IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 121,460

STATE OF KANSAS,
Appellee,

v.

MATTHEW PAUL SLUSSER,
Appellant.

SYLLABUS BY THE COURT

1.

The invited-error doctrine precludes a party who has led the district court into error from complaining of that error on appeal. In determining whether the invited-error doctrine applies, appellate courts must carefully consider the party's actions and the context in which those actions occurred to determine whether that party in fact induced the district court to make the alleged error.

2.

In the context of jury instructions, the mere failure to object to an instruction does not trigger the invited-error doctrine. And the doctrine does not automatically apply every time a party requests an instruction at trial but then, on appeal, claims the district court erred by giving it. But application of the doctrine is appropriate when the party proposing an instruction before trial could have ascertained the instructional error at that time.

3.

A party aggrieved by a Court of Appeals' decision on a particular issue must seek review to preserve that issue for Kansas Supreme Court review.

4.

Prosecutors generally have wide latitude in crafting their closing arguments, so long as those arguments accurately reflect the evidence presented at trial and accurately state the controlling law. But prosecutors step outside the bounds of proper argument if they lower the State's burden to prove the defendant's guilt beyond a reasonable doubt or shift the burden onto the defendant.

5.

There is a legally significant difference between inferences and presumptions. An inference is a conclusion rationally drawn from a proven fact or set of facts. In contrast, a presumption is a rule of law that requires the fact-finder to draw a certain conclusion from a proven fact or set of facts in the absence of contrary evidence.

6.

Because presumptions direct jurors to draw certain conclusions once the State has satisfied a certain evidentiary predicate, they have the potential to relieve the State of its burden to prove the defendant's guilt beyond a reasonable doubt and shift the burden onto the defendant to prove his or her innocence.

Review of the judgment of the Court of Appeals in an unpublished opinion filed December 23, 2020. Appeal from Shawnee District Court; DAVID DEBENHAM, judge. Opinion filed April 14, 2023. Judgment of the Court of Appeals affirming the district court is affirmed in part and reversed in part. Judgment of the district court is affirmed in part and reversed in part, and the case is remanded with directions.

James M. Latta, of Kansas Appellate Defender Office, argued the cause, and *Jennifer C. Bates*, of the same office, was on the briefs for appellant.

Steven J. Obermeier, assistant solicitor general, argued the cause, and *Derek Schmidt*, attorney general, was with him on the briefs for appellee.

The opinion of the court was delivered by

WALL, J.: This appeal raises several issues addressing the showing needed under Kansas law to establish that a defendant intended to distribute a controlled substance. The matter began when two law enforcement officers stopped Matthew Paul Slusser for a traffic infraction in Topeka. Two minor children were riding in the car with Slusser at the time. After discovering Slusser's driver's license was suspended, the officers arrested him and conducted a search, which led to the discovery of 11.2 grams of methamphetamine in Slusser's pocket.

A jury convicted Slusser of one count of driving while suspended (second offense) in violation of K.S.A. 2017 Supp. 8-262(a)(1); two counts of aggravated child endangerment in violation of K.S.A. 2017 Supp. 21-5601(b)(2) (establishing an intent to distribute as one of the elements of the offense); and one count of possessing methamphetamine with intent to distribute in violation of K.S.A. 2017 Supp. 21-5705(a)(1).

Whether Slusser intended to distribute the methamphetamine in his possession was a central issue at trial and on appeal. To convict Slusser of possessing methamphetamine with intent to distribute, the State had to prove beyond reasonable doubt that he: (1) possessed methamphetamine; and (2) intended to distribute the drug. As to the second element, K.S.A. 2022 Supp. 21-5705(e)(2) further provides that "*there shall be a rebuttable presumption* of an intent to distribute if any person possesses . . . 3.5 grams or more of . . . methamphetamine." (Emphasis added.) This statute creates a mandatory (albeit rebuttable) presumption of an intent to distribute. In other words, it requires the jury to presume Slusser intended to distribute methamphetamine if he possessed 3.5

grams or more of the controlled substance, unless he rebuts this presumption with affirmative evidence to the contrary. See *State v. Holder*, 314 Kan. 799, 805, 502 P.3d 1039 (2022).

But rather than instructing the jury on this mandatory presumption, the district court provided a "permissive inference" instruction founded on PIK Crim. 4th 57.022 (2013 Supp.). This permissive inference instruction informed the jury that if the evidence showed Slusser possessed 3.5 grams or more of methamphetamine, then it *could* (but was not required to) *infer* that Slusser intended to distribute the controlled substance.

On appeal, Slusser raised three challenges to his convictions—all related to the "intent to distribute" issue. First, he argued to a panel of the Court of Appeals that the district court's permissive inference instruction was legally inappropriate because it was inconsistent with the mandatory presumption in K.S.A. 2022 Supp. 21-5705(e). See, e.g., 314 Kan. at 802-08. Second, Slusser argued the mandatory presumption in K.S.A. 2022 Supp. 21-5705(e)(2) was unconstitutional. Finally, he argued the prosecutor erred in closing argument by characterizing the permissive inference instruction as a mandatory presumption. The panel was not persuaded and affirmed Slusser's convictions.

Slusser now seeks review of the panel's decision. As to Slusser's instructional challenge, we decline to reach the merits. The Court of Appeals held that Slusser invited the error by proposing the very instruction he now challenges on appeal. And in his briefing to our court, Slusser failed to explain why the panel's application of the invited-error doctrine was erroneous. Further, we conclude the panel's application of the invited-error doctrine in these circumstances was appropriate and consistent with our precedent.

As to Slusser's constitutional challenge to K.S.A. 2022 Supp. 21-5705(e)(2), we again decline to reach the merits. In his petition for review, Slusser failed to seek review of the panel's holding on that issue. Thus, Slusser failed to preserve this constitutional challenge for our court's review.

But we do reach the merits of Slusser's prosecutorial error claim. We hold that the prosecutor erred by mischaracterizing the permissive inference jury instruction, effectively arguing the instruction described a presumption that relieved the State of its burden to prove beyond reasonable doubt that Slusser intended to distribute the methamphetamine. And we conclude that the State failed to carry its burden to prove this error was harmless, at least as to those convictions that required the State to prove Slusser's intent to distribute. Thus, we reverse Slusser's convictions for aggravated endangering a child and possession of methamphetamine with intent to distribute. We affirm his conviction for driving while suspended. And we remand the case to the district court for a new trial and resentencing.

FACTS AND PROCEDURAL BACKGROUND

Two officers stopped Slusser for a traffic infraction in Topeka. At the time, Slusser had two minor children riding in the car with him. The officers soon learned Slusser's driver's license was suspended, and they arrested him for driving with a suspended license. While searching Slusser following his arrest, officers found a plastic bag in his pocket containing 11.2 grams of methamphetamine. Officers also searched the car but did not find any other items commonly associated with drug distribution, such as plastic baggies, a scale, multiple cell phones, or a large sum of cash. Slusser told the officers he was working with a DEA agent, but that was not true.

Slusser was indicted on one count of possession with intent to distribute; two counts of aggravated endangering a child; and one count of driving while suspended (2nd offense).

The two officers involved in Slusser's arrest both testified at trial. One officer testified that methamphetamine users usually have a gram or less of methamphetamine at a time, while methamphetamine dealers usually have more. The other officer testified that the most significant factor in distinguishing personal users of narcotics from dealers is the quantity they possess, and methamphetamine dealers would have significantly more than a gram. That officer also testified that personal users usually have less than 3.5 grams, but he admitted it is possible a user could possess more than that amount. When pressed on this point during cross-examination, the officer said he believed the 3.5-gram threshold came from a statute. But he did not rely exclusively on that statutory presumption to determine whether someone was a dealer. Instead, the officer explained that in his experience weighing narcotics after arrest, methamphetamine dealers usually possessed more than 3.5 grams.

The jury convicted Slusser on all counts. After designating the possession with intent to distribute count as Slusser's primary offense of conviction for sentencing purposes, the district court imposed a controlling term of 135 months' imprisonment. Slusser appealed, and the Court of Appeals affirmed. *State v. Slusser*, No. 121,460, 2020 WL 7636318 (Kan. App. 2020) (unpublished opinion).

We granted Slusser's petition for review. And we heard oral argument from the parties on December 12, 2022. Jurisdiction is proper. See K.S.A. 20-3018(b) (providing for petition for review of Court of Appeals decision); K.S.A. 60-2101(b) (providing Supreme Court jurisdiction over cases subject to review under K.S.A. 20-3018).

ANALYSIS

I. *Did the District Court Commit Instructional Error?*

For his first claim of error, Slusser argues the district court provided an erroneous instruction to the jury. The challenged instruction informed the jury it could, but was not required to, infer Slusser intended to distribute methamphetamine if the evidence showed he possessed 3.5 grams or more of the drug.

Slusser argues this permissive inference instruction, founded on PIK Crim. 4th 57.022, was legally inappropriate because it deviates from the applicable law. See *State v. Plummer*, 295 Kan. 156, 161, 283 P.3d 202 (2012) (to be legally appropriate, jury instruction must fairly and accurately reflect the applicable law). The pattern instruction cites K.S.A. 21-5705(e) as its legal authority. PIK Crim. 4th 57.022. But that statute provides "there *shall be* a rebuttable *presumption* of an intent to distribute if any person possesses . . . 3.5 grams or more of . . . methamphetamine." (Emphasis added.) K.S.A. 2022 Supp. 21-5705(e)(2). Slusser argues the plain language of the statute imposes a mandatory presumption of an intent to distribute when the evidence shows defendant possessed 3.5 grams or more of methamphetamine. But the instruction to the jury described a permissive inference under the same set of circumstances. And we have recognized that "[a] rebuttable presumption has a different legal effect than a permissive inference." *Holder*, 314 Kan. at 806.

Normally, we review claims of instructional error using a multi-step standard of review. *State v. Douglas*, 313 Kan. 704, 709, 490 P.3d 34 (2021). But here, the Court of Appeals held Slusser invited the instructional error he complains of on appeal. *Slusser*, 2020 WL 7636318, at *2. If the panel is correct, and Slusser did invite the error, we need

not reach the merits of his instructional challenge. See *State v. Fleming*, 308 Kan. 689, 701, 423 P.3d 506 (2018) ("Kansas courts do not review for clear error . . . when the invited-error doctrine applies . . . to claimed errors in a jury instruction.").

Thus, we must determine whether the panel erred by applying the invited-error doctrine to this instructional challenge. We begin by discussing the applicable standard of review and legal framework. Then, we identify additional facts relevant to our analysis. Finally, we analyze the panel's invited-error holding and affirm its decision both because Slusser's briefing waived any challenge to the panel's holding and because the panel's reasoning is legally sound.

A. *Standard of Review and Legal Framework*

Whether the invited-error doctrine applies is a question of law over which this court has unlimited review. *Douglas*, 313 Kan. at 706. But see *Fleming*, 308 Kan. at 695-97 (questioning whether standard of review should technically be abuse of discretion but finding resolution of that question unnecessary because defendant's argument was based on a claim of legal error).

The invited-error doctrine precludes a party who has led the district court into error from complaining of that error on appeal. *State v. Roberts*, 314 Kan. 835, 846, 503 P.3d 227 (2022). There is no bright-line rule for the doctrine's application. Instead, appellate courts must carefully consider the party's actions and the context in which those actions occurred to determine whether that party in fact induced the district court to make the alleged error. *Douglas*, 313 Kan. at 707-08.

In the context of jury instructions, the mere failure to object to an instruction does not trigger the invited-error doctrine. *Fleming*, 308 Kan. at 702. And the doctrine "does not automatically apply every time a party requests an instruction at trial but then, on

appeal, claims the district court erred by giving it." 308 Kan. at 689. But we have applied the doctrine when the party proposing an instruction before trial could have ascertained the instructional error at that time. See 308 Kan. at 703 (defendant invited error by proposing pretrial instruction that differed from language in complaint because "[t]his difference was as obvious before trial as after"); *State v. Brown*, 306 Kan. 1145, 1166, 401 P.3d 611 (2017) (defendant invited error by proposing pretrial instruction that defined offense more broadly than it had been charged by the State).

B. *Additional Facts*

Before trial, Slusser proposed a permissive inference of intent instruction based on PIK Crim. 4th 57.022:

> "If you find the defendant possessed 3.5 grams or more of methamphetamine, you may infer that the defendant possessed with intent to distribute. You may consider the inference along with all the other evidence in the case. You may accept or reject it in determining whether the State has met the burden of proving the intent of the defendant. This burden never shifts to the defendant."

After proposing this instruction to the district court, Slusser did not later object to the proposed or final jury instruction. The language in Slusser's proposed instruction is identical to the final instructional language he challenges on appeal.

C. *The Panel Did Not Err by Applying the Invited-Error Doctrine*

The Court of Appeals held that Slusser invited any error in the challenged jury instruction. We affirm the panel's holding for two reasons. First, Slusser waived any

challenge to the panel's invited-error holding. Second, the panel's application of the invited-error doctrine was legally sound. We address each basis for affirming the panel's decision in turn.

1. *Slusser Waived Any Challenge to the Panel's Holding that the Invited-Error Doctrine Applies*

In his briefing to our court, Slusser waived any challenge to the Court of Appeals' application of the invited-error doctrine. In his petition for review, Slusser asserted that the Court of Appeals erred by holding he invited the instructional error. But outside of this conclusory assertion (contained only in the headings of the briefing), Slusser failed to develop the issue in his petition for review or his supplemental brief. Slusser's briefing offers no analysis and cites no authority explaining why the panel's application of the invited-error doctrine constituted error in this instance.

Thus, Slusser waived or abandoned any challenge to the panel's holding by failing to adequately brief the issue. See *State v. Gallegos*, 313 Kan. 262, 277, 485 P.3d 622 (2021) (issues not adequately briefed are deemed waived or abandoned); see also *State v. Meggerson*, 312 Kan. 238, 246, 474 P.3d 761 (2020) (A point raised incidentally in a brief and not argued therein is deemed waived or abandoned.).

2. *The Panel Correctly Applied the Invited-Error Doctrine*

Moreover, the panel's holding is consistent with our precedent defining the scope and applicability of the invited-error doctrine. Slusser proposed the very permissive inference instruction he now challenges on appeal, and he did not object to that instruction after submitting it to the district court.

Granted, we have acknowledged that the invited-error doctrine should not apply when the error in a defendant's proposed instruction does not become apparent until the close of evidence or after trial. See, e.g., *State v. Sasser*, 305 Kan. 1231, 1238-39, 391 P.3d 698 (2017) (invited-error doctrine did not apply when defendant proposed challenged instruction before trial because alleged alternative means error in instruction would not have become apparent until close of evidence). But where the alleged instructional error was apparent at the time defendant submitted the proposed instruction and defendant fails to object to the final instructions before the district court delivers them to the jury, the invited-error doctrine applies. See *Fleming*, 308 Kan. at 702-03.

Here, Slusser's instructional challenge falls into the latter category. Certainly, at the time Slusser proposed the instruction, this court had yet to consider the legal appropriateness of PIK Crim. 4th 57.022, the pattern instruction Slusser incorporated into his proposed instructions to the district court. We subsequently held the pattern instruction was legally inappropriate because it provided for a permissive inference and thus did not fairly and accurately reflect the statutory rebuttable presumption set forth in K.S.A. 2022 Supp. 21-5705(e). *Holder*, 314 Kan. 799, Syl. ¶ 4. Using a similar rationale, we later held an inference instruction identical to the one given in Slusser's case was legally inappropriate. *State v. Valdez*, 316 Kan. 1, 8-9, 512 P.3d 1125 (2022).

But Slusser need not have waited for our decisions in *Holder* and *Valdez* to identify the potential error in the inference instruction he proposed. In fact, in Slusser's opening brief and his petition for review (both of which Slusser filed before we issued our decision in *Holder*) he argued the inference instruction was legally inappropriate because it deviated from the language of K.S.A. 2022 Supp. 21-5705(e). This purported error was just as apparent before trial as it was after. Thus, Slusser knew or should have known of this error at the time he submitted the proposed instruction and later when the district court incorporated the proposed instruction into its final instructions to the jury. Under our established precedent, the panel properly applied the invited-error doctrine

under these circumstances to foreclose Slusser's instructional challenge on appeal. See *State v. Cottrell*, 310 Kan. 150, 162, 445 P.3d 1132 (2019) (Invited-error doctrine foreclosed review of instructional error where error in defendant's proposed instruction was as obvious before trial as after and defendant did not object to the final instructions.).

Furthermore, applying the invited-error doctrine is consistent with our more recent decisions clarifying that a party must affirmatively induce the alleged error for the doctrine to apply. See *Douglas*, 313 Kan. at 708. Here, Slusser affirmatively requested the instruction he now challenges on appeal, even though he could have readily ascertained before trial that the instruction's language deviated from the language of K.S.A. 2022 Supp. 21-5705(e). While the State also proposed a similar instruction, Slusser's submission confirmed that both parties agreed that the district court should give the proposed instruction to the jury. And Slusser did not later object to the final instructions. Under these circumstances, Slusser's conduct induced the district court to deliver the instruction as proposed by both parties.

Thus, Slusser waived any objection to the panel's holding by failing to adequately brief the issue before our court. And, here, the panel's application of the invited-error doctrine comports with our established precedent. For these reasons, we affirm the panel's holding and decline to reach the merits of Slusser's challenge to the permissive inference instruction.

II. *Slusser Failed to Preserve His Challenge to the Constitutionality of K.S.A. 2022 Supp. 21-5705(e)*

In his opening brief to the Court of Appeals, Slusser argued K.S.A. 2022 Supp. 21-5705(e) is facially unconstitutional because it violates a defendant's due process rights to have the State prove every element of a crime beyond a reasonable doubt. Slusser claims the statute imposes a mandatory rebuttable presumption which impermissibly

shifts the burden of persuasion to the defendant on the element of intent. See *Francis v. Franklin*, 471 U.S. 307, 314, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985) (mandatory presumption is unconstitutional if it relieves the State of its burden of persuasion on an element of an offense).

The Court of Appeals declined to address Slusser's constitutional challenge to K.S.A. 2022 Supp. 21-5705(e)'s rebuttable presumption because the presumption was never applied to him. *Slusser*, 2020 WL 7636318, at *2. As discussed in the analysis of the prior issue, the district court gave an instruction based on PIK Crim. 4th 57.022, which describes a permissive inference rather than a rebuttable presumption. See *Holder*, 314 Kan. 799, Syl. ¶ 4. The panel reasoned that because the jury was never informed of the statute's rebuttable presumption, the jury could not have considered it in convicting Slusser, and thus Slusser would not have been prejudiced by any alleged constitutional infirmity in the statutory presumption. *Slusser*, 2020 WL 7636318, at *2. In other words, the panel held that Slusser lacks standing to challenge the constitutionality of K.S.A. 2022 Supp. 21-5705. See *Ulster County Court v. Allen*, 442 U.S. 140, 154-55, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979) ("A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights.").

In our order granting review of Slusser's petition, we ordered the parties to provide supplemental briefing regarding whether Slusser has standing to challenge the constitutionality of K.S.A. 2022 Supp. 21-5705(e). And both parties complied with our order.

Even so, in his petition, Slusser did not ask this court to review the Court of Appeals' holding that he lacks standing to challenge K.S.A. 2022 Supp. 21-5705(e). "A party aggrieved by a decision of the Court of Appeals on a particular issue must seek review in order to preserve the matter for Kansas Supreme Court review." *Snider v. American Family Mut. Ins. Co.*, 297 Kan. 157, 172, 298 P.3d 1120 (2013). Because

Slusser failed to include this issue in his petition, he has not preserved this issue for our review. And at oral argument, Slusser's appellate counsel candidly conceded this issue had not been properly preserved. Thus, we will not consider whether Slusser has standing to challenge the constitutionality of the statute or reach the merits of his constitutional challenge. See Supreme Court Rule 8.03(b)(6)(C)(i) (2022 Kan. S. Ct. R. at 56) (Supreme Court will not consider issues not presented or fairly included in the petition for review).

III. *Did the State Commit Prosecutorial Error During Closing Argument?*

Finally, Slusser claims the prosecutor committed error by mischaracterizing the inference of intent instruction during closing argument and relieving the State of its burden to prove Slusser's criminal intent. To analyze Slusser's issue, we first identify the applicable standard of review and legal framework. Then, we set forth additional facts relevant to our analysis. Finally, we address the prosecutorial error issue on its merits.

A. *Standard of Review and Legal Framework*

Slusser did not object to any of the prosecutor's comments that he challenges on appeal. But a defendant need not contemporaneously object to a prosecutor's comments to preserve claims of prosecutorial error for appellate review. *State v. Blevins*, 313 Kan. 413, 428, 485 P.3d 1175 (2021).

To determine whether prosecutorial error has occurred, we consider whether the challenged prosecutorial acts "fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial." *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016). If error is found, we then determine whether the error

prejudiced the defendant's right to a fair trial by considering whether the State can prove that no reasonable possibility exists that the error contributed to the verdict. 305 Kan. at 109.

Prosecutors generally have wide latitude in crafting their closing arguments, so long as those arguments accurately reflect the evidence presented at trial and accurately state the controlling law. *State v. Thomas*, 311 Kan. 905, 910, 468 P.3d 323 (2020). But prosecutors step outside the bounds of proper argument if their comments lower the State's burden of proof or shift the burden onto the defendant. See *State v. Aguirre*, 313 Kan. 189, 222, 485 P.3d 576 (2021); *State v. Hilt*, 307 Kan. 112, 124, 406 P.3d 905 (2017). In determining whether a prosecutor erred during closing argument, we consider the prosecutor's comments in the context in which they were made rather than in isolation. *State v. Thomas*, 307 Kan. 733, 744, 415 P.3d 430 (2018).

B. *Additional Facts*

Slusser's claim of error arises from a portion of the State's closing argument discussing the permissive inference instruction given at Slusser's trial. We recite that portion in full to provide the appropriate context:

> "Now, I want to talk to you guys about something called the rebuttable presumption. This is listed in Instruction No. 9 at the very last paragraph and you'll have a copy of this, but I want to read it again briefly.
>
> "If you find the defendant possessed 3.5 grams or more of methamphetamine, you may infer that he possessed it with the intent to distribute. You may consider the inference along with all other evidence in the case. You may accept or reject it in determining whether the State has met the burden of proving the intent of the defendant and this burden never shifts to the defendant.

> "Why is this important? Why am I reading this to you again? You've heard it once already. The point is, this is a rebuttable presumption. What that means is, you can presume it. The law and the legislature tells you, you can presume it, but you don't have to assume. This is not a 100 percent, you must do this. But it's important. Why? During jury selection when we were doing our voir dires nobody that's seated indicated that they have personal experience with methamphetamine. Therefore, I think it's safe to assume that me and Mr. Luttrell, can assume that you all may not know the differences between a dealer weight, a distributor weight, or a simple user weight. So we have this rebuttable presumption in there for that reason.
>
> "Again, if someone is possessing methamphetamine over 3.5 grams, which is what we have here, remember we have 11.2, you can assume that they are possessing that with the intent to distribute, merely on the weight alone. Again, like I said, you don't have to follow that presumption. And you should consider that with all the other evidence that has been presented in front of you. But you don't have to automatically throw that out. The legislature is trying to give you, and the PIK instruction is trying to give you instruction or guidance on that topic. They have found that typically 3.5 grams or more is—goes along with the intent to distribute. And I would argue that that's what we have here, the intent to distribute."

Slusser claims the prosecutor's comments crossed the line of permissible argument. Rather than present the jurors with facts and evidence from which they could reasonably infer Slusser's intent to distribute, Slusser contends the prosecutor informed jurors they should presume Slusser's criminal intent based solely on the weight of methamphetamine he possessed. He argues the prosecutor's comments not only departed from the inference of intent instruction, but they also effectively relieved the State of its burden of persuasion on the element of intent.

The Court of Appeals rejected Slusser's claim. While not addressing the prosecutor's comments in detail, the panel held the closing argument was, for the most part, fair comment on the law and evidence. *Slusser*, 2020 WL 7636318, at *3. The panel recognized one potential concern—the prosecutor referred to the inference of intent set

forth in the jury instruction as a "'rebuttable presumption'" and told the jurors they could "'presume'" Slusser intended to distribute the methamphetamine based on its weight. 2020 WL 7636318, at *3. The panel explained the prosecutor technically mischaracterized the instruction because there is a legal distinction between inferences and presumptions. But the panel held the error would not have prejudiced Slusser because it was doubtful that "lay jurors would impute materially different meanings to presumptions, assumptions, and inferences in the context of the prosecutor's closing argument." 2020 WL 7636318, at *3.

C. *The Prosecutor's Closing Arguments Constituted Reversible Error*

We agree with the panel's conclusion that the prosecutor's comments characterizing the jury instruction as a presumption were problematic. In fact, we hold that these comments fall outside the wide latitude afforded prosecutors in arguing the case. But we disagree with the panel's conclusion that any error was harmless. To substantiate this conclusion, we address the error and prejudice analysis in turn.

1. *The Prosecutor Committed Error During Closing Argument*

We agree with the Court of Appeals that the prosecutor mischaracterized the jury instruction, but we also recognize this case presents us with a particularly unique set of circumstances. For one, we have previously held that the permissive inference of intent instruction given in Slusser's trial was legally inappropriate because it deviates from the mandatory statutory presumption in K.S.A. 2022 Supp. 21-5705(e)(2). See *Valdez*, 316 Kan. at 8-9. Slusser challenges the propriety of the jury instruction given at his trial on this very basis. But we are precluded from addressing the merits of Slusser's instructional challenge because he invited the error. Likewise, we are precluded from addressing the

merits of Slusser's constitutional challenge to K.S.A. 2022 Supp. 21-5705(e)'s rebuttable presumption because he failed to seek review of the panel's holding that he lacked standing to challenge the constitutionality of the statute.

These unique circumstances also distinguish Slusser's case from *State v. Strong*, 317 Kan. ___ (No. 121,865, this day decided). Like the prosecutor in Slusser's case, the prosecutor in *Strong* told the jury in closing argument that the jury "can presume" the defendant had an intent to distribute if he possessed 3.5 grams or more of methamphetamine. 317 Kan. at ___, slip op. at 20-21. But unlike Slusser's case, the district court in *Strong* gave an instruction telling the jury that it "may presume" the defendant's intent to distribute based on the amount of methamphetamine in his possession, and that the jury "may consider 'this presumption'" along with the other trial evidence. 317 Kan. at ___, slip op. at 19-20. Thus, while the prosecutor in *Strong* used some of the same language that the prosecutor in the present case used, that language matched the given jury instruction at Strong's trial.

Given the unique procedural history and circumstances of Slusser's case, we are left to consider the prosecutor's comments as measured against the jury instruction given in this case and to determine whether those comments impermissibly lowered the State's burden of proof irrespective of K.S.A. 2022 Supp. 21-5705(e). Using that yardstick, we hold that under these unique circumstances the prosecutor erred. See *Thomas*, 311 Kan. at 911 (claims of prosecutorial error are fact specific and outcomes will depend on the particulars of each case).

We begin with the prosecutor's mischaracterization of the permissive inference instruction—that is, her comments indicating that the instruction created a presumption of an intent to distribute, rather than an inference. As the panel recognized, there is a legally significant distinction between inferences and presumptions. An inference is a conclusion rationally drawn from a proven fact or set of facts. *Shim v. Rutgers*, 191 N.J. 374, 386,

924 A.2d 465 (2007); 1 Jones on Evidence § 4:1 (7th ed. 2023). Inferences are derived using reason and logic. See *Computer Identics Corp. v. Southern Pacific Co.*, 756 F.2d 200, 204 (1st Cir. 1985); *Mayland v. Flitner*, 28 P.3d 838, 853 (Wyo. 2001). They are by nature permissive, and the fact-finder is free to accept or reject them. *Johnson v. Missouri Bd. of Nursing Adm'rs*, 130 S.W.3d 619, 631 (Mo. Ct. App. 2004).

A presumption, on the other hand, is a rule of law that requires the fact-finder to draw a certain conclusion from a proven fact or set of facts in the absence of contrary evidence. *Parson v. Miller*, 296 Va. 509, 524, 822 S.E.2d 169 (2018); *Shim*, 191 N.J. at 386. In other words, "a presumption is a mandatory inference that discharges the burden of producing evidence as to a fact (the presumed fact) when another fact (the basic fact) has been established." 191 N.J. at 386. Thus, the panel was correct that, in a legal sense, the prosecutor mischaracterized the jury instruction by referring to it as a presumption.

But this is not simply a technical error. Even outside the realm of legal jargon, "infer" and "presume" have different meanings. In common usage, "infer" means to "conclude from evidence or by reasoning." American Heritage Dictionary of the English Language 899 (5th ed. 2011). Yet "presume" means "[t]o take for granted as being true in the absence of proof to the contrary." American Heritage Dictionary of the English Language 1395 (5th ed. 2011). Put another way, "infer suggests the arriving at a decision or opinion by reasoning from known facts or evidence." Webster's New World College Dictionary 745 (5th ed. 2016). But "presume implies a taking something for granted or accepting it as true, usually on the basis of probable evidence in its favor and the absence of proof to the contrary." Webster's New World College Dictionary 1153 (5th ed. 2016).

Thus, the jury instruction, on its face, told the jurors they could use reason to conclude Slusser intended to distribute the methamphetamine in his possession based on the evidence showing he possessed 3.5 grams or more. And the prosecutor read that instruction to the jury during closing argument. But after reading the instruction, the

prosecutor then explained how the jury should interpret and apply it. Specifically, the prosecutor explained that the instruction allowed the jury to "presume" Slusser's intent to distribute—that is, the jurors could take for granted that Slusser intended to distribute the methamphetamine if he possessed 3.5 grams or more, unless the defendant's evidence proved otherwise.

The prosecutor's characterization of the jury instruction as a "presumption" is particularly problematic because it diminished the presumption of innocence and the State's burden of proof. In criminal prosecutions, defendants are presumed innocent, and the State may only overcome this presumption through proof beyond a reasonable doubt. K.S.A. 2022 Supp. 21-5108(a) and (b); see also *State v. Ross*, 310 Kan. 216, 221, 445 P.3d 726 (2019) (criminal defendants have constitutional right to presumption of innocence and jury may find defendant guilty only if State proves defendant's guilt). Inferences do not relieve the State of this burden because it must still persuade the jury to infer a particular fact or element in the State's favor, and the jury remains free to accept or reject the inference. See, e.g., *Francis*, 471 U.S. at 314 ("A permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proved.").

But presumptions are another matter. Presumptions direct jurors to draw certain conclusions once the State has satisfied a specific evidentiary predicate. In other words, once the State has proved the predicate fact, the State need not produce evidence establishing the presumed fact or persuade the jury to presume that fact, unless the defendant produces evidence to rebut the presumption. See *Shim*, 191 N.J. at 386. Presumptions thus have the potential to relieve the State of its burden to prove the defendant's guilt beyond a reasonable doubt and shift the burden onto the defendant to prove his or her innocence. See *Ulster*, 442 U.S. at 157 ("A mandatory presumption

. . . may affect not only the strength of the 'no reasonable doubt' burden but also the placement of that burden."). And as noted above, this material distinction is reflected in the ordinary meaning of the terms "infer" and "presume."

Here, the prosecutor mischaracterized the instruction by telling jurors they could presume Slusser's criminal intent based on the amount of methamphetamine in his possession. Moreover, her argument described this presumption in a way that effectively relieved the State of its burden to prove that element of the crime. See *Aguirre*, 313 Kan. at 222 (noting "'[a]ny attempt to lower the [State's] burden of proof . . . is [prosecutorial] misconduct'").

For one, the prosecutor used the words "presume" and "assume" interchangeably throughout her argument. For instance, she told jurors they "can presume [Slusser's intent to distribute], but you don't have to assume." And she later said, "if someone is possessing methamphetamine over 3.5 grams . . . you can assume that they are possessing that with the intent to distribute, merely on the weight alone."

"Although *presume* and *assume* both mean 'to take something as true,' 'presume' implies more confidence or evidence backed reasoning. An 'assumption' suggests there is little evidence supporting your guess." Merriam-Webster Dictionary, *available at* https://www.merriam-webster.com/words-at-play/assume-vs-presume; see also Garner's Modern America Usage 71 (3d ed. 2009) ("The connotative distinction between these words is that *presumptions* are more strongly inferential and more probably authoritative than mere *assumptions*, which are usually more hypothetical."). By equating "presume" with "assume," the prosecutor effectively told the jury it could simply take for granted that Slusser intended to distribute the methamphetamine even if reason or evidence provided little support for that conclusion. Furthermore, the prosecutor told jurors they could "assume" Slusser's intent "merely on weight alone." This reinforced the message

that the jurors need not consider whether the totality of the evidence supported the conclusion that Slusser intended to distribute the methamphetamine before accepting that conclusion as true.

Next, the prosecutor bolstered the strength of the supposed presumption, not by referring to evidence presented at trial, but by telling the jury the presumption had the Legislature's imprimatur. Cf. *In re Care and Treatment of Foster*, 280 Kan. 845, Syl. ¶ 4, 127 P.3d 277 (2006) ("It is improper and misconduct for counsel to argue that his or her case or some aspect of it has judicial approval."). According to the prosecutor, the presumption existed because lay jurors "may not know the differences between . . . a distributor weight, or a simple user weight" so "[t]he legislature is trying to give you . . . instruction or guidance on that topic." The prosecutor stated "the law and the legislature tells you, you can presume" an intent to distribute when a person possesses 3.5 grams or more of methamphetamine. More troublingly, the prosecutor told the jury the Legislature "[has] found that typically 3.5 grams or more . . . goes along with the intent to distribute," even though the record contained no evidence of such Legislative fact-findings. See *Thomas*, 311 Kan. at 910 (prosecutor may not comment on facts outside evidence). These comments not only lent unearned credibility to the argued presumption, but also enabled jurors (who were the fact-finders in this case) to simply defer to the supposed legislative findings regarding Slusser's intent to distribute, rather than decide the issue independently based on the evidence submitted at trial. See *Allen*, 442 U.S. at 156 (Evidentiary devices such as presumptions are unconstitutional if they "undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt."). Together, these arguments suggested the jury could simply take for granted that Slusser intended to distribute the methamphetamine because he possessed more than 3.5 grams, and that the jury need not test the logic or evidence supporting that assumption because a credible governmental body had already done so.

Certainly, the prosecutor made some comments which could have mitigated the overall effect of this portion of her closing argument. For example, she told the jury "you should consider [the presumption] with all the other evidence that has been presented in front of you." But she immediately undercut that statement by saying, "But you don't have to automatically throw [the presumption] out." This latter statement reinforced the overall message that the jury could still simply accept as true that Slusser intended to distribute the methamphetamine because he possessed more than 3.5 grams, even if the totality of the evidence did not support that conclusion beyond reasonable doubt.

The prosecutor also told the jurors, "you don't have to follow that presumption" and, "[t]his is not a 100 percent, you must do this." But at most, these comments told the jury it *could* take Slusser's intent to distribute for granted regardless of whether that finding was supported by the weight of the evidence, but the jury did not *have to* take it for granted. Thus, the prosecutor still presented the jury with the option to assume Slusser intended to distribute the methamphetamine, even if such intent had not been proven beyond a reasonable doubt.

2. *The Prosecutorial Error Was Not Harmless*

Having concluded the prosecutor erred, we must now consider whether that error was harmless. Because prosecutorial error implicates a defendant's constitutional right to a fair trial, we apply the traditional constitutional harmlessness standard in determining whether the error requires reversal. *Sherman*, 305 Kan. at 109. Under that standard, the party benefitting from the error must show there is no reasonable possibility the error contributed to the verdict. *State v. Ward*, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 (2011). Put another way, the State must show "'beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record.'" *Sherman*, 305 Kan. at 109.

We begin by noting jurors generally are presumed to follow their instructions. *State v. Brown*, 316 Kan. 154, 170, 513 P.3d 1207 (2022). In this case, however, the nature of the prosecutor's argument regarding the permissive inference instruction overcomes this presumption. While the prosecutor accurately read the instruction during her closing argument, she then proceeded to explain to the jury how it should interpret and apply that instruction. And her explanation mischaracterized the instruction in a legally significant and material manner.

The prosecutor exacerbated this error by signaling to jurors the instruction had special significance. She did this by reading the instruction in closing and repeatedly telling the jury the instruction was "important." And, as noted in the error analysis above, she bolstered the legitimacy and credibility of the supposed "presumption" contained in the jury instruction by referring to facts not in the record. According to the prosecutor, the Legislature had found dealers tend to possess 3.5 grams or more. By suggesting the "presumption" was endorsed by the Legislature's independent findings, the prosecutor's argument encouraged jurors to rely on this "presumption" over the evidence presented at trial. In this regard, the argument enabled the jury to find Slusser intended to distribute methamphetamine without considering whether the evidence supported that finding beyond reasonable doubt.

The panel concluded the error was harmless because it was doubtful that "lay jurors would impute materially different meanings to presumptions, assumptions, and inferences in the context of the prosecutor's closing argument." *Slusser*, 2020 WL 7636318, at *3. But as explained in the error analysis above, the prosecutor's error was not merely technical—the distinction between an inference and a presumption is reflected in the ordinary meaning of these terms. Moreover, the prosecutor reinforced this distinction by equating a "presumption" with an "assumption." Thus, we are not convinced beyond reasonable doubt that the error was beyond the comprehension of lay jurors.

The State also argues the prosecutor's comments during the rebuttal portion of her closing argument rendered the error harmless. During rebuttal, the prosecutor discussed some of the evidence, aside from weight, that would support a finding that Slusser intended to distribute the methamphetamine in his possession. This evidence included the testimony of law enforcement officers who indicated that methamphetamine users typically possess a gram or less while methamphetamine dealers usually buy and carry larger amounts.

But the prosecutor's discussion of this evidence does not render the error harmless. For one, the prosecutor did not discuss any of this other evidence in the opening portion of her closing argument. See *Brown*, 316 Kan. at 170-71 (finding prosecutor's erroneous "we know" statements were harmless in part because they were made while discussing evidence that supported the suggested inference). Instead, the prosecutor focused only on the inference of intent instruction and functionally told jurors the instruction allowed them to simply accept as true that Slusser intended to distribute the methamphetamine because he possessed 3.5 grams or more. By failing to discuss the trial evidence during the opening portion of closing argument, the prosecutor implicitly underscored the message that the jury was under no obligation to consider all the evidence before deciding whether the State had proven Slusser's requisite intent beyond reasonable doubt.

And in discussing the evidence during the rebuttal portion of closing argument, the prosecutor did not suggest it would be reasonable for the jury to infer Slusser intended to distribute the methamphetamine based on the quantity he possessed. Instead, the prosecutor again emphasized that "the legislature" was telling the jury it could "presume" or "assume" Slusser's intent:

> "[W]e do have the weight. The legislature tells you if it's over 3.5 grams, you can assume it's—or presume that he's dealing it. And we're not just toeing the line. I mean, we're not 3.8 grams. We're all the way at 11.2 grams. This is weight, because the defendant was distributing that much weight."

Finally, the strength of the evidence alone does not convince us the error was harmless. See *Sherman*, 305 Kan. at 111 (Explaining that while the "strength of the evidence against the defendant may secondarily impact this analysis one way or the other, it must not become the primary focus of the [harmlessness] inquiry."). The evidence of Slusser's intent to distribute was not overwhelming. And this distinguishes Slusser's case from others in which we have held that the erroneous permissive inference instruction fell short of prejudicial error (as does the more stringent clear error standard applied in those cases to determine whether unpreserved instructional error requires reversal).

For example, in *State v. Martinez*, 317 Kan. ___ (No. 121,204, this day decided), the defendant possessed 111 grams of methamphetamine—over 30 times more than the threshold amount triggering the inference of intent set forth in the jury instruction—and uncontroverted trial testimony established that the quantity, street value, and composition of the substance indicated a commercial supply. And in *State v. Strong*, 317 Kan. ___ (No. 121,865, this day decided), the State presented evidence that the defendant possessed other items, such as scales and plastic baggies, which would also support a conclusion that the defendant intended to distribute the controlled substances in his possession.

Here, Slusser possessed 11.2 grams of methamphetamine—more than the threshold amount triggering the instruction's inference of intent to distribute, but significantly less than the 111 grams possessed by the defendant in *Martinez*. And on cross-examination of one of the arresting officers, Slusser elicited testimony that a personal user could possess more than 3.5 grams of methamphetamine.

Also, unlike *Strong*, Slusser did not possess any items commonly associated with the distribution of controlled substances. The State points out Slusser was driving his mother's car, which could explain why no other items were found. But this fact provides only marginal support for an inference that Slusser intended to distribute the methamphetamine in his possession despite the absence of other tools of the drug trade.

In the end, the jury may have considered the weight of the evidence and decided the State had proven beyond a reasonable doubt that Slusser intended to distribute the methamphetamine in his possession. But based on the prosecutor's closing arguments, the jury may have also simply assumed Slusser had the requisite intent to distribute because he possessed more than 3.5 grams of methamphetamine, without considering the State's burden of proof and the weight of the evidence presented at trial. The State has not shown beyond a reasonable doubt that the jury's verdict was founded on the former rationale, rather than the latter one. See *State v. Pabst*, 268 Kan. 501, 511, 996 P.2d 321 (2000) (A prosecutor's improper statements during closing were not harmless in part because "[t]he jury could have found, based on the physical evidence, that [the defendant] was guilty. However, the jury also might have decided [the defendant] was guilty because the prosecutor told it [the defendant] was lying, and if he was lying, it could convict him.").

Because the State has not met its burden to prove the error did not affect the verdict on Slusser's charge of possession with intent to distribute, we reverse that conviction. And because Slusser's aggravated child endangerment convictions also required the jury to find Slusser possessed methamphetamine with an intent to distribute, we also reverse those two convictions. See K.S.A. 2022 Supp. 21-5601(b)(2) ("Aggravated endangering a child is . . . causing or permitting such child to be in an environment where the person knows or reasonably should know that any person is . . . possessing with intent to distribute . . . any methamphetamine."). But because Slusser's intent to distribute was not an essential element of the driving while suspended charge,

we affirm this conviction. Even so, because Slusser's conviction for possession with intent to distribute was designated as his primary offense for sentencing purposes and we are reversing that conviction, we remand the driving while suspended conviction to the district court for resentencing. See K.S.A. 2022 Supp. 21-6819(b)(5). Thus, we remand the case to the district court for further proceedings consistent with this opinion.

The judgment of the Court of Appeals is affirmed in part and reversed in part. The judgment of the district court is affirmed in part and reversed in part, and the case is remanded with directions.

* * *

STEGALL, J., concurring: I concur in the result based on the rationale expressed in my concurrence in *State v. Strong*, 317 Kan. __, __ P.3d __ (No. 121,865, this day decided).

LUCKERT, C.J., joins the foregoing concurrence.