry of adjudication. See *Obregon*, 309 Kan. at 1274 (addressing documents the district court may consider in applying modified categorical approach to determine a defendant's criminal history).

Thus, we decline the State's request to take judicial notice of the complaint from Rankin's terroristic threat adjudication in Barton County case No. 83JV61 to determine whether Rankins's adjudication for terroristic threat was based on the intentional or reckless version of the statute. Instead, we remand the case to district court to make this determination and to resentence Rankin if the State is unable to show that his juvenile adjudication for terroristic threat was based on the intentional version of the statute.

Remanded with directions.