OFFICIALLY SELECTED
CASES ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF THE

STATE OF KANSAS

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SARA R. STRATTON

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COURT OF APPEALS

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No. 121,842

JAMES T. KRAUSE and PATRICIA ANN VANLEAR, *Appellants*, v. JAMES M. KERNS and CHRISTINE C. KERNS, *Defendants*, and AMERICAN AUTOMOBILE INSURANCE COMPANY, *Appellee*.

SYLLABUS BY THE COURT

1. SUMMARY JUDGMENT—*No Genuine Issue as to Material Fact—Moving Party Entitled to Judgment.* Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

2. SAME—*No Factual Dispute—Appellate Review.* When there is no factual dispute, appellate courts review an order regarding summary judgment de novo.

3. INSURANCE—*Definition of Accident--Required under Insurance Policy's Definition of Occurrence.* An accident, as required under an insurance policy's definition of occurrence, is an undesigned, sudden, and unexpected event, usually of an afflictive or unfortunate character, and is often accompanied by a manifestation of force.

4. REAL PROPERTY—*Buyer's Closing on Home Not Occurrence Under Insurance Policy.* A buyer closing on a home is not an occurrence under an insurance policy when an occurrence requires there to be an accident because closing on a home is designed, planned, and expected.

5. SAME—*Assumption of Liability in Seller's Disclosure Statement Not Occurrence.* An assumption of liability statement located in a seller's disclosure statement is not an occurrence because the assumption of liability was not an accident.

Appeal from Johnson District Court; DAVID W. HAUBER, judge. Opinion filed October 16, 2020. Affirmed.

Douglas J. Patterson, of Juris, LLC, of Leawood, for appellants.

Matthew K. Holcomb and *Scott R. Schillings*, of Hinkle Law Firm LLC, of Wichita, for appellee.

Before HILL, P.J., MALONE, J., and WALKER, S.J.

WALKER, J.: Sometimes what appears to be the most routine home sale transaction can result in grave legal problems and seriously

complicated litigation. In this case, James M. and Christine C. Kerns owned a residence covered by a homeowner's insurance policy issued by American Automobile Insurance Company (AAIC). The Kernses entered into a contract to sell their home to James T. Krause and Patricia Ann Vanlear (collectively Krause). As part of the sale, the Kernses provided a disclosure statement which indicated that there were no problems with several common areas of concern when buying a home. However, according to Krause the disclosure either misrepresented a number of issues or outright omitted problems with the home.

Krause sued the Kernses under a number of different theories. Krause and the Kernses settled the suit, and as part of the settlement the Kernses agreed to assign all of their rights under their insurance policy to Krause. After Krause initiated garnishment proceedings against AAIC, the insurer moved for summary judgment arguing, in part, that coverage under the policy was not triggered because there was no "occurrence" which the policy required. The district court agreed and granted AAIC summary judgment. Krause timely appeals.

FACTS

In March 2016, the Kernses entered into a contract to sell their home to Krause. Several months before entering into the contract, the Kernses provided Krause with a "Seller's Disclosure and Condition of Property Addendum." The disclosure stated that "**SELLER understands that the law requires disclosure of any material defects, known to SELLER, in the Property to prospective Buyer(s) and that failure to do so may result in civil liability for damages.**"

Krause specifically points out that the Kernses disclosed that

"a. Defendants had owned the Property for sixteen (16) years.
"b. Swimming Pool and Equipment—Operating and Staying with the Property.
"c. Any water leakage or dampness in the house, crawl space or basement - No.
"d. Any problems with fireplace including, but not limited to firebox, chimney, chimney cap or gas line - No.
"e. Any repairs or other attempts to control the cause or effect of any problem
described above - No.
"f. Any other environmental issues - No.
"g. Any other conditions that may materially affect the value - No.
"h. Any other condition, including but not limited to financial, that may prevent
you from completing the sale of the Property - No.
"1. Disclose any material information and describe any significant repairs,

> improvements or alterations to the Property not fully revealed above - None.
> "j. The undersigned SELLER represents, to the best of their knowledge, the information set forth in the foregoing disclosure Statement is accurate and complete.
> "k. Other provisions of the Disclosure."

According to Krause, after closing on the property they discovered multiple issues with the property that were not properly addressed in the disclosure. As examples, Krause alleged that the pool was in serious disrepair, the fireplace was unusable because of ventilation problems, there was a leak in the basement, and the lawn irrigation system was largely inoperable.

In late 2016, Krause sued the Kernses for property damage and other relief. The suit was dismissed without prejudice in October 2017. Krause filed a second suit against the Kernses in January 2018. The suit included eight claims, all of which related to the Kernses' misrepresentations or omissions in the disclosure.

The suit between Krause and the Kernses was settled. As part of the settlement, the Kernses agreed to stipulate to a final judgment in the amount of $79,482 in favor of Krause. The Kernses also agreed to assign "all of their rights, claims, and causes of action against AAIC and its agents, brokers, employees, officers and all other persons or entities relating to our arising" out of the Kernses insurance policy with AAIC. Additionally, Krause agreed to not take any action to collect from their judgment against the Kernses. Instead, Krause could only pursue collection of the judgment against AAIC.

Subsequently, Krause brought AAIC into the current suit through garnishment proceedings to recover the judgment amount. AAIC filed a motion for summary judgment arguing that the insurance policy did not cover misrepresentations made by the Kernses, and therefore, AAIC was not liable for any damages Krause suffered.

Krause filed a cross-motion for summary judgment arguing that the insurance policy covered the Kernses' misrepresentations and, thus, AAIC was obligated to satisfy Krause's claims against the Kernses.

The insurance policy referenced by the settlement agreement referred to the homeowner insurance policy the Kernses had through AAIC. Under the policy, AAIC agreed to insure "Property losses and **bodily injury**; **personal injury**; or **property damage** caused by an **occurrence**."

Essentially, Krause argued that an "occurrence," as defined by the insurance policy, included the "failure of [the Kernses] to remedy or otherwise correct the errors and omissions from disclosure made by [the Kernses] in the disclosure." Further, Krause asserted that "a damage 'occurrence' happened to Krause—when they closed on their acquisition of the Property at a time when [the Kernses] had previously assumed the obligation of representing the house accurately in the disclosure." Krause argued that "the damage to the Property was conveyed by [the Kernses] to Krause in an occurrence."

The district court granted AAIC's motion for summary judgment and denied the Krause's motion for summary judgment. The district court disagreed with Krause's arguments that there was an occurrence as defined by the insurance policy. The district court found that "[e]very cause of action in the underlying petition relate[d]" to the Kernses' disclosure and that the disclosure was not an occurrence.

The district court also noted that even if the disclosure and subsequent damages constituted an occurrence as defined by the policy, Krause still could not recover because of another exclusionary clause in the policy. Under the heading "LOSSES NOT COVERED—LIABILITY AND MEDICAL PAYMENTS TO OTHERS," the following exclusionary language appears: "C. Personal Liability Coverage does not apply to: . . . 7. Any claim or liability arising, in whole, or in part out of any written or oral statement made, or which should have been made, by you or others on your behalf which is material to the sale of any property." The district court concluded that AAIC had no duty to indemnify the Kernses because the Kernses' statements and Krause's reliance on those statements clearly fell within the exclusion set out by Section C.7.

Krause timely appealed the district court's order.

ANALYSIS

On appeal, Krause argues the district court erred in granting AAIC's motion for summary judgment because the Kernses' misrepresentations and omissions in the disclosure constituted an occurrence under the insurance policy.

As an initial matter, Krause "agrees that there is a provision in the [AAIC] Policy which, in and of itself, would preclude any claim made against [AAIC] to satisfy a typical seller's disclosure claim from a person acquiring the property from its insured."

Thus, Krause acknowledges Section C.7. of the insurance policy is exclusionary of the claims they make, but they argue that the case does not rely solely on the assumption that "[AAIC] is responsible to Krause based upon the indemnity policy insuring [the Kernses] relating only to a misrepresentation." But, as we explain below, we find this to be a strained interpretation which cannot successfully evade the blunt force of the policy provisions defining an occurrence.

The standards for a court considering summary judgment motions in Kansas are oft-repeated and are very clear:

"'"Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, we apply the same rules and when we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied."' [Citation omitted.]" *Patterson v. Cowley County, Kansas*, 307 Kan. 616, 621, 413 P.3d 432 (2018).

Where there is no factual dispute, appellate review of an order regarding summary judgment is de novo. *Martin v. Naik*, 297 Kan. 241, 246, 300 P.3d 625 (2013).

Under the policy, AAIC agreed to insure the Kernses in the event of: "A. Property losses and **bodily injury**; **personal injury**; or **property damage** caused by an **occurrence**; or B. Loss assessment that is charged against you; during the policy period." As part of that coverage, if a claim or suit was brought against the Kernses, AAIC agreed to:

> "1. pay on behalf of the **insured** up to the limit of insurance shown on the Declarations for damages for which the **insured** is legally liable. Damages include prejudgment interest awarded against the **insured**; and,
> "2. settle or defend, as we consider appropriate, any claim or suit asking for these damages. In addition to our limit of liability, we will pay all defense costs we incur. Our duty to defend ends when our limit of liability for this coverage has been exhausted by payment of judgments or settlements. We have no duty to defend any suit or settle any claim for **bodily injury**, **personal injury** or **property damage** not covered under this policy."

But once again under the heading "LOSSES NOT COVERED—LIABILITY AND MEDICAL PAYMENTS TO OTHERS," in Section C.1. the following language appears:

> "C. Personal Liability Coverage does not apply to:
> 1. Liability to others assumed by an **insured** under a contract or agreement unless that contract or agreement:
> a. directly relates to the ownership, maintenance or use of an **insured location**;
> b. is entered into by the **insured** prior to an **occurrence**; and
> c. is not covered elsewhere in this policy."

Krause argues that the exception to Section C.1. brings their claims within AAIC's policy because the Kernses assumed liability through the disclosure statement and each of the requirements after the "unless" in Section C.1. are present. As Krause explains it, the Kernses assumed liability through the disclosure statement in the housing contract and the housing contract and disclosure statement directly relate to the ownership, maintenance, or use of the Kernses' home—the insured location. Krause then argues that the housing contract was entered into by the Kernses prior to an occurrence—the occurrence being closing on the home after receiving the disclosure statement. And finally, Krause notes that the claim is not covered elsewhere in the policy.

In response, AAIC argues that Krause is fundamentally incorrect in their interpretation of Section C.1. According to AAIC, the language in Section C.1. relates to "agreements where the insured assumes the liability of another, such as a hold harmless or indemnity provision." AAIC cites two out-of-state cases—*Gibbs M. Smith, Inc. v. U.S. Fidelity*, 949 P.2d 337, 341 (Utah 1997), and *Olympic, Inc. v. Providence Wash. Ins. Co.*, 648 P.2d 1008, 1011 (Alaska 1982)—to support its point. As AAIC explains it, liabilities assumed by the insured in this context do "not involve liabilities incurred directly by the insureds themselves, but rather the *liabilities of others assumed by the insured*."

But we need not address this argument because, even if we assume that Krause is correct that Section C.1. arguably applies to situations like the one here, AAIC is still not liable because the exception in Section C.1. is simply irrelevant if there was no occurrence. This is so because the entire linchpin of this case, in our

opinion, is whether there was an occurrence, as defined in the policy, which would trigger coverage. If there was no occurrence, then there is no policy coverage and thus no need to look to any other policy provisions of inclusion or exclusion. Krause contends that the Kernses' faulty disclosure statement which they relied on at the closing of the contract constituted the occurrence requiring policy coverage. AAIC denies this. We believe resolution of the case is controlled by the answer to this question.

As defined by the policy:

"Occurrence means:

a. Under **Coverage For Damage to Your Property**: accidental loss and damage to covered property which occurs during the policy period and is caused by one or more causes of loss we cover.

. . . .

b. Under **Coverage For Liability And Medical Payments To Others**:

(1) An accident, including continuous or repeated exposure to the same general harmful conditions, which results, during the policy period, in **bodily injury** or **property damage**; or

(2) An act or series of acts of the same or similar nature that occurs during the policy period and which results in **personal injury**."

Krause argues that Kansas courts have previously held that the terms "'occurrence'" and "'accident'" are ambiguous and "as such must be construed in a manner favorable to the insured." For support, Krause cites to *Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.*, 281 Kan. 844, 137 P.3d 486 (2006).

In *Lee Builders, Inc.*, the Kansas Supreme Court held that an occurrence existed where faulty materials and workmanship caused a home to be continuously exposed to moisture. 281 Kan. 844, Syl. ¶ 6. In that case, the homeowner sued Lee Builders, who was in charge of constructing the home, after the homeowner noticed that his windows were leaking. Lee Builders' insurance company denied coverage for the issue, stating that the leaky windows did not meet the insurance policy's definition of property damage or occurrence.

The insurance policy in question defined an occurrence as "'[a]n accident, including continuous or repeated exposure to substantially the same general harmful conditions.'" 281 Kan. at 850. The term accident was not defined by the policy. 281 Kan. at 850. In its opinion, the Kansas Supreme Court noted that the United

States District Court of Kansas, when addressing a similar issue, held that "'the Kansas Supreme Court would find that the damage that occurs as a result of faulty or negligent workmanship constitutes an "occurrence" as long as the insured did not intend for the damage to occur.'" 281 Kan. at 854 (quoting *Fidelity & Deposit of Maryland v. Hartford Cas.*, 189 F. Supp. 2d 1212, 1218 [D. Kan. 2002]). The Kansas Supreme Court also cited approvingly to the court's conclusion in *Fidelity & Deposit of Maryland* that Kansas courts would hold that the "generally accepted meaning" of accident was "'an undesigned, sudden, and unexpected event, usually of an afflictive or unfortunate character, and often accompanied by a manifestation of force.'" *Lee Builders, Inc.*, 281 Kan. at 852 (quoting *Fidelity & Deposit of Maryland*, 189 F. Supp. 2d at 1216).

Ultimately, the Kansas Supreme Court held that the moisture damage was an occurrence under the policy "because faulty materials and workmanship provided by [Lee Builders'] subcontractors caused continuous exposure of the Steinberger home to moisture. The moisture in turn caused damage that was both unforeseen and unintended." 281 Kan. at 859. Moreover, the court noted that even if it assumed that the policy's definition of occurrence was ambiguous the result would be similar. The court reasoned that ambiguity in an insurance policy "'should not be allowed to defeat the coverage reasonably to be expected by the insured.'" 281 Kan. at 858.

But the situation in *Lee Builders, Inc.* is not similar to the situation in this case. While the term occurrence was defined similarly to AAIC's policy, the purported occurrence is of a totally different character. See 281 Kan. at 850. In *Lee Builders, Inc.*, the use of faulty materials and workmanship "caused continuous exposure of a home to moisture, which in turn caused damage that was both unforeseen and unintended." 281 Kan. 844, Syl. ¶ 6. The occurrence there was directly related to the construction and maintenance of the home.

Here, for AAIC to cover the Kernses' liability, there must have been an occurrence—defined as "[a]n accident, including continuous or repeated exposure to the same general harmful conditions, which results, during the policy period, in **bodily injury** or **property damage**." Like in *Lee Builders, Inc.*, the term accident is not

defined. But the Kansas Supreme Court seemed to approve of the definition in *Fidelity & Deposit of Maryland*—"'an undesigned, sudden, and unexpected event, usually of an afflictive or unfortunate character, and often accompanied by a manifestation of force.'" *Lee Builders, Inc.*, 281 Kan. at 852 (quoting *Fidelity & Deposit of Maryland*, 189 F. Supp. 2d at 1216); see *Harris v. Richards*, 254 Kan. 549, 553, 867 P.2d 325 (1994) (defining accident in the same way).

Using that definition, there is no occurrence here which would require AAIC to indemnify the Kernses for Krause's suit against them. As Krause states in their brief, their argument relies on "obligations assumed by the insured . . . entered into by the insured prior to an occurrence (the occurrence being the Krause closing on the home after receiving the Disclosure statement which they relied upon)." But, in our opinion, the closing was not an occurrence as defined by the policy. Krause closing on the home was not "'an undesigned, sudden, and unexpected event, usually of an afflictive or unfortunate character, and often accompanied by a manifestation of force.'" *Lee Builders, Inc.*, 281 Kan. at 852 (quoting *Fidelity & Deposit of Maryland*, 189 F. Supp. 2d at 1216). On the contrary, Krause closing on the home was designed, planned, and expected.

Alternatively, Krause argues that the occurrence was the Kernses' failure to "remedy or otherwise correct the errors and omissions from disclosure made by [the Kernses] in the Disclosure and failure to maintain the property in the condition as disclosed by [the Kernses] in the Disclosure which had suffered continuous or repeated exposure to the same general harmful conditions." But again, this does not seem to be an undesigned, sudden, and unexpected event. The Kernses made their disclosure and provided incorrect information. Krause does not explain how this was an accident on the Kernses' part.

Krause cites to a recent Missouri case, *American Family Mutual Ins. Co. v. Sharon*, 596 S.W.3d 135 (Mo. Ct. App. 2020), to support their argument that the misrepresentation itself constitutes an occurrence under the insurance policy. In *Sharon*, the home seller misrepresented that there had not been any water damage or

dampness in the house. However, shortly after buying the property, Sharon's new home experienced significant water leaks and water damage in the basement. Sharon sued the seller for negligent misrepresentation.

At the time of the sale, American Family provided homeowners insurance to the seller. The insurance policy was similar to the one in this case, requiring an occurrence and defining occurrence as "an accident, including exposure to conditions, which results during the policy period, in . . . property damage. Continuous or repeated exposure to substantially the same general harmful conditions is considered to be one occurrence." 596 S.W.3d at 140. The district court declared that the insurance policy did not require American Family to defend or indemnify the seller.

On appeal, the appellate court, relying on earlier Missouri caselaw, held that a negligent misrepresentation can be an "accident" as required under the policy. 596 S.W.3d at 144. But the court's analysis did not end there. For the seller to be covered under the policy, absent some exclusion, the accident must also result in property damage. 596 S.W.3d at 145.

The court went on to hold that Sharon could not "recover costs to repair defects that existed at the time of the sale because they are not damages to tangible property caused by the misrepresentation." 596 S.W.3d at 146. However, the court reasoned, Sharon's claim relied on the idea that the negligent misrepresentation "caused post-sale water damage because he would not have purchased the property but for the misrepresentations or he relied on the misrepresentations and as a result did not take corrective action that would have prevented said damage." 596 S.W.3d at 146.

Sharon is not binding precedent on this court. Nor is the case particularly instructive given the facts in this case. While Missouri courts have held that an accident, under homeowner insurance policies, can include a seller's negligent misrepresentations, that is not the situation in Kansas. Missouri courts do not seem to define an accident in the same way as Kansas courts. In Kansas, an accident in this context is "'an undesigned, sudden, and unexpected event, usually of an afflictive or unfortunate character, and often accompanied by a manifestation of force.'" See *Lee Builders, Inc.*, 281 Kan. at 852 (quoting *Fidelity & Deposit of Maryland*, 189 F. Supp. 2d at 1216). But even if we agreed with the Missouri court's

interpretation and held that the Kernses' misrepresentations constituted an accident under the policy, the remaining facts here differ from those in *Sharon*.

In this case, Krause's claims do not rely on damage that was incurred after the negligent misrepresentations. In contrast to the damage to the property in *Sharon*, Krause's claims focus solely on property damage that occurred before the Kernses made their disclosures. The applicability of *Sharon* is limited in this case. But there is Kansas law which is instructive.

Holding that AAIC was not required to insure the Kernses for their misrepresentations or omissions is consistent with prior Kansas caselaw. In *Bush v. Beal*, 26 Kan. App. 2d 183, Syl. ¶ 2, 987 P.2d 1103 (1999), a panel of our court held that an insurance policy did not cover a seller's negligent misrepresentations because the damage to the property was not caused by the misrepresentations.

In *Bush*, plaintiff Bush purchased a residence with undisclosed termite damage from Beal. After obtaining a default judgment against Beal, Bush initiated garnishment proceedings against Beal's insurance company. The insurance policy in *Bush* provided that coverage would exist for property damage caused by an occurrence. Occurrence was defined as "'an accident, including exposure to conditions, which results in: . . . property damage.'" 26 Kan. App. 2d at 184. The insurance company argued that the termites, not Beal's negligent misrepresentations, caused any property damage.

Our court agreed, holding that there was "no coverage under the [insurance] policy because the damage to the conveyed property was not caused by the negligent misrepresentations of Beal. The damage was caused by termites." 26 Kan. App. 2d at 185.

A similar situation exists here. Occurrence has a similar definition in this case as it did in *Bush*. And, like in *Bush*, the damage here was not the result of the Kernses' misrepresentations or omissions. The damage was caused by some other factor or factors not related to the misrepresentations or omissions. See 26 Kan. App. 2d at 184-85.

Krause attempts to differentiate this case from *Bush* by arguing that the Kernses assumed liability through their disclosure

statement and this constituted an occurrence. However, the assumption of liability present in the disclosure statement does not create an occurrence under the definition in the policy. The assumption of liability was not an accident.

Ultimately, we believe the district court did not err by granting AAIC's motion for summary judgment and holding there was no occurrence as defined by AAIC's policy. And the existence of such an occurrence is the necessary predicate for application of provisions allowing coverage under any other language of the policy.

Additionally, even if we would find the existence of an occurrence triggering coverage under the policy, we agree with the district court's final holding that the provisions of section C.7. are fatal to Krause's case. In language that seems particularly applicable to this case, C.7. excludes any "claim or liability arising, in whole, or in part out of any written or oral statement made, or which should have been made, by you or others on your behalf which is material to the sale of any property." Krause concedes that this language appears facially adverse to their claims, even as they try to craft a way around its provisions.

The upshot is that, even if we assume that Section C.1. would apply to situations where an insured assumes liability through an improper disclosure, Krause's argument that personal liability coverage applies under the exception in Section C.1. is not persuasive. Under Section C.1., liability assumed by the insured under a contract or agreement is not covered by the policy unless, in part, the contract is "entered into by the **insured** prior to an **occurrence**." Again, we believe none of the postdisclosure events qualify as occurrences under the language of AAIC's policy.

Finally, AAIC argues that even if Krause is correct in their arguments, AAIC would not cover the claims because other exclusions in the policy remove coverage. AAIC points to Section B.2. in the policy which states:

> "2. We do not cover loss or damage caused directly or indirectly by any of the following. Such loss or damage is not covered regardless of any other cause or event that contributes concurrently or in any sequence to the loss:
>
> . . . .

> f. Fraudulent, dishonest or criminal acts by or at the direction of an **insured**."

AAIC also raises other similar provisions but does not delve into as much detail regarding them. Regardless, these arguments are immaterial in this case because the district court did not err when it granted summary judgment in favor of AAIC because there was no occurrence and therefore no coverage under the policy.

Affirmed.

No. 121,572

STATE OF KANSAS, *Appellee*, v. CAESAR K. LOUIS, *Appellant*.

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Postsentence Motion to Withdraw Plea—Time Limit—Exception for Excusable Neglect.* Postsentencing, a district court may set aside a conviction and allow a defendant to withdraw a plea to correct manifest injustice. But a defendant must bring a postsentencing motion to withdraw plea within one year after the termination of appellate jurisdiction of the defendant's direct appeal. This time limit may be extended only upon an additional, affirmative showing of excusable neglect by the defendant.

2. SAME—*Exception by Law for Excusable Neglect—Definition.* Excusable neglect is a failure—which the law will excuse—to take some proper step at the proper time, not because of the party's own carelessness, inattention, or willful disregard of the court's process, but because of some unexpected or unavoidable hindrance or accident or because of reliance on the care and vigilance of the party's counsel or on a promise made by the adverse party.

3. SAME—*Excusable Neglect under Law—Application.* Excusable neglect requires something more than unintentional inadvertence or neglect common to all who share the ordinary frailties of mankind. Ignorance of the law does not constitute excusable neglect.

4. SAME—*Motion to Withdraw Plea—Allege Sufficient Grounds for Relief—Time Limit.* A movant must allege in a plea withdrawal motion itself sufficient grounds for relief, including the existence of excusable neglect when the motion is filed beyond the one-year time limit. If a defendant's plea withdrawal motion makes no showing of excusable neglect, then summary denial is proper.

5. SAME—*Motion to Withdraw Plea—Allegation of Ineffective Assistance of Counsel—Two-Part* Strickland *Test to Establish Manifest Injustice*. When a postsentence plea withdrawal motion alleges ineffective assistance of counsel, the defendant must meet the constitutional test for ineffective assistance of counsel to establish manifest injustice. Whether counsel was ineffective is determined by applying the two-part test in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), which requires an examination of whether the attorney's performance fell below an objective standard of reasonableness and whether there is a reasonable probability that, but for the attorney's errors, the result of the proceeding would have been different.

6. SAME—*Criminal Threat Made in Reckless Disregard Statute Found Unconstitutionally Overbroad.* According to the Kansas Supreme Court in

State v. Boettger, 310 Kan. 800, 450 P.3d 805 (2019), *cert. denied* 140 S. Ct. 1956 (2020), the portion of K.S.A. 2018 Supp. 21-5415(a)(1) proscribing criminal threat if a threat of violence is made in reckless disregard for causing fear is unconstitutionally overbroad because it can apply to statements made without the intent to cause fear of violence. The same reckless disregard portion of the earlier version of criminal threat contained in K.S.A. 2009 Supp. 21-3419(a)(1) is also unconstitutionally overbroad.

7. SAME—*Virginia v. Black—No Reference of First Amendment Allowing Conviction for Reckless Threat.* The United States Supreme Court in *Virginia v. Black*, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003), did not directly address whether the First Amendment tolerates a conviction for making a threat even though there was no intent to cause fear.

8. SAME—*Sentencing—Prior Convictions for Crime Found Unconstitutional—Not Applied to Criminal History Score.* According to K.S.A. 2019 Supp. 21-6810(d)(9), prior convictions for a crime that has since been declared unconstitutional by an appellate court shall not be used for criminal history scoring purposes.

9. SAME—*Legality of Sentence—Controlled by Law at Time of Sentencing—Date of Sentencing Pronouncement.* The legality of a sentence is controlled by the law in effect at the time of sentencing. A sentence is not illegal because of a change in the law that occurs after the sentence is pronounced. A party may seek and obtain a benefit of a change in the law during the pendency of a direct appeal, but a party moving to correct an illegal sentence is stuck with the law in effect at the time the sentence was pronounced.

10. SAME—*Reckless Criminal Threat Charge Found Unconstitutional—Defendant Not Entitled to Change if Sentence Final Before Finding of Unconstitutionality.* Under the facts of this case, the defendant is not entitled to the benefit of a change in the law as reckless criminal threat was declared unconstitutional in 2019 and the defendant's sentence became final in 2014. The defendant's sentence is not illegal, even though his criminal history contains a prior conviction for criminal threat, because at the time the sentence was imposed reckless criminal threat was not unconstitutional.

Appeal from Sedgwick District Court; JEFFREY SYRIOS, judge. Opinion filed October 23, 2020. Affirmed.

Caroline M. Zuschek, of Kansas Appellate Defender Office, for appellant.

Julie A. Koon, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before MALONE, P.J., BUSER and POWELL, JJ.

POWELL, J.: Caesar K. Louis appeals the district court's summary denial of his second motion to withdraw plea. He claims the

district court erred by not conducting an evidentiary hearing to determine whether excusable neglect justified the untimely filing of his motion. He also asserts, for the first time, that we should remand his case to the district court so it may determine if his prior 2009 conviction for criminal threat was wrongly included in his criminal history. Louis claims the presentence investigation (PSI) report is unclear as to whether this prior conviction was for reckless criminal threat, which has been declared unconstitutional by the Kansas Supreme Court in *State v. Boettger*, 310 Kan. 800, 450 P.3d 805 (2019), *cert. denied* 140 S. Ct. 1956 (2020). If so, Louis argues it was wrongly included in his criminal history, making his criminal history score incorrect and his sentence illegal.

After a careful review of the record, we conclude Louis fails to establish the requisite excusable neglect necessary to justify the untimely filing of his second motion to withdraw plea. Alternatively, we find no merit to his claim that his plea was not knowingly and understandably made. As to his allegation that his sentence is illegal, we hold Louis' sentence is not illegal because reckless criminal threat had not yet been declared unconstitutional by our Supreme Court at the time he was sentenced or before his sentence became final. Thus, this prior conviction was properly included in his criminal history and his sentence is not illegal. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

As part of a plea deal with the State, Louis pled guilty to a reduced charge of second-degree murder, aggravated burglary, and aggravated robbery. In his acknowledgement of rights and entry of plea, Louis said he knew of no reason his mental competence should be questioned. Louis listed that he was taking a drug called Haldol. When asked by the district court at the plea hearing, Louis explained Haldol helped him focus and kept his thoughts from racing. The medicine did not affect Louis' ability to understand his rights or comprehend his plea. The district court accepted Louis' plea and found him guilty.

Louis' PSI report included in his criminal history a prior 2009 conviction for criminal threat and calculated his criminal history score as C. On October 22, 2013, the district court sentenced Louis to a presumptive prison term of 345 months' imprisonment.

Louis appealed his sentence, and the Kansas Supreme Court summarily affirmed his presumptive sentence and dismissed his appeal. The mandate was issued on December 3, 2014.

On November 23, 2015, Louis filed a pro se motion to withdraw his guilty plea. Among other things, Louis claimed that Haldol impaired his mental faculties and rendered him incompetent, causing him not to knowingly and voluntarily enter his plea because he did not fully comprehend his circumstances and the consequences of his plea. Counsel was appointed to represent Louis at the plea withdrawal hearing.

At the hearing on his motion, Louis' counsel tried to raise a claim that plea counsel had been ineffective, but the State objected on the grounds that claim had not been included in Louis' original motion and was time barred. The district court agreed and refused to consider it.

Louis testified his plea counsel told him he would be convicted of first-degree murder if he did not plea and claimed plea counsel did not know how to defend him. Louis admitted he told the district court that Haldol did not affect his ability to understand his rights or aid in his defense. Louis testified that when he arrived at the El Dorado Correctional Facility, the medication was ended. Louis felt like he was waking up from a haze and was shocked his sentence was longer than what he believed he had received.

Dr. Katherine Girrens testified she prescribed Haldol to Louis because she believed he had episodic agitation and Haldol had low side effects. Dr. Girrens prescribed 1 mg out of a maximum dose of 100 mg.

Louis' plea counsel testified Haldol made Louis calmer and more focused. Plea counsel informed Louis that Louis' concession he was present at the house where the aggravated robbery and aggravated burglary took place would make it hard to avoid a felony murder conviction.

The district court denied Louis' plea withdrawal motion, finding Louis fairly, understandingly, knowingly, and voluntarily entered his guilty plea. The district court also found, despite its refusal to consider Louis' ineffective assistance of counsel claim, the evidence presented at the hearing did not establish plea counsel had been ineffective.

On March 25, 2019, Louis filed a second pro se motion to withdraw his plea. Louis again asserted his plea had not been knowingly made because he was suffering from a mental disorder and had been under the influence of psychotropic drugs. Louis further claimed his plea counsel had been ineffective for not developing a mental defect defense, not investigating his mental disorder, and not calling an expert witness vital to Louis' defense. Finally, Louis argued the trial court should have granted his earlier motion for new counsel due to conflict of interest. The district court summarily denied Louis motion, finding it had failed to present a substantial question of law or fact, was time barred, and was an abuse of remedy.

Louis timely appeals.

I. DID THE DISTRICT COURT ERR IN SUMMARILY DENYING LOUIS' PLEA WITHDRAWAL MOTION?

Louis argues the district court erred in summarily denying his second plea withdrawal motion and asserts a hearing should have held because his allegations of ineffective assistance of counsel required evidence to prove if they were true or false. Louis also argues the district court erred in finding his motion was time barred instead of analyzing the timeliness of his motion under the proper standard of excusable neglect. Finally, Louis claims his filing of successive motions was not an abuse of remedy because exceptional circumstances justified filing a second motion.

Standard of Review

When a district court summarily denies a defendant's postsentence plea withdrawal motion, we exercise de novo review because we "'have the same access to the motion, records, and files as the district court.' Like the district court, we must determine whether [the] 'motion, records, and files conclusively show that [the defendant] is entitled to no relief.' [Citations omitted.]" *State v. Moses*, 296 Kan. 1126, 1128, 297 P.3d 1174 (2013).

Analysis

Postsentencing, a district court may set aside a conviction and allow a defendant to withdraw a plea to correct manifest injustice.

K.S.A. 2019 Supp. 22-3210(d)(2). A defendant must bring a post-sentencing motion to withdraw plea within one year after the termination of appellate jurisdiction of the defendant's direct appeal. K.S.A. 2019 Supp. 22-3210(e)(1). This time limit may be extended "only upon an additional, affirmative showing of excusable neglect by the defendant." K.S.A. 2019 Supp. 22-3210(e)(2).

Louis' direct appeal ended on November 4, 2014, and the mandate was issued December 3, 2014. He filed his first plea withdrawal motion on November 23, 2015. This motion was timely, but after a hearing the district court denied it, and Louis did not appeal the district court's adverse ruling. Louis then filed his current motion to withdraw plea, his second, on March 25, 2019. Louis admits his motion falls well outside of the one-year time limit. Given the untimeliness of Louis' second motion, he was required to make an "affirmative showing of excusable neglect." See K.S.A 2019 Supp. 22-3210(e)(2).

"Excusable neglect requires 'something more than unintentional inadvertence or neglect common to all who share the ordinary frailties of mankind.' *Montez v. Tonkawa Village Apartments*, 215 Kan. 59, 65, 523 P.2d 351 (1974)." *State v. Gonzalez*, 56 Kan. App. 2d 1225, 1229, 444 P.3d 362 (2019), *rev. denied* 311 Kan. ___ (February 20, 2020). The *Gonzalez* panel relied on Black's Law Dictionary to define excusable neglect:

"'A failure—which the law will excuse—to take some proper step at the proper time (esp. in neglecting to answer a lawsuit) not because of the par[t]y's own carelessness, inattention, or willful disregard of the court's process, but because of some unexpected or unavoidable hindrance or accident or because of reliance on the care and vigilance of the party's counsel or on a promise made by the adverse party.' Black's Law Dictionary 1133 (9th ed. 2009)." 56 Kan. App. 2d at 1229-30.

"'[I]gnorance of the [law] does not constitute excusable neglect . . . .'" *State v. Davisson*, 303 Kan. 1062, 1069, 370 P.3d 423 (2016).

Unfortunately for Louis, his second and untimely motion to withdraw plea stumbles out of the gate because his motion makes no claim about why excusable neglect existed. His brief also makes no attempt to show excusable neglect. Louis acknowledges that unpublished opinions issued by other panels of our court have

held summary denial is appropriate when a plea withdrawal motion does not raise an additional, affirmative showing of excusable neglect. See *State v. Marshall*, No. 112,875, 2016 WL 197744, at *4 (Kan. App. 2016) (unpublished opinion); *State v. Baker*, No. 106,171, 2012 WL 5392094, at *2 (Kan. App. 2012) (unpublished opinion). But Louis argues those cases were based on a misinterpretation of *State v. Jackson*, 255 Kan. 455, 874 P.2d 1138 (1994).

According to Louis, *Jackson* did not examine the excusable neglect provision of the statute but, instead, held the manifest injustice provision did not require the appointment of counsel or an evidentiary hearing where the plea withdrawal motion did not raise substantial questions of law, triable issues of fact, or conclusively demonstrate the movant was not entitled to relief. Louis claims these unpublished cases erred by conflating the merits of a movant's claims with the procedures required to consider them. We disagree.

Jackson holds a movant must allege in the motion itself sufficient grounds for relief and due process does not require the appointment of counsel and a hearing unless that is done. 255 Kan. at 461. That same logic applies to the existence of excusable neglect. If a defendant's plea withdrawal motion makes no showing of excusable neglect, then due process does not require a hearing and summary denial is proper. See *Marshall*, 2016 WL 197744, at *4; *Baker*, 2012 WL 5392094, at *2; see also *State v. Williams*, 303 Kan. 605, 608, 366 P.3d 1101 (2016) (motion presented no reason to excuse delay); *Moses*, 296 Kan. at 1128 (motion made no attempt to affirmatively show excusable neglect). Because Louis' motion to withdraw plea failed to affirmatively show excusable neglect, it is untimely and procedurally barred. The district court did not err in denying the motion. Because we find Louis' motion to withdraw plea untimely, we need not address Louis' other allegations of procedural error concerning the denial of his motion.

Alternatively, even if Louis had established excusable neglect to allow consideration of his untimely motion, the district court could allow Louis to withdraw his plea only to correct manifest injustice. See K.S.A. 2019 Supp. 22-3210(d)(2). Manifest injustice is something "obviously unfair or shocking to the conscience." *Noyce v. State*, 310 Kan. 394, 402, 447 P.3d 355 (2019).

Although it did not use the term "manifest injustice" in denying the motion, the district court found Louis failed to present a substantial question of law or fact. A hearing on a plea withdrawal motion is limited only to those instances when the defendant raised substantial issues of fact or law. When the record conclusively shows the defendant is not entitled to relief, the motion must be denied. "Mere conclusions of the defendant are insufficient to raise a substantial issue of fact when no factual basis is alleged or appears in the record." *State v. Fritz*, 299 Kan. 153, 156, 321 P.3d 763 (2014).

Louis' motion provided several reasons why he should be allowed to withdraw his plea. On appeal, Louis has streamlined his argument to three allegations, all of which claim he did not receive effective assistance from his plea counsel: (1) Plea counsel failed to develop a mental defect defense; (2) plea counsel failed to investigate Louis' disability before recommending he enter a plea; and (3) plea counsel failed to consult an expert witness vital to Louis' defense.

When a postsentence plea withdrawal motion alleges ineffective assistance of counsel, the defendant must meet the constitutional test for ineffective assistance of counsel to establish manifest injustice. Whether counsel was ineffective is determined by applying *Strickland*'s two-part test and evaluating "(1) whether the attorney's performance fell below an objective standard of reasonableness and (2) whether there is a reasonable probability that, but for the attorney's errors, the result of the proceeding would have been different." *State v. Kelly*, 298 Kan. 965, 969, 318 P.3d 987 (2014); see *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A strong presumption exists that "counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.' When . . . the conduct at issue precede[s] a guilty plea, prejudice means a reasonable probability that, but for the deficient performance, the defendant would have insisted on going to trial instead of entering the plea. [Citation omitted.]" *Kelly*, 298 Kan. at 970.

Louis' ineffective assistance of counsel claims are lacking in the necessary details to satisfy manifest injustice. First, Louis

claims plea counsel failed to develop a mental defect defense. But Louis' motion does not explain what mental defect he suffered from. His motion claims he was incompetent to enter a guilty plea "given his mental health history which includes psychotic problems" but does not allege what that history or psychotic problems were.

Second, Louis' allegation that he has a mental defect contradicts the record. His acknowledgement of rights and entry of plea, which Louis signed, states he knew of no reason his mental competence should be questioned. At the plea hearing, the district court discussed the effects of Haldol with Louis. Louis told the district court Haldol helped him focus and did not affect his ability to understand his rights. When asked, Louis told the district court he understood the consequences of his guilty plea and the rights he was waiving. Until his second plea withdrawal motion, Louis never suggested he suffered from a mental defect. In fact, one of his claims in his first plea withdrawal motion was that he did not want to take Haldol because he was depressed and did not have a mental disease.

Louis also claims his plea counsel was ineffective for failing to investigate his disability before recommending he enter a plea. But again, Louis does not explain what his disability is. Presumably, Louis means his alleged mental defect. However, Louis failed to mention any alleged mental defect at his plea hearing or in his first plea withdrawal motion. The record also contradicts his claim because, at the first plea withdrawal hearing, plea counsel explained he saw no reason to investigate the effects of Haldol on Louis because plea counsel saw it had a positive effect on him. Plea counsel found Louis was able to focus during their discussions.

Louis' final ineffective assistance of counsel claim is plea counsel failed to consult an expert witness vital to Louis' defense. Louis does not explain who the expert witness is or how the witness was vital. Without more information, it is impossible to determine if plea counsel was deficient for not calling an expert witness. Additionally, as there was no actual trial, we fail to see how there was any opportunity for plea counsel to call an expert witness to testify.

Finally, we note the district court asked Louis at the plea hearing if he was satisfied with his counsel's representation. Louis informed the district court he was. Moreover, although the district court ruled Louis could not amend his first plea withdrawal motion to include a claim for ineffective assistance of counsel, evidence concerning plea counsel's competence was presented and the district court found based on this evidence that Louis was represented by competent counsel.

Louis' ineffective assistance of counsel claims lack merit. Louis cannot overcome the strong presumption that his counsel rendered adequate assistance given the record before us, and it cannot be said his plea counsel's performance fell below an objective standard of reasonableness. Thus, Louis is not entitled to relief. We affirm the district court's denial of Louis' second motion to withdraw plea.

II. IS LOUIS' SENTENCE ILLEGAL?

In his supplemental brief, Louis argues for the first time his sentence is illegal because one of the convictions used to calculate his criminal history score is for criminal threat. Not long ago, the Kansas Supreme Court held in *State v. Boettger*, 310 Kan. 800, 822, 450 P.3d 805 (2019), *cert. denied* 140 S. Ct. 1956 (2020), that the reckless disregard portion of the criminal threat statute was unconstitutional. Louis argues that because the criminal history listed in his PSI report fails to state whether his prior conviction was for intentional or reckless criminal threat, we should vacate his sentence and remand the case to the district court to determine whether Louis was previously convicted of intentional or reckless criminal threat.

Even though Louis is only now raising this issue, we may consider it because an illegal sentence claim may be raised at any time. See K.S.A. 2019 Supp. 22-3504(a); *State v. Dickey*, 301 Kan. 1018, 1034, 350 P.3d 1054 (2015). "Whether a sentence is illegal is a question of law subject to unlimited review." *State v. Fowler*, 311 Kan. 136, 139, 457 P.3d 927 (2020).

Analysis

"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. 2019 Supp. 21-6810(d)(9). Louis has a prior conviction for criminal

threat. At the time of his conviction, a criminal threat was any threat to:

"Commit violence communicated with intent to terrorize another, or to cause the evacuation, lock down or disruption in regular, ongoing activities of any building, place of assembly or facility of transportation, or in reckless disregard of the risk of causing such terror or evacuation, lock down or disruption in regular, ongoing activities." K.S.A. 2009 Supp. 21-3419(a)(1).

K.S.A. 2018 Supp. 21-5415(a)(1), the version addressed in *Boettger*, defines criminal threat as any threat to:

"Commit violence communicated with intent to place another in fear, or to cause the evacuation, lock down or disruption in regular, ongoing activities of any building, place of assembly or facility of transportation, or in reckless disregard of the risk of causing such fear or evacuation, lock down or disruption in regular, ongoing activities."

Louis acknowledges the criminal threat statute under which he was convicted is worded differently than the version found unconstitutional by the Kansas Supreme Court in *Boettger*.

In *Boettger*, the Kansas Supreme Court addressed a constitutional challenge to the portion of the 2018 version of the statute criminalizing a threat communicated "in reckless disregard of causing fear." 310 Kan. at 801. *Boettger* relied on *Virginia v. Black*, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003), to hold the reckless criminal threat portion of K.S.A. 2018 Supp. 21-5414(a)(1) was unconstitutionally overbroad:

"*Black* found specific intent was necessary to convict under the Virginia cross-burning statute at issue in that case. See 538 U.S. at 360. The Court stated '[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.' *Black*, 538 U.S. at 360. It strains the plain meaning of the Court's language to conclude that 'statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals' are not made 'with the intent of placing the [particular individual or group of individuals] in fear of bodily harm or death.' *Black*, 538 U.S. at 359-60. A person who '*means* to communicate a *serious* expression of an *intent* to commit an act of *unlawful violence*' is aware of the illegality of the violence he or she purportedly *intends* to commit and makes a *serious* expression of that intent, which he or she *meant* to communicate. See *Black*, 538 U.S. at 360. This definition conveys that the conduct is intentional.

"Under *Black*, 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. See K.S.A. 2018 Supp. 21-5202(h) and (j) (defining 'intentionally' and 'recklessly' in Kansas criminal statutes). The provision significantly targets protected activity. And its language provides no basis for distinguishing circumstances where the speech is constitutionally protected from those where the speech does not warrant protection under the First Amendment." *Boettger*, 310 Kan. at 822-23.

While the language of the 2009 version differs slightly from the 2018 version, the analysis does not change. When holding reckless criminal threat unconstitutional, our Supreme Court focused on the required mental state to be criminally convicted of making a threat and held specific intent was necessary to criminalize a threat. 310 Kan. at 822-23. The version of the statute under which Louis was convicted criminalized a threat committed with reckless disregard, just as the 2018 version did. *Boettger*'s requirement of specific intent also applies to the 2009 version of the statute. Therefore, the reckless disregard portion of K.S.A. 2009 Supp. 21-3419(a)(1) is also unconstitutionally overbroad.

Having established that the 2009 version of reckless criminal threat is also unconstitutional, we turn to Louis' criminal history. The State bears the burden of proving a defendant's criminal history by a preponderance of the evidence. *State v. Obregon*, 309 Kan. 1267, Syl. ¶ 4, 444 P.3d 331 (2019). Typically, a PSI report will satisfy the State's burden when a defendant does not object to the inclusion of an offense in his or her criminal history. K.S.A. 2019 Supp. 21-6814(b); *Obregon*, 309 Kan. at 1275. However, "more is required when the summary does not indicate which version" of an offense a defendant has committed, even when there is no objection. 309 Kan. at 1275. When the record on appeal does not contain substantial competent evidence to support a district court's classification of a prior conviction or, as in this case, the inclusion of a prior conviction in an offender's criminal history, a remand is required to allow the district court to determine the propriety of including the prior conviction in the offender's criminal history. See *State v. Ewing*, 310 Kan. 348, 359-60, 446 P.3d 463 (2019); *Obregon*, 309 Kan. at 1275-76. Here, Louis' PSI report

does not show whether his criminal threat conviction was reckless or intentional. Because of this, Louis argues a remand is required.

Standing in the way of Louis' effort at relief is the rule that the legality of a sentence is controlled by the law in effect at the time of sentencing. See *State v. Murdock*, 309 Kan. 585, 591, 439 P.3d 307 (2019) (*Murdock II*). Moreover, a sentence is not illegal because of a change in the law that occurs after the sentence is pronounced. K.S.A. 2019 Supp. 22-3504(c)(1); see also *Murdock II*, 309 Kan. at 590 ("K.S.A. 22-3504 does not say a sentence may *become* illegal at any time."). The Kansas Supreme Court made clear in *Murdock II* that the legality of a sentence is fixed at one point in time—at the pronouncement from the bench:

> "Today, we clearly state what we gestured toward in [*State v.*] *Lee*[, 304 Kan. 416, 418, 372 P.3d 415 (2016)]: the legality of a sentence under K.S.A. 22-3504 is controlled by the law in effect at the time the sentence was pronounced. The legality of a sentence is fixed at a discrete moment in time—the moment the sentence was pronounced. At that moment, a pronounced sentence is either legal or illegal according to then-existing law. Therefore, for purposes of a motion to correct an illegal sentence, neither party can avail itself of subsequent changes in the law.
>
> ". . . Put simply, a party may seek and obtain the benefit of a change in the law during the pendency of a direct appeal, but a party moving to correct an illegal sentence is stuck with the law in effect at the time the sentence was pronounced." 309 Kan. at 591-92.

Although Louis is not on direct appeal and normally would not be eligible to benefit from a change in the law, Louis uses his supplemental brief to launch a preemptory strike against this argument by claiming it does not matter that he is not on direct appeal. Louis asserts the reckless form of criminal threat was potentially unconstitutional due to the United States Supreme Court's opinion in *Black* in 2003, prior to his conviction for criminal threat and well before 2019 when the Kansas Supreme Court issued its *Boettger* opinion.

Boettger was the first time the Kansas Supreme Court considered whether a conviction for recklessly making a threat violated the First Amendment to the United States Constitution, though a panel of our court rejected the argument in 2001—two years before *Black*. *Boettger*, 310 Kan. at 808. Our Supreme Court also noted that the United States Supreme Court never explicitly held whether criminalizing the reckless making of a threat violated the

First Amendment. In fact, post-*Black* courts have reached different results in determining what type of intent is necessary to pass constitutional muster. See 310 Kan. at 809. Our Supreme Court held *Black* explained the necessary intent to prosecute a threat without violating the First Amendment, but it noted *Black* itself "did not directly address whether the First Amendment tolerates a conviction for making a threat even though there was no intent to cause fear." *Boettger*, 310 Kan. at 812. Ultimately, our Supreme Court held K.S.A. 2018 Supp. 21-5415(a)(1) unconstitutionally overbroad because it criminalizes more than the true threats allowed under *Black* and potentially punishes constitutionally protected speech. *Boettger*, 310 Kan. at 822; see *State v. Johnson*, 310 Kan. 835, 842, 450 P.3d 790 (2019).

The *Boettger* court did not hold that reckless criminal threat was declared unconstitutional in *Black*. Our Supreme Court noted *Black* never addressed whether a person could be convicted for making a threat without an intent to cause fear. *Boettger* also contradicts Louis' claim by reviewing the disagreements among courts on that issue following *Black*. See *Boettger*, 310 Kan. at 812-16. Contrary to Louis' argument, reckless criminal threat was not held unconstitutional in 2003 but in 2019, when the Kansas Supreme Court applied *Black*'s analysis to K.S.A. 2018 Supp. 21-5415(a)(1) and held the reckless disregard portion of the statute was unconstitutionally overbroad. *Boettger*, 310 Kan. at 822.

Because *Boettger* is a subsequent development in the law, occurring after the end of Louis' direct appeal, Louis is not entitled to its benefits. Louis is stuck with the law at the time of his sentencing. When he was sentenced in 2013, both the intentional and reckless disregard versions of criminal threat were constitutional. Therefore, it does not matter whether Louis' prior conviction was for reckless or intentional criminal threat; the inclusion of either one in his criminal history was proper. Thus, Louis' sentence is not illegal.

Affirmed.

No. 121,619

STATE OF KANSAS, *Appellee*, v. BRITTANY R. SMITH, *Appellant*.

SYLLABUS BY THE COURT

1. SEARCH AND SEIZURE—*Warrantless Search and Seizure Invalid—Exception*. Under the Fourth Amendment to the United States Constitution and section 15 of the Kansas Constitution Bill of Rights, warrantless searches and seizures by law enforcement officers are deemed unreasonable and invalid unless a recognized exception to the warrant requirement applies.

2. SAME—*Fourth Amendment's Prohibition of Warrantless Searches—Emergency-Aid Exception.* Kansas courts have recognized a limited exception to the Fourth Amendment's prohibition of warrantless searches when a law enforcement officer is aiding a person who is seriously injured or seriously threatened with injury. Under certain circumstances, this emergency-aid exception to the warrant requirement permits not only a search of a residence but also a search of personal belongings.

3. SAME—*Emergency-Aid Exception—Application.* The emergency-aid exception applies when (1) law enforcement officers have an objectively reasonable basis to believe someone is seriously injured or imminently threatened with serious injury and (2) the manner and scope of any ensuing search is reasonable.

4. SAME—*Warrantless Search—Emergency-Aid Exception—Limited Authority*. The emergency-aid exception is limited in time and scope. Under this limited authority, an officer may take reasonable steps to determine whether someone needs assistance and to provide that assistance. This authority ends when the emergent need dissipates—when it is no longer reasonable to believe a person needs emergency assistance.

5. SAME—*Warrantless Search—Emergency-Aid Exception—Reasonableness is Touchstone.* There is no bright-line demarcation that defines when an officer's limited authority to conduct a warrantless search under the emergency-aid exception ends. Instead, the touchstone of a court's analysis is reasonableness: whether officers reasonably believe the search is necessary to provide emergency assistance and whether the search itself is reasonable in manner and scope.

Appeal from Reno District Court; TRISH ROSE, judge. Opinion filed October 23, 2020. Affirmed.

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

Natasha Esau, assistant district attorney, *Keith Schroeder*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before WARNER, P.J., STANDRIDGE and GARDNER, JJ.

WARNER, J.: The Fourth Amendment to the United States Constitution protects our right to be free from unreasonable searches. In general, this means that law enforcement officers must obtain a warrant before initiating a search of a person or property. But in some instances, other considerations—such as the need to provide emergency assistance to someone who has an immediate and serious medical condition—justifies a warrantless search. This case presents such an instance.

Brittany Smith appeals her convictions of possession of methamphetamine, possession of paraphernalia, and driving under the influence, claiming the district court should have suppressed evidence obtained when police officers searched her purse without a warrant. That search occurred after the officers found Smith unresponsive in a running car parked in someone else's driveway. After failing to rouse Smith, the officers removed her from the car, but she remained largely unresponsive and appeared to be suffering an overdose. When emergency medical personnel arrived at the scene, the officers searched Smith's purse, looking for her identification and any information regarding substances she may have ingested. Under these circumstances, we—like the district court—conclude the scope of the officers' warrantless search was reasonable and confined to assist in addressing Smith's medical emergency. Thus, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In the early morning hours of February 18, 2018, two officers from the Hutchinson Police Department—Officer Hannah Brown and Sergeant Eric Buller—went to check on a woman who had apparently fallen asleep in her car. The sleeping woman, later identified as Smith, had been delivering the local paper when she backed into a residential driveway; a concerned neighbor called the police after Smith remained in the running car for 45 minutes, hunched over behind the wheel.

The officers approached the vehicle and began knocking on the slightly cracked driver's side window, attempting to wake Smith. When Smith did not rouse, Officer Brown said, "I'm gonna open the door. She's not responding." The officers continued to

bang on the window for several minutes, but Smith remained unresponsive. Upon seeing paperwork on top of a bundle of newspapers with the name "Brittany Smith" on it, Officer Brown called dispatch and attempted to confirm Smith's identity; she stated "Brittany Smith is the paper carrier listed for this route" and then asked dispatch to "locate anything in house for a Brittany Smith." Dispatch informed Officer Brown that there were two Brittany Smiths in the system with similar dates of birth, heights, weights, and physical descriptions.

While Officer Brown spoke to dispatch, Sergeant Buller unsuccessfully attempted to pull down the driver's side window but managed to widen the opening. The officers then attempted to use a lockout kit—essentially a stick with a hook—to open the car door. Sergeant Buller poked Smith in the head with the lockout tool numerous times, but she remained unresponsive. Another officer told Officer Brown over the radio that he was familiar with a Brittany Smith who had a history of opioid use, so the officers decided to call EMS, concerned that Smith was potentially overdosing. At that time, Officer Brown was still not "100 percent" certain about which Brittany Smith she was dealing with.

The officers were eventually able to get the car door open with the lockout tool. When the door opened, Smith slumped forward and Officer Brown pulled her up by her hoodie; Smith put her hands to her face and gradually began to wake up, but she remained unresponsive and continued to cover her face. Hutchinson firefighters and paramedics soon arrived and began to provide Smith with emergency medical care. Officer Brown asked her if her name was "Brittany Smith"; Smith nodded in response, but Officer Brown was still unsure which Brittany Smith she was.

As the emergency medical personnel took over, Officer Brown stated she was "familiar with [Smith]" and mentioned the possibility that Smith was overdosing on opioids. Officer Brown then briefly patted Smith down to check for any needles; Smith remained confused and largely unresponsive as she mumbled short, incoherent responses to questions from Officer Brown and EMS.

As the firefighters and paramedics were caring for Smith, Officer Brown stated, "Where's her purse? I'm gonna try to find her ID." Officer Brown then asked Smith for consent to search her

purse to confirm her identity and "[t]o make sure she was treated correctly [by EMS] and make sure she—it was her." At this point, Officer Brown had confirmed Smith's birthday with dispatch prior to searching the purse and "had a strong idea of who she was." Officer Brown later testified that the main reason she searched the purse was to look for Smith's identification. But Officer Brown also stated she was looking for prescriptions in Smith's purse, trying to help inform EMS about what Smith might have overdosed on.

When looking through Smith's purse, Officer Brown found prescription and non-prescription medications and a pipe covered with "crystal-like residue and burnt residue." Smith's identity was confirmed via the prescription medications, but Officer Brown never found her driver's license. By the time Officer Brown finished the search of the purse, Smith had been loaded in the ambulance.

After Smith headed to the hospital in the ambulance, Officer Brown began searching Smith's car, looking "[f]or identification and any substance, prescriptions, nonprescription that she might have ODd on." Officer Brown found a spoon with a cotton ball and residue on it under the car's radio. The officer then went to speak to Smith at the hospital, advised her of her *Miranda* rights, and interviewed her about the drugs and paraphernalia found in the purse and car.

The State charged Smith with one count of possession of methamphetamine, one count of possession of paraphernalia, and one count of driving under the influence. Smith filed a motion to suppress the evidence seized from her purse and car, arguing that the officers' continued search of her vehicle and purse was unlawful because she was too intoxicated to consent to the search and that the search was not justified as part of the officer's efforts to provide her with emergency aid. Smith also moved to suppress the statements she made at the hospital, contending she was too intoxicated to knowingly and voluntarily waive her *Miranda* rights.

The court suppressed the evidence seized from Smith's car and elicited from her statements in the hospital. But it denied Smith's motion with regard to the evidence found in her purse, explaining:

"The officers had been given the information that Ms. Smith had arrived recently, so apparently had parked in a driveway and was definitely incapacitated and she was in an operable vehicle and that triggers the public safety exception, not only for herself, but the rest of the public. . . . I'm not questioning at the preliminary the officer testified she looked only for I.D. but today she testified that she was looking in the purse for prescriptions also, and it is reasonable to me in the course of a safety stop to find something that might help the hospital treat Ms. Smith, because she definitely needed treatment. And so assuming the officer was also looking for evidence of prescriptions, or whatever Ms. Smith had consumed, if she had, to me the purse search is valid."

Smith's case proceeded to a bench trial on stipulated facts. She was convicted of all charges. Because of Smith's participation in drug treatment and her recent progress in refraining from drug use, the district court granted Smith a departure sentence, suspending the 30-month controlling sentence and imposing 12 months' probation. Smith now appeals.

DISCUSSION

On appeal, Smith renews her arguments from her motion to suppress, claiming Officer Brown's search of her purse after emergency medical personnel arrived at the scene was unlawful. Smith argues that the evidence obtained from search should have been excluded and urges this court to remand the case for a new trial without the pipe and methamphetamine found in her purse.

We review the factual underpinnings of a district court's decision on a motion to suppress evidence for substantial competent evidence and its ultimate legal conclusion de novo. *State v. Doelz*, 309 Kan. 133, 138, 432 P.3d 669 (2019). When, as here, the material facts are not in dispute, the constitutionality of a search is a question of law over which our review is unlimited. *State v. Stevenson*, 299 Kan. 53, 57-58, 321 P.3d 754 (2014). Although a defendant initiates a constitutional challenge to a search or seizure by filing a motion to suppress the evidence in question, the State has the burden to prove any challenged police conduct was permissible. K.S.A. 22-3216(2); *State v. Cleverly*, 305 Kan. 598, 605, 385 P.3d 512 (2016).

The Fourth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment's Due Process Clause, protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures." Section 15 of the Kansas Constitution Bill of Rights provides "the same protection from unlawful government searches and seizures as the Fourth Amendment." *State v. Daniel*, 291 Kan. 490, 498, 242 P.3d 1186 (2010). Under both the Fourth Amendment and section 15, warrantless searches and seizures by law enforcement officers are deemed unreasonable and invalid unless a recognized exception to the warrant requirement applies. *Doelz*, 309 Kan. at 140.

Relevant here, Kansas courts have recognized a limited exception to the Fourth Amendment's prohibition of warrantless searches when a law enforcement officer is aiding a person who is "seriously injured or imminently threatened with injury." *State v. Neighbors*, 299 Kan. 234, 248, 328 P.3d 1081 (2014). In *Neighbors*, our Kansas Supreme Court analyzed the contours of this emergency-aid exception in the context of determining when officers could enter a person's residence without a warrant. Adopting the United States Supreme Court's rationale in *Mincey v. Arizona*, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978), *Neighbors* found that the emergency-aid exception applies when "(1) law enforcement officers enter the premises with an objectively reasonable basis to believe someone inside is seriously injured or imminently threatened with serious injury; and (2) the manner and scope of any ensuing search once inside the premises is reasonable." 299 Kan. at 249.

Neighbors explained that the emergency-aid exception to the warrant requirement "gives an officer limited authority to 'do no more than is reasonably necessary to ascertain whether someone is in need of assistance and to provide that assistance.'" 299 Kan. at 251 (quoting 3 LaFave, Search and Seizure § 6.6[a], p. 622 & n.65). Thus, when entering a residence, as the officers did in *Neighbors*, an officer is "limited in the areas of the premises that can be searched" to places where the person needing assistance may be found. 299 Kan. at 251-52. And "the right of entry dissipates once an officer confirms no one needs assistance or the assistance has been provided." 299 Kan. at 252. As these considerations indicate, the primary test in determining whether the emer-

gency-aid exception applies is whether the officers reasonably believe that a person in the searched area needs emergency assistance. See *Mincey*, 437 U.S. at 392.

Typically, courts discuss the emergency-aid exception in cases that involve a "trespass investigation"—police entering a person's home in response to an emergency inside. See, e.g., *Neighbors*, 299 Kan. at 250-53. This case does not involve such facts. But the district court found that the reasoning behind that exception was equally applicable to Officer Brown's search of Smith's purse due to her medical emergency. Other jurisdictions, citing *Mincey*, have recognized a medical-emergency exception justifying a warrantless search of a person's purse or wallet when that person is found in an unconscious or semi-conscious condition. See, e.g., *People v. Wright*, 804 P.2d 866, 870 (Colo. 1991) (finding the exception applied when there is "a real and immediate danger to the life or safety of another" and "the officer's purpose in conducting the search [is] to render aid or assistance to the endangered person").

Although Kansas courts have not previously applied the emergency-aid exception in this context, the Kansas Supreme Court peripherally discussed the matter in *State v. Evans*, 308 Kan. 1422, 430 P.3d 1 (2018). In *Evans*, the State argued that law enforcement officers were justified in searching a wallet to look for a person's driver's license because they had a statutory duty to complete an accident report—that is, the officer's search of a wallet was necessary to verify the driver's identity. Our Kansas Supreme Court disagreed, finding that

> "the circumstances did not present an exigency or an emergency that required an immediate verification of Evans' identity or give rise to the emergency doctrine exception to the warrant requirement. Compare *United States v. Dunavan*, 485 F.2d 201 (6th Cir. 1973) (upholding search when driver was foaming at the mouth and unable to talk and officer was seeking information explaining nature of the defendant's condition and the best means of treating it), and *Evans v. State*, 364 So.2d 93 (Fla. Dist. Ct. App. 1978) (holding officer lawfully searched purse for medical information that would account for driver's condition of being unable to communicate in any way), with *Morris v. State*, 908 P.2d 931 (Wyo. 1995) (holding search of effects not permissible when individual was conscious and able to ask and answer questions)." *Evans*, 308 Kan. at 1436.

The court's discussion in *Evans* focused on the plain-view doctrine. But it also noted there was no exigent need for the officers to verify Evans' identity and—unlike a situation where a person is found unconscious or is unable to communicate with officers—no medical emergency necessitated the search. 308 Kan. at 1436-37; see also 308 Kan. at 1437 (citing *Wright*, 804 P.2d at 871) (observing that "the Legislature did not impose a duty on officers that would justify invading the privacy guaranteed by the Fourth Amendment when . . . *the driver is conscious and able to answer the officer's questions about her identity*"). (Emphasis added.)

Thus, although the emergency-aid exception did not apply in *Evans*, the court recognized that there may be exigent circumstances where an officer may be justified in searching a purse or other personal effect to address an emergency. And Kansas law enforcement officers may search a person's purse or wallet to seek information if that person is unconscious or uncommunicative and there are exigent circumstances, such as a medical emergency, necessitating the search. That is, the emergency-aid exception to the warrant requirement may permit not only a search of a residence but also a search of personal belongings. In such circumstances, the emergency-aid exception applies when (1) law enforcement officers have an objectively reasonable basis to believe someone is seriously injured or imminently threatened with serious injury and (2) the manner and scope of any ensuing search is reasonable. See *Neighbors*, 299 Kan. at 249.

With this background, we must analyze the district court's conclusion that Officer Brown's search of Smith's purse fell within the emergency-aid exception to the warrant requirement. In other words, we must determine whether Officer Brown had an objectively reasonable basis to believe Smith's life or safety was in real and immediate danger and, if so, whether the manner and scope of the search of Smith's purse was reasonable. *Neighbors*, 299 Kan. at 249; *Wright*, 804 P.2d at 870.

When Officer Brown arrived at the scene, Smith was unconscious in her vehicle. Smith could have been sleeping, but she did not respond to the officers' repeated pounding on the window, shouting, or even their poking of her head with the lockout tool.

The officers were also informed that a woman named "Brittany Smith" had a history of opioid abuse, which—along with her unresponsiveness—led the officers to believe that she had potentially overdosed and was in need of immediate medical assistance. Even after the officers opened the door to the car and were able to rouse Smith, she remained incoherent and was unable to hold up her head; she struggled to respond to basic questions. While Smith was somewhat conscious, her condition not only made the officers' and paramedics' communication with her difficult but further suggested her need for immediate medical attention. Under these circumstances, we conclude Officer Brown's belief that Smith's life or safety was in immediate danger due to a potential overdose was objectively reasonable. Accord *State v. McKenna*, 57 Kan. App. 2d 731, 737-40, 459 P.3d 1274, *rev. denied* 312 Kan. ___ (August 31, 2020) (discussing similar steps in the context of a public-safety stop and concluding the officer's actions were reasonable).

Smith does not dispute that Officer Brown had an objectively reasonable basis to believe that she was suffering a medical emergency and was in need of urgent care. She also "does not take issue with Brown's initial retrieval of the purse." Instead, she argues that this emergent need dissipated when emergency medical personnel arrived at the scene and began administering care. In other words, Smith contends that Officer Brown's continued search of her purse exceeded the scope of the exigency after paramedics and firefighters arrived at the scene.

It is true, as our Kansas Supreme Court noted in *Neighbors*, that the emergency-aid exception is limited in time and scope. Under this limited authority, an officer may take reasonable steps to determine whether someone needs assistance and to provide that assistance. 299 Kan. at 251; see also *Mincey*, 437 U.S. at 393 (cautioning that a warrantless search "must be 'strictly circumscribed by the exigencies which justify its initiation'"). This authority ends when the emergent need dissipates—when it is no longer reasonable to believe that a person needs emergency assistance. See *Neighbors*, 299 Kan. at 254.

At the same time, Smith provides no legal authority to support her contention that the exigency justifying a warrantless search dissipates as soon as other medical personnel are present. Such a

rule would undermine the purpose of the emergency-aid doctrine—a recognition that the need to protect or preserve life or avoid serious injury, in certain circumstances, supersedes a person's right of privacy—and would counteract the case-by-case analysis Kansas courts employ when determining whether the exception applies. We conclude there is no bright-line demarcation that defines when officers' limited authority to conduct a warrantless search under the emergency-aid exception ends. Instead, the touchstone of a court's analysis is reasonableness: whether the officers reasonably believe the search is necessary to provide emergency assistance and whether the search itself is reasonable in manner and scope.

Officer Brown searched Smith's purse seeking Smith's identity and any information that would explain the nature of Smith's condition and the best means of treating it. When the officer made this decision, the paramedics were beginning to treat Smith. But Smith's medical emergency and the need to provide her assistance did not abruptly end once the ambulance was on the scene.

During Officer Brown's search, Smith was only semi-conscious and was unable to effectively communicate with the emergency personnel on the scene. The scope of Officer Brown's search was tailored to helping aid the paramedics and firefighters to treat Smith more effectively. Unlike the officers in *Evans*, Officer Brown testified she searched Smith's purse to look for any substance, prescription or non-prescription, Smith might have taken to help the paramedics render proper medical treatment. Officer Brown explained that the search for Smith's driver's license was not simply to identify her for a police report but to look up whether she had any specific medical conditions—i.e., to help the paramedics render aid. And Officer Brown's search, which was aided by one of the paramedics, did reveal a prescription that helped to positively identify Smith.

As with any exception to the Fourth Amendment's warrant requirement, the scope of any search under the emergency-aid exception must be strictly circumscribed by a real exigency justifying the warrantless intrusion. Here, Officer Brown's actions were reasonably tailored to her attempts to aid emergency medical personnel in rendering appropriate care and treatment to Smith. We

conclude Officer Brown's search of Smith's purse was justified by the emergency-aid exception to the warrant requirement. Thus, the district court correctly denied Smith's motion to suppress.

Affirmed.

No. 121,380

STATE OF KANSAS, *Appellee,* v. JASON FLOYD CASTLE, *Appellant.*

SYLLABUS BY THE COURT

1. CIVIL PROCEDURE—*Mootness Determination—Appellate Review*. The determination of whether a case is moot is subject to unlimited review by an appellate court.

2. SAME—*Mootness Doctrine—Application*. A case is moot when a court determines that it is clearly and convincingly shown the actual controversy has ended, the only judgment that could be entered would be ineffectual for any purpose, and it would not impact any of the parties' rights.

3. COURTS—*Mootness Finding by Appellate Court—Appellate Review*. The Kansas Supreme Court has 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. But an appellate court must carefully scrutinize the reliability of evidence before considering it a basis for appellate fact-finding.

4. SAME—*Mootness Finding by Appellate Court—Requirement of Reliable Evidence to Support Finding*. A written certification from the Kansas Department of Corrections records custodian is reliable evidence that may support appellate fact-finding for the limited purpose of deciding whether an appeal is moot.

5. CRIMINAL LAW—*Mootness in Sentencing Appeal—Factors for Determination—Burden on Defendant.* A defendant's release from custody does not always establish mootness in a sentencing appeal. An appellate court must also look to other factors to determine whether judgment would be ineffectual for any purpose. But the burden is on the defendant to show the existence of a substantial interest that would be impaired by dismissal or that an exception to the mootness doctrine applies.

Appeal from Jackson District Court; NORBERT C. MAREK JR., judge. Opinion filed November 6, 2020. Appeal dismissed.

Korey A. Kaul, of Kansas Appellate Defender Office, for appellant.

Natalie Chalmers, assistant solicitor general, and *Derek Schmidt*, attorney general, for appellee.

Before ARNOLD-BURGER, C.J., MALONE, J., and WALKER, S.J.

MALONE, J.: In this direct sentencing appeal, Jason Floyd Castle claims the district court erred by classifying his two prior California convictions of sex crimes as person felonies when calculating his criminal history score. The State disagrees and argues that Castle's release from prison moots this appeal. To support its mootness claim, the State has filed with this court a notice of change in custodial status under Kansas Supreme Court Rule 2.042 (2020 Kan. S. Ct. R. 18) with a written certification from the Kansas Department of Corrections (KDOC) records custodian stating Castle has been released from custody. Castle contends the State has failed to meet its burden to show he is released from custody, but he does not otherwise argue that his appeal is not moot.

The Kansas Supreme Court has 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. We hold that a written certification from the KDOC records custodian is reliable evidence that may support appellate fact-finding for the limited purpose of deciding whether an appeal is moot. Without any evidence offered by Castle challenging the accuracy of the information in the KDOC certification, we accept the written certification as reliable evidence sufficient to show that Castle is no longer in prison. Because Castle is now on postrelease supervision and he makes no claim that his appeal challenging his criminal history score has an impact on his current or future rights, we dismiss his appeal as moot.

FACTUAL AND PROCEDURAL BACKGROUND

On January 24, 2019, pursuant to a plea agreement, Castle pled no contest to one count of possession of methamphetamine and the district court found him guilty. The presentence investigation report showed a criminal history score of B based on California convictions in 2002 for rape and oral copulation, which were scored as person felonies. Castle filed a written objection to his criminal history score, arguing that the California crimes should not be classified as person felonies because the elements of those crimes were broader than the comparable Kansas offenses. If the

district court classified the California crimes as nonperson felonies, Castle's criminal history score would be F, leading to presumptive probation instead of a presumptive prison sentence.

The district court held a sentencing hearing on May 24, 2019, and Castle renewed his objection to his criminal history score. The district court overruled Castle's objection to his criminal history score but granted his motion for a downward durational departure and sentenced him to 17 months' imprisonment and 12 months' postrelease supervision. The term of Castle's sentence was the same that he would have received with a criminal history score of F, but the district court imposed the presumptive imprisonment based on Castle's criminal history score of B. Castle timely appealed his sentence.

Proceedings on appeal

This appeal was docketed on June 19, 2019. Castle filed his appellate brief on December 30, 2019, claiming the district court erred by classifying his California convictions of sex crimes as person felonies when calculating his criminal history score. Castle asked to be resentenced under a criminal history score that would allow for presumptive probation. The State filed its appellate brief on April 9, 2020, arguing that the district court did not err in sentencing Castle. The State also asserted that Castle's earliest date of release from prison was April 25, 2020, so this appeal "will likely become moot a few weeks after the State completes its brief." The State argued that "once Castle has served his entire prison sentence, he cannot obtain relief." Castle did not file a reply brief or otherwise respond to the State's mootness argument.

On April 28, 2020, the State filed a "Notice of Change in Custodial Status," alleging that according to the KDOC website, commonly called KASPER, Castle was placed on postrelease supervision on April 24, 2020, so this appeal is moot. On June 8, 2020, this court ordered Castle to show cause why the appeal should not be dismissed as moot. But on June 23, 2020, before Castle responded, this court withdrew its order because of the Kansas Supreme Court's June 19, 2020 decisions in *State v. Roat*, 311 Kan. 581, 466 P.3d 439 (2020), and *State v. Yazell*, 311 Kan. 625, 465

P.3d 1147 (2020). We will address those decisions in detail in this opinion.

Five days after the Kansas Supreme Court issued its opinions in *Yazell* and *Roat*, the State filed a second "Notice of Change in Custodial Status," arguing that its previous notice was accurate and attaching a "Certification of Time Served" the State had obtained from the KDOC that stated Castle was released on "[p]arole" on April 24, 2020. The certification included the following signed statement:

"I, the undersigned Vickie Belanger, of lawful age being duly sworn, do hereby, declare and certify that I am designated as a Public Service Administrator for the Kansas Department of Corrections and by virtue of my said office I am the legal keeper of all official records and files of the Office of the Secretary of Corrections. The foregoing is true and correct information from the records of: **CASTLE, Jason F. KDOC# 122171**."

On June 30, 2020, this court ordered Castle to show cause why this court should not dismiss his appeal as moot. In his response, Castle contended that the State had failed to meet its burden under *Yazell* to prove his release. Castle also pointed out that Kansas Supreme Court Rule 5.05(b) (2020 Kan. S. Ct. R. 32) addresses involuntary dismissals and states: "If dismissal depends on an issue of fact, the appellate court may remand the case to the district court with direction to make findings of fact." Thus, Castle argued, if mootness depends on his custodial status, it depends on a question of fact, so this court should remand to the district court for an evidentiary hearing.

The State replied to Castle's response, complaining that if the KDOC certification is insufficient under *Yazell*, the State "is unclear how it can ever avoid an evidentiary hearing on whether a case is moot." After noting that Castle's counsel did "nothing to refute the fact that [Castle] is not in prison," the State argued that remand for an evidentiary hearing on a fact that is not disputed would waste judicial resources. The State asked that this court hold any necessary evidentiary hearing itself and order Castle's appellate counsel to represent him at any such hearing.

In minute orders dated July 15, 2020, this court noted the response and reply, retained the appeal, and stated: "The panel of judges assigned to this case may revisit the issue of mootness." On

August 31, 2020, the State filed a "Motion to Determine if an Evidentiary Hearing is Needed to Decide if Castle Remains in Prison." This motion informed this court that "what the State actually wants is a ruling by this Court on whether an evidentiary hearing is required that can be reviewed by the Kansas Supreme Court." The State sought clarification on whether the KDOC certification was sufficient to establish Castle's custodial status, "either in an order making the finding of the court clear or in the court's decision on this appeal."

Castle responded to the motion, arguing that an evidentiary hearing in this court would be improper because this court is not a fact-finding court. On September 9, 2020, this court issued an order stating the hearing panel would address the issue in its opinion.

IS THE APPEAL MOOT?

Castle's substantive claim on appeal is that the district court erred by classifying his two prior California convictions of sex crimes as person felonies when calculating his criminal history score. But the State claims the appeal is moot because Castle has been released from prison. The determination of whether a case is moot is subject to unlimited review by an appellate court. *Roat*, 311 Kan. at 590.

> "A case is moot when a court determines that '"it is clearly and convincingly shown the actual controversy has ended, the only judgment that could be entered would be ineffectual for any purpose, and it would not impact any of the parties' rights."'
>
> . . . .
>
> "The party asserting mootness generally bears the initial burden of establishing that a case is moot in the first instance. In an appeal solely challenging a sentence, the party asserting mootness may establish a prima facie showing of mootness by demonstrating that the defendant has fully completed the terms and conditions of his or her sentence. The burden then shifts to the party opposing the mootness challenge to show the existence of a substantial interest that would be impaired by dismissal or that an exception to the mootness doctrine applies. [Citations omitted.]" *Roat*, 311 Kan. at 584, 593.

To support its claim that Castle has been released from prison, the State has filed with this court a notice of change of custodial status under Supreme Court Rule 2.042 with a written certification from the KDOC records custodian stating Castle has been released

from custody. Castle contends the State has failed to meet its burden to show he is released from custody. Castle argues that whether he is released from custody is a question of fact, so this court should remand to the district court for an evidentiary hearing to resolve this issue.

Our Supreme Court recently addressed the mootness issue in *Yazell* and *Roat*, so we will address those decisions in detail. While Corey Leroy Yazell's appeal from his probation revocation was in the Court of Appeals, a panel of this court sua sponte ordered the parties to show cause why the appeal should not be dismissed as moot because Yazell had been released from custody. The State responded that KASPER showed Yazell was on postrelease supervision and asserted it had confirmed Yazell's release with a telephone call to a KDOC senior administrative specialist in the sentence computation unit. Yazell argued that the KASPER website warns that its accuracy is unreliable; he also challenged the reliability of the KDOC employee's statement, which he characterized as an "unsworn ex parte communication not subject to cross-examination." 311 Kan. at 627. Without analyzing the parties' arguments, this court dismissed the appeal. 311 Kan. at 627.

On a petition for review, our Supreme Court focused on whether the State had established that Yazell was released from custody. The court acknowledged that although Kansas appellate courts rarely make factual findings, at times they must do so when it is necessary to "confirm the change in circumstances" that a party has alleged renders the appeal moot. 311 Kan. at 628. Because "[t]he appellate forum is not conducive to the taking or testing of evidence," the *Yazell* court held that "appellate courts must carefully scrutinize the reliability of evidence before making the rare finding of fact." 311 Kan. at 628. Ultimately, the court held "that the Court of Appeals erred to the extent that it relied on KASPER and the State's hearsay assertions about a Corrections employee confirming the accuracy of the report." 311 Kan. at 631.

Our Supreme Court decided *Roat* on the same day as *Yazell*. While Tony Roat's appeal from the denial of his motion to correct illegal sentence was pending in the Court of Appeals, the State filed a notice of change of custodial status alleging that Roat "had satisfied both the prison and post-release supervision provisions of his sentences." 311 Kan. at 583. When this court ordered Roat

to show cause why the appeal should not be dismissed, Roat did not dispute that he was no longer in prison. But Roat argued that his appeal still was not moot because his sentence could impact future sentences and he was considering a legal malpractice claim against his attorney for not raising certain issues at sentencing. After receiving the response, this court dismissed the appeal. 311 Kan. at 583.

On a petition for review, our Supreme Court affirmed the dismissal but held that this court had "engag[ed] in either erroneous or insufficient analysis of the [mootness] question." 311 Kan. at 584. After recognizing inconsistencies in Kansas appellate courts' treatment of the mootness doctrine as discretionary or jurisdictional and reviewing federal courts' application of mootness, the *Roat* court held "that the better approach is to consider mootness a prudential doctrine." 311 Kan. at 590. The court stressed the importance of respecting litigants' fundamental "'right to a day in court'" so they may "vindicate injuries suffered to their rights." 311 Kan. at 591.

Because mootness is a particularized analysis, the *Roat* court found that a bright-line test for mootness "is contrary to the law of our state." 311 Kan. at 592. Rather, "[a]n appeal should not be dismissed for mootness 'unless it is clearly and convincingly shown that the actual controversy has ended, the only judgment that could be rendered would be ineffectual *for any purpose*, and it would not impact *any* of the parties' rights.' [Citation omitted.]" 311 Kan. at 592. The court explained that the rights to be examined and the effect of a judgment are not limited to the case at hand; courts also must examine the collateral effects on rights and the preservation of rights for future litigation. 311 Kan. at 594. But the court limited the consideration to "vital, or substantial, right[s] requiring a judgment in this appeal." 311 Kan. at 596. It also noted that "[m]ere stigma or 'rightness' is insufficient to justify continuing to exercise jurisdiction over an appeal." 311 Kan. at 599. Finally, the court cautioned: "Litigants must do more than mention speculative rights; they must give substance to their arguments when asserting that protection of collateral rights necessitates resolution of their underlying appellate issues. And appellate courts must analyze and evaluate those arguments before exercising the

prudential authority to dismiss appeals because of mootness." 311 Kan. at 601.

Returning to Castle's appeal, we must first decide whether the KDOC certification is reliable evidence to show that Castle is no longer in prison. Assuming we find that it is, we must next decide whether Castle's release from prison renders this appeal moot.

Is the KDOC certification reliable evidence to show that Castle is no longer in prison?

The threshold question is whether the "Certification of Time Served" the State filed with this court is sufficient to show that Castle is no longer in prison. In *Yazell*, our Supreme Court recognized that an appellate court may engage in limited fact-finding necessary "to confirm the change in circumstances" that a party has alleged renders an appeal moot. 311 Kan. at 628. But "appellate courts must carefully scrutinize the reliability of evidence" before considering it a basis for appellate fact-finding. 311 Kan. at 628. Our Supreme Court held in *Yazell* that it was error to rely on the KASPER website information and on hearsay assertions made over the telephone by a corrections employee confirming the accuracy of the KASPER report. See 311 Kan. at 631.

The *Yazell* court's rejection of the KASPER website information as reliable evidence to show an inmate's custodial status was not surprising. The website itself contains a disclaimer on "the accuracy, completeness, or usefulness of any information" provided to the public. See http://kdocrepository.doc.ks.gov/kasper/search/disclaimer. A reader must agree to the disclaimer before the website will provide information about an inmate. The *Yazell* court also found the State's assertion that it confirmed Yazell's release with a telephone call to a KDOC employee was unreliable evidence. This assertion essentially amounted to hearsay within hearsay.

Here, the State has filed a notice of change in custodial status in compliance with Supreme Court Rule 2.042 stating that Castle has been released from prison and is on postrelease supervision. Attached to the notice is a written "Certification of Time Served" on KDOC official letterhead. The certification confirms that Castle was released from KDOC custody on April 24, 2020. The cer-

tification contains a signature of the KDOC records custodian "being duly sworn" and states that it provides "true and correct information" from Castle's records with the KDOC. Castle has offered no evidence to controvert the evidence presented by the State. He contends the State has failed to meet its burden to show he is released from custody. Significantly, Castle has not affirmatively represented to this court that the information in the KDOC certification is inaccurate.

Granted, Castle is unable to "cross-examine" the KDOC records custodian who signed the certification. Likewise, the signature on the certification is not notarized or subscribed before the person who administered the oath. Following this procedure would have strengthened the evidentiary value of the certification. But without any evidence offered by Castle challenging the accuracy of the information in the KDOC certification, we accept the written certification as reliable evidence sufficient to show that Castle is no longer in prison for the limited purpose of deciding whether this appeal is moot.

Does Castle's release from prison render this appeal moot?

Of course, a defendant's release from custody does not always establish mootness in a sentencing appeal. An appellate court must also look to other factors discussed in *Roat* to determine whether judgment would be ineffectual for any purpose including future impact on the rights of the parties. See 311 Kan. at 591-01. But once the State has established a prima facie showing of mootness by demonstrating that the defendant has fully completed the terms and conditions of his or her sentence, the burden shifts to the defendant to show the existence of a substantial interest that would be impaired by dismissal or that an exception to the mootness doctrine applies. 311 Kan. at 593. Here, other than contending the State has failed to meet its burden to show he is released from custody, Castle develops no argument about why his case is not moot.

Throughout its various filings in this court, the State has argued that this appeal is moot because Castle has served his entire prison sentence. In his response to this court's show-cause order

issued on June 30, 2020, Castle pointed out he is still on postrelease supervision. A person on postrelease supervision is still "'under a sentence.'" *State v. Lehman*, 308 Kan. 1089, 1098, 427 P.3d 840 (2018). But the fact that Castle is on postrelease supervision does not keep his appeal challenging his criminal history score from being moot because a defendant's criminal history score does not affect the mandatory term of postrelease supervision. See K.S.A. 2019 Supp. 22-3717(d).

Moreover, as the State asserts in its brief, this court cannot grant Castle any meaningful relief in this appeal. Even if this court agreed with Castle that the district court erred in calculating his criminal history score and remanded for resentencing under a criminal history score that would allow for presumptive probation, the district court could not impose probation because Castle has served his underlying sentence. See K.S.A. 2019 Supp. 21-6805(a); *State v. Kinder*, 307 Kan. 237, 243, 408 P.3d 114 (2018) (holding that if an underlying sentence has been served, probation may not be imposed).

In sum, the State has provided reliable evidence to show that Castle is no longer in prison and is on postrelease supervision. Castle makes no claim that his appeal challenging his criminal history score has an impact on his current or future rights. We are unable to grant Castle any meaningful relief in this appeal and the only judgment that could be entered would be ineffectual for any purpose. Under these circumstances, we dismiss Castle's appeal as moot.

Appeal dismissed.

No. 119,677

STATE OF KANSAS, *Appellee*, v. JOHN PATRICK STEVENSON, *Appellant*.

SYLLABUS BY THE COURT

1. COURTS—*District Court's Decision Based on Wrong Ground—Appellate Court Will Uphold.* If a district court reaches the correct result, its decision will be upheld even though it relied on the wrong ground or assigned erroneous reasons for its decision.

2. CRIMINAL LAW—*Statutory Right to Speedy Trial.* A defendant held to answer on an appearance bond for criminal charges who is not brought to trial within 180 days after arraignment shall be entitled to be discharged from further liability for the charged offenses. The State bears the legal obligation to ensure a defendant is brought to trial within this statutory deadline, and a defendant need not take any affirmative action to ensure these speedy trial rights are honored.

3. SAME—*Statutory Right to Speedy Trial—Failure of Defendant to Appear—Bench Warrant Issued by Court.* The plain reading of K.S.A. 2019 Supp. 22-3402(d) states that when a defendant appears in court "on such warrant," it is referring to the bench warrant issued due to the defendant's failure to appear at the trial or pretrial hearing in that court while on bond because the court that issued the warrant is the court that has the power to reschedule the trial.

4. SAME—*"Reckless Disregard" Portion of Criminal Threat Statute Found Unconstitutionally Overbroad by Kansas Supreme Court—Application to 2015 Version*. The Kansas Supreme Court in *State v. Boettger*, 310 Kan. 800, 818-19, 450 P.3d 805 (2019), *cert. denied* 140 S. Ct. 1956 (2020), declared the "reckless disregard" portion of the criminal threat statute found in K.S.A. 2018 Supp. 21-5415(a)(1) to be unconstitutionally overbroad because it encompassed more than true threats and thus potentially punished constitutionally protected speech. While the *Boettger* court held the 2018 version of reckless criminal threat unconstitutional, the 2015 version of reckless criminal threat is the same in relevant part and is also unconstitutional.

5. SAME—*Change in Law by Appellate Court Decision—Prospective Change*. When an appellate court decision changes the law, that change acts prospectively and applies only to all cases that are pending on direct review or not yet final. A defendant whose case was on direct appeal at the time an opinion changing the law is issued is entitled to the benefit of the change in the law.

6. TRIAL—*Effect of Constitutional Error—Harmless if State Shows Error Did Not Affect Outcome of Trial*. A constitutional error is harmless if the State can 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, i.e., where there is no reasonable possibility that the error contributed to the verdict.

7. CRIMINAL LAW—*Sufficiency of Evidence Challenge—Appellate Review*. When sufficiency of the evidence is challenged in a criminal case, the 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 fact-finder could have found the defendant guilty beyond a reasonable doubt. Appellate courts do not reweigh evidence, resolve evidentiary conflicts, or make witness credibility determinations.

8. TRIAL—*Jury Instruction Issues—Three-Step Process for Appellate Review*. The appellate courts employ a three-step process when analyzing jury instruction issues: (1) determine whether the appellate court can or should review the issue, i.e., whether there is a lack of appellate jurisdiction or a failure to preserve the issue for appeal; (2) consider the merits of the claim to determine whether error occurred below; and (3) assess whether the error requires reversal, i.e., whether the error can be deemed harmless. The first and third step are interrelated in that whether a party has preserved a jury instruction issue will affect the reversibility inquiry at the third step.

9. CRIMINAL LAW—*Disorderly Conduct Not Lesser Included Offense of Criminal Threat.* Disorderly conduct as defined in K.S.A. 2019 Supp. 21-6203 is not a lesser included offense of criminal threat as defined in K.S.A. 2019 Supp. 21-5415(a)(1) because all the elements of disorderly conduct are not included within the elements of criminal threat.

Appeal from Ellis District Court; GLENN R. BRAUN, judge. Opinion filed November 20, 2020. Affirmed in part, reversed in part, and remanded with directions.

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

Jodi Litfin, assistant solicitor general, and *Derek Schmidt*, attorney general, for appellee.

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

POWELL, J.: John Patrick Stevenson was convicted by a jury of his peers of criminal threat. He now appeals that conviction, arguing his speedy trial rights were violated, his conviction is both unconstitutional and unsupported by the evidence, and a lesser included instruction of disorderly conduct should have been given. Because the State charged Stevenson in one count with both intentional and reckless criminal threat and because it is possible the

jury found him guilty of reckless criminal threat—which the Kansas Supreme Court has declared to be unconstitutional—his conviction for criminal threat must be reversed and the case remanded to the district court for a new trial. We affirm the district court in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

During the evening of July 27, 2015, Ellis Police Chief Taft Yates received a call about a reckless driver in a white early 1990s Ford truck. Not long after, Yates saw the truck in question make a left turn around a corner "at a high rate of speed."

Yates initiated a traffic stop, exited his patrol vehicle, approached the driver of the truck—Stevenson—and explained the reason for the stop. A passenger was also present. Yates requested Stevenson's driver's license, which Stevenson did not have on him, and learned from dispatch that Stevenson's license had been suspended. Yates told Stevenson that he would have to take him to the Ellis Police Department "and issue him a ticket and some instructions." Yates told the passenger she could follow them to the police department and could take Stevenson home once they were finished. Yates informed Stevenson he would be placed in handcuffs and asked Stevenson if he had anything in his pockets. Stevenson said he had a straight razor in his pocket.

At that same time, Stevenson put his hand into his front left pants pocket, discreetly pulled out a brown prescription bottle, and tossed it on the passenger's seat of the truck. Yates then handcuffed Stevenson and asked what he threw on the seat. Stevenson replied, "Nothing." Yates then reached into the truck and picked up the bottle; he discovered it was a prescription of OxyContin, which is a controlled substance, for Kimberly A. Owston, with whom Stevenson lived and for whom he cared.

Yates then placed Stevenson in the back of his patrol car and told the passenger not to come to the police station after all because Stevenson was also being arrested for possession of OxyContin and would be booked into jail. Yates returned to the patrol vehicle, informed Stevenson of the crimes he was being arrested for, and discussed the pills with Stevenson. Stevenson told Yates he was the primary care giver for Owston and they were her pills,

although at times he identified the person he was caring for as a different individual.

Yates transported Stevenson to the Ellis Police Department. There, Stevenson became belligerent and agitated, which continued to escalate as he and Yates were talking. Stevenson began threatening Yates. These threats included threats about Yates' job and his badge, threats about taking Yates out and hanging him, and threats for Yates to take off his gun and badge and take off Stevenson's handcuffs and then Stevenson would "fuck [Yates] all up." Stevenson also exclaimed, "I don't care whether I have cuffs on or not." Stevenson's outburst was captured on video, but apparently a small portion of the video was corrupted, and not all the interaction between Yates and Stevenson was able to be played for the jury.

One video begins after Stevenson had been transported to the police station. It appears Yates was not recording the entire time and at some point deemed it necessary to turn on his body cam because the video starts with what can be assumed to be Yates' finger briefly partially blocking the view while he is turning on the camera. Stevenson is then heard saying, mid-sentence in an agitated manner, "—that fucking house, and move shit around. There's pills stash—" then the body cam is pointed at Stevenson and he immediately clams up and declares, "Don't even put that on [inaudible]. I'm not talking to you no more." Stevenson begins to close a door, and Yates orders him to leave the door alone and come into his office so he can begin Stevenson's paperwork. Of note, Yates was the only officer on duty that night, so he and Stevenson were in the station alone. Stevenson ultimately comes into Yates' office and continues to speak to Yates in an angry manner.

Two females associated with Stevenson arrive at the station and ring the station's door buzzer. Yates informs one of the females that Stevenson is going to jail; she tells Yates that the pills were not Stevenson's and encourages Stevenson to calm down. Yates does not permit her to come into the station. Stevenson angrily rants and walks away. The females, one of whom is crying, buzz the door again and beg for Stevenson to be released. Yates tells them to "explain it to the Judge, please." Yates then goes to find Stevenson, who returned to Yates' office.

As Yates is entering his office, Stevenson states, "Your ass is gonna get hung for this one." Yates begins to work at his computer and is on the phone attempting to get transportation backup. Stevenson is sitting against the far wall in Yates' office with a desk between them. Stevenson occasionally speaks to Yates, at one point saying, "Fuck up my corrections and I'll make your life just as bad as mine." Stevenson begins to get angry again about the pills and abruptly stands up while yelling at Yates, explaining the pills belong to the woman he cares for and they are not his. During this exchange he yells his lawyer is "going to crawl up your fucking ass and choke you out."

Some time passed between splices of the video. When the recording picks up again, Stevenson is in the main portion of the station; Yates' office is off to one side, and Yates is still at his desk. Stevenson states, "Fucking with me every day. This is what I get to look forward to, huh? [Inaudible.] Local law enforcement can fuck you over and treat you like they're your friend just so they can stick [a] knife and a dick in your ass." Stevenson continues to rant for several minutes. At one point during this rant he exclaims, "Why don't you take your badge and your gun off, mother fucker? I'm gonna hang you by your fucking [inaudible]. I'm serious to fucking God." He also exclaimed, "Take off your fucking badge and your fucking gun and let's go in the back and leave the handcuffs on and I'll fuck you all up. Guarantee it."

Stevenson quickly reenters Yates' office and continues yelling at Yates. He briefly leaves, then returns and grabs a chair in the office, with his hands still cuffed behind his back, and carries it right up next to Yates' desk, with about a foot and a half between the men. He repeatedly threatens Yates' job, as he has been doing throughout their encounter. At times Yates whispers in an attempt to deescalate the situation. When backup arrives Yates orders Stevenson to leave; Stevenson refuses to do so, prompting Yates to touch his arm, and Stevenson exclaims, "Take your fucking hands off of me! I don't care if I got fucking handcuffs on or not!" After a pat-down and confiscation of the straight razor by the backup officer, Stevenson is transported to the jail.

Yates recalled that Stevenson threatened him with physical violence "at least" three times during the entire encounter. Although Stevenson was handcuffed, Yates testified he took the physical threats "very seriously" because he knew someone could inflict physical harm to another even without their hands.

Initially, the State charged Stevenson with one count of unlawful possession of Oxycodone, one count of criminal threat, and one count of possession of drug paraphernalia. Stevenson pled not guilty. The district court granted Stevenson's request for bond and released him on November 23, 2015. After being released, however, Stevenson disappeared and his whereabouts became unknown until he was arrested in August 2017 in Reno County on outstanding warrants.

After Stevenson's apprehension, the State filed an amended complaint, reducing the charges to a single count of criminal threat because Owston died before a full investigation of the drug charges could be completed. The case proceeded to a jury trial on February 20, 2018.

At trial, Stevenson testified on his own behalf. He testified he was "just upset and venting," He did not mean to threaten Yates and "was just talking shit." He did admit to telling Yates, "I'm going to fuck you up," but said he did so only while venting and was mad. He never admitted it was a threat to communicate violence. He also told the jury he "never meant anything [he] said to [Yates]."

The jury found Stevenson guilty of one count of criminal threat. The district court sentenced him to 12 months' imprisonment.

Stevenson timely appeals.

ANALYSIS

Stevenson raises four points of error on appeal: (1) His statutory right to a speedy trial was violated; (2) his conviction for criminal threat cannot stand because the criminal threat statute is unconstitutionally overbroad; (3) there is insufficient evidence supporting his criminal threat conviction; and (4) the district court erred in not giving an unrequested disorderly conduct jury instruction because that offense is a lesser included offense of criminal threat.

III. WAS STEVENSON DENIED HIS STATUTORY RIGHT TO A SPEEDY TRIAL?

First, Stevenson argues the district court erred in denying his motion to dismiss for a violation of his statutory speedy trial rights. Specifically, he argues the speedy trial clock began to run after he was brought before the Barton County District Court on its warrant and while his Ellis County bench warrant was pending. The State replies that the speedy trial clock on the rescheduled trial did not start to run until Stevenson appeared in front of the Ellis County District Court.

A. *Standard of Review*

Often, a district court's ruling involving a defendant's speedy trial rights involves factual and legal disputes, although the relevant facts here are undisputed. We review the district court's factual findings to determine if they are supported by substantial competent evidence while we give no deference to a district court's legal conclusions. Whether a trial setting violated a defendant's statutory right to a speedy trial is a question of law we review de novo. *State v. Vaughn*, 288 Kan. 140, 143, 200 P.3d 446 (2009). Interpretation of a statute is also a question of law subject to unlimited review. *State v. Alvarez*, 309 Kan. 203, 205, 432 P.3d 1015 (2019).

B. *Speedy Trial Statute*

K.S.A. 2019 Supp. 22-3402(b) mandates that a defendant held to answer on an appearance bond for criminal charges who is not "brought to trial within 180 days after arraignment . . . shall be entitled to be discharged from further liability" for the charged offenses. See *State v. Brownlee*, 302 Kan. 491, 503, 354 P.3d 525 (2015). The State bears the legal obligation to ensure a defendant is brought to trial within this statutory deadline, and a defendant need not take any affirmative action to ensure these speedy trial rights are honored. *State v. Sievers*, 299 Kan. 305, 307, 323 P.3d 170 (2014).

However, a different rule applies when the defendant's trial date has been set but the defendant fails to appear for the trial or any pretrial hearing and a bench warrant is issued:

"After any trial date has been set within the time limitation prescribed by subsection (a), (b) or (c), if the defendant fails to appear for the trial or any pretrial hearing, and a bench warrant is ordered, the trial shall be rescheduled within 90 days after the defendant has appeared in court after apprehension or surrender on such warrant. However, if the defendant was subject to the 180-day deadline prescribed by subsection (b) and more than 90 days of the original time limitation remain, then the original time limitation remains in effect." K.S.A. 2019 Supp. 22-3402(d).

C. *Chronology of Events*

According to the relevant undisputed chronology, Stevenson was arraigned on October 9, 2015; the district court set a pretrial conference for January 7, 2016, and the trial on January 26, 2016. However, Stevenson failed to appear for the pretrial—in fact, his bond had been revoked and a bench warrant issued due to allegations that he had violated the terms of his pretrial release—and subsequently his counsel sought a continuance of the trial because Stevenson's whereabouts were unknown. The district court granted this request and indicated it would not set a new trial date until Stevenson was apprehended and appeared in court.

Stevenson was subsequently arrested in Reno County for outstanding warrants from both Barton and Ellis Counties on August 22, 2017, and was personally served the Ellis County warrant while in jail in Barton County. He appeared before the Barton County District Court the next day and remained in the Barton County jail from the date of his arrest until November 22, 2017, after resolving his Barton County cases. Stevenson was again personally served the Ellis County warrant on November 25, 2017; he returned to Ellis County on November 27, 2017, and appeared before the district court there. At that appearance, Stevenson's trial was rescheduled for February 20, 2018—86 days later. Stevenson subsequently moved to have his case dismissed on statutory speedy trial grounds.

At the February 4, 2018 hearing on the motion to discharge Stevenson's case for statutory speedy trial violations, Stevenson's counsel did not make a specific argument as to how the State had

violated Stevenson's right to a speedy trial, stating instead, "[T]he motion really speaks for itself." Stevenson's written motion before the district appears to make the same arguments he presents to us—his statutory speedy trial rights under K.S.A. 2019 Supp. 22-3402(d) were violated because he was not brought to trial on his Ellis County charge within 90 days of appearing before the Barton County District Court. The State argued then and argues now that the speedy trial clock for rescheduling the trial did not begin to run until Stevenson appeared on the bench warrant in front of the Ellis County District Court.

The district court agreed with the State's argument that Stevenson's trial was appropriately scheduled after his appearance on the warrant from Ellis County. In its written order, it held:

> "WHEREUPON, following argument of the parties, the Court finds that the defendant was scheduled within ninety (90) days of [trial] after appearing before the Court on November 27, 2017. The time prior to that from the issuance of the bench warrant for the defendant's failure to appear at pretrial conference on January 7, 2016, through November 27, 2017, is charged to the defendant for speedy trial calculations. Therefore, the Court denied the defendant's Motion to Dismiss and finds the trial schedule is in compliance with K.S.A. 22-3402(d). The defendant's motion is denied."

The district court based its decision in part on the fact that Stevenson had failed to seek relief under the Uniform Mandatory Disposition of Detainers Act (UMDDA), K.S.A. 22-4301 et seq. This conclusion was erroneous because the UMDDA only allows those in the custody of the Secretary of Corrections to seek resolution of any pending charges. See K.S.A. 2019 Supp. 22-4301 (UMDDA applicable to "[a]ny inmate in the custody of the secretary of corrections"); see also *State v. Burnett*, 297 Kan. 447, 456, 301 P.3d 698 (2013) (UMDDA applicable to defendant being physically located in county jail but in KDOC custody in accordance with district court's order). Here, Stevenson was not in the custody of the Secretary of Corrections and was being held in the Barton County jail. Nevertheless, if a district court reaches the correct result, its decision will be upheld even though it relied on the wrong ground or assigned erroneous reasons for its decision. See *State v. Overman*, 301 Kan. 704, 712, 348 P.3d 516 (2015).

D. *No Speedy Trial Violation*

At dispute here is the following language in K.S.A. 2019 Supp. 22-3402(d): "[T]he trial shall be rescheduled within 90 days

after the defendant has appeared in court after apprehension or surrender on such warrant." Stevenson argues this provision is triggered after a defendant appears in any court; the State argues the clock does not start running until the defendant appears in the court that issued the warrant because it alone has the jurisdiction to schedule and conduct the trial on the outstanding charges. We agree with the State.

The most fundamental rule of statutory construction is the intent of the Legislature governs if that intent can be ascertained. *State v. LaPointe*, 309 Kan. 299, 314, 434 P.3d 850 (2019). We 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, we are not permitted to speculate about the legislative intent behind that clear language and must refrain from reading something into the statute that is not readily found in its words. In fact, where there is no ambiguity in the statute, we need not resort to statutory construction. Only if the statute's language or text is unclear or ambiguous do we use canons of construction or examine legislative history to construe the Legislature's intent. *State v. Pulliam*, 308 Kan. 1354, 1364, 430 P.3d 39 (2018).

Here, a plain reading of K.S.A. 2019 Supp. 22-3402(d) tells us that when a defendant appears in court "on such warrant," it is referring to the bench warrant issued due to the defendant's failure to appear at the trial or pretrial hearing *in that court* while on bond. This makes sense because the court that issued the warrant—and for which the trial needs to be rescheduled because the defendant's elusive actions prevented the trial from taking place—is the court that has the power to reschedule the trial.

Applying this understanding to the facts in this case illustrates the point. Stevenson claims his appearance before the Barton County District Court started the 90-day clock. There are two problems with this argument. First, Stevenson did not appear in the Barton County District Court on his Ellis County warrant. Although he was arrested in Reno County on both Ellis County and Barton County warrants, the Barton County District Court had the authority to resolve only the Barton County charges and warrants, not the ones from Ellis County. See *State v. Hartman*, 27 Kan. App. 2d 98, 101, 998 P.2d 128 (2000) (Sedgwick County had no ability to remove

defendant from Cowley County and have him appear before Sedgwick County court).

Second, if Stevenson is correct, the State and Ellis County would be in an impossible position because once Stevenson appeared before the Barton County District Court, the Ellis County authorities would have had only 90 days to bring Stevenson to trial even though they had no authority to bring that about as long Stevenson remained in Barton County's custody. That makes no sense.

Applying the plain language of K.S.A. 2019 Supp. 22-3402(d) to the facts, it becomes clear there is no statutory speedy trial violation here. Stevenson's trial in Ellis County was originally set for January 26 and 27, 2016, which was within the time limitation prescribed. See K.S.A. 2019 Supp. 22-3402(b). He then failed to appear for his scheduled pretrial hearing, so the Ellis County District Court issued a bench warrant. After Stevenson resolved his Barton County cases, he was released on November 22, 2017, and was again served with the Ellis County warrant on November 25, 2017. On November 27, 2017, Stevenson appeared before the Ellis County District Court on the bench warrant ordered in the present case. At that appearance his trial was rescheduled for February 20, 2018, 86 days from the date Stevenson appeared in court on the bench warrant issued in the instant case. Thus, Stevenson was brought to trial within 90 days after he appeared in court on his Ellis County bench warrant, as required by K.S.A. 2019 Supp. 22-3402(d).

Stevenson's statutory speedy trial rights were not violated.

IV. IS STEVENSON'S CRIMINAL THREAT CONVICTION UNCONSTITUTIONAL?

Second, Stevenson argues his criminal threat conviction must be reversed because the statute under which he was convicted is unconstitutionally overbroad. A statute's constitutionality is a question of law subject to unlimited review. *State v. Boettger*, 310 Kan. 800, 803, 450 P.3d 805 (2019), *cert. denied* 140 S. Ct. 1956 (2020).

Stevenson was convicted of criminal threat in violation of K.S.A. 2015 Supp. 21-5415(a)(1), which reads:

"(a) A criminal threat is any threat to:

(1) Commit violence communicated with intent to place another in fear, or to cause the evacuation, lock down or disruption in regular, ongoing activities of any building,

place of assembly or facility of transportation, or in reckless disregard of the risk of causing such fear or evacuation, lock down or disruption in regular, ongoing activities."

After the briefs were filed in this case, the Kansas Supreme Court issued its opinion in *Boettger*, 310 Kan. at 818-19, holding the "reckless disregard" portion of the criminal threat statute found in K.S.A. 2018 Supp. 21-5415(a)(1) to be unconstitutionally overbroad because it encompassed more than true threats and thus potentially punished constitutionally protected speech. K.S.A. 2018 Supp. 21-5415(a)(1) prohibited any threat to

> "[c]ommit violence communicated with intent to place another in fear, or to cause the evacuation, lock down or disruption in regular, ongoing activities of any building, place of assembly or facility of transportation, *or in reckless disregard of the risk* of causing such fear or evacuation, lock down or disruption in regular, ongoing activities." (Emphasis added.)

While the *Boettger* court held the 2018 version of reckless criminal threat unconstitutional, Stevenson was convicted under the 2015 version of reckless criminal threat. This difference is immaterial because both statutes in relevant part are the same. Thus, the 2015 version of reckless criminal threat under which Stevenson was convicted is also unconstitutional.

Even though reckless criminal threat was declared unconstitutional after Stevenson's conviction, generally speaking, "when an appellate court decision changes the law, that change acts prospectively and applies only to all cases . . . that are pending on direct review or not yet final on the date of the appellate court decision." *State v. Mitchell*, 297 Kan. 118, Syl. ¶ 3, 298 P.3d 349 (2013). Thus, because the opinion in *Boettger* was issued while Stevenson's case has been on direct appeal, he is entitled to the benefit of this change in the law. See *State v. Spanta*, No. 120,095, 2020 WL 4555808, at *1 (Kan. App. 2020) (unpublished opinion).

Shortly after the filing of *Boettger*, the State filed a letter of additional authority in accordance with Supreme Court Rule 6.09 (2020 Kan. S. Ct. R. 39) and argued that any error here was harmless. On July 15, 2020, our court issued a show cause order requiring the State to show cause why the appeal should not be dismissed in light of *Boettger*. The State responded, and we retained the appeal.

The State argues that any error was harmless because the very language of the threats establishes that Stevenson's threats were intentional, and "[n]o jury would find these threats were anything other than intentionally made with the intent to place another in fear."

This argument is undermined by the Kansas Supreme Court's opinion in *State v. Johnson*, 310 Kan. 835, 450 P.3d 790 (2019) (applying *Boettger*), *cert. denied* 140 S. Ct. 1956 (2020), which has facts very similar to ours and is a companion case to *Boettger*, and was filed on the same day. In *Boettger*, the defendant's conviction was based solely on the reckless disregard provision of the criminal threat statute. In *Johnson*, the State charged the defendant with intentionally or recklessly making a criminal threat, which is what was done here. The jury was instructed on both mental states and was given a verdict form asking it to simply determine if Johnson was guilty of criminal threat. There was no unanimity instruction or language in the verdict form requiring the jury to separately determine whether Johnson acted either intentionally or recklessly. The State's indistinct charging along with the jury instructions and verdict form created an alternative means issue because both mental states were alleged. The *Johnson* court employed the constitutional harmless error analysis to determine if the conviction was to be reversed:

> "A constitutional error is harmless if the State can 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, *i.e.*, where there is no reasonable possibility that the error contributed to the verdict.' [Citations omitted.]" 310 Kan. at 843.

Ultimately, the Kansas Supreme Court reversed Johnson's conviction and remanded the case for a new trial, holding that the State failed to meet the no reasonable possibility standard. In so holding, it relied on four considerations: (1) "The district court instructed the jury on both forms of criminal threat and accurately recited the [statutory] definitions of 'intentionally' and 'recklessly'"; (2) "neither the jury instructions nor the State's arguments steered the jury toward convicting Johnson based solely on one mental state or the other"; (3) the district judge did not "instruct the jury it had to agree unanimously on whether Johnson acted

intentionally or recklessly"; and (4) "the verdict form did not require the jury to make a specific finding." 310 Kan. at 843. Further, the court noted that based on the evidence, it was reasonable the jury "could have believed the [defendant's] statements were made with a reckless disregard for whether they caused fear." 310 Kan. at 844.

The Kansas Supreme Court took the same approach from *Johnson* and applied it in *State v. Lindemuth*, 312 Kan. 12, 470 P.3d 1279 (2020), where the same circumstances existed. First, the district court instructed the jury on both mental states and provided their statutory definitions. Second, neither the jury instruction nor the State's arguments directed the jury towards a conviction based solely on one mental state or the other. Third, although the district court instructed the jury that its agreement on a verdict must be unanimous, the district court did not instruct the jury it must unanimously agree on whether the defendant acted either intentionally or recklessly. Fourth, the verdict form did not indicate if the jury had unanimously concluded the defendant made a criminal threat either intentionally or recklessly. Finally, Lindemuth denied making any threatening statements to the victim; and, based on the evidence presented at trial, a reasonable person could have concluded that Lindemuth recklessly disregarded causing fear in his victim rather than intentionally doing so. Therefore, the trial record provided no basis for the district court to clearly discern whether the jury concluded the State sufficiently proved intentional criminal threat. Given these considerations, our Supreme Court held the State did not met its harmless error burden and, like in *Johnson*, reversed Lindemuth's conviction and remanded the case to the district court. *Lindemuth*, 312 Kan. at 19. *Johnson* and *Lindemuth* compel the same result here.

The factual similarities in *Johnson*, *Lindemuth*, and our case are striking. First, the district court here instructed the jury on both forms of criminal threat but did not provide the statutory definitions of "intentionally" and "recklessly." The jury instructions provided, in part:

"To establish this charge, each of the following claims must be proven beyond a reasonable doubt:

"1. The defendant threatened to commit violence and communicated the threat with the intent to place another in fear; to-wit: Taft Yates, or with reckless disregard of the risk of causing such fear."

Second, neither the jury instructions nor the State's arguments steered the jury toward convicting Stevenson solely on one mental state or the other. In fact, during its closing argument the State explicitly argued either mental state was applicable on multiple occasions:

"The evidence presented today is that Mr. Stevenson threatened Chief Yates. He did it either intentionally or with reckless disregard. . . .

. . . .

". . . [E]ither he intended to do it or he did it with reckless disregard . . . .

. . . .

" . . . Mr. Stevenson threatened to commit violence, more than once, and Chief Yates was put in fear. That's it. That's the statute. Either he intended [it], or he did it with reckless disregard. Either way, you have seen the video, you have seen the evidence, you heard Chief Yates."

Third, while the district court did give the jury a general unanimity instruction, it did not instruct the jury it had to agree unanimously on whether Stevenson acted intentionally or recklessly. The jury instruction read: "Your agreement upon a verdict must be unanimous."

Fourth, the verdict form did not require the jury to make a specific finding as to whether Stevenson acted intentionally or recklessly. It simply asked the presiding juror to sign indicating either: "We, the jury, find the defendant not guilty of criminal threat," or "We, the jury, find the defendant guilty of criminal threat."

Based on the evidence, it is reasonable that the jury could have believed Stevenson's statements were made with reckless disregard for whether they caused Yates fear. Stevenson testified he was just "talking shit" and "venting" and he did not mean to frighten Yates. Moreover, Stevenson was handcuffed during the encounter. Although Yates testified someone can still do physical harm while handcuffed, such a restraint could have been a factor the jury took into consideration. In *Lindemuth*, our Supreme Court remarked the jury could have believed that Lindemuth "simply

spoke in the heat of argument and the result of unthinking rage—more reckless, impulsive bluster than an intentional threat." 312 Kan. at 18. Such "impulsive bluster" is the same type of statements Stevenson testified he made toward Yates, and the jury could have accepted Stevenson's assertion and still found the statements to be reckless criminal threat.

Like in *Johnson* and *Lindemuth*, the trial record here provides no basis for us to discern whether the jury found the State had proved beyond a reasonable doubt that Stevenson committed criminal threat intentionally. Accordingly, we cannot conclude the State met its harmless error burden to show there is no reasonable possibility the error contributed to the verdict. Stevenson's conviction must be reversed.

V. DOES SUFFICIENT EVIDENCE SUPPORT A CONVICTION OF INTENTIONAL CRIMINAL THREAT?

Third, Stevenson argues insufficient evidence supports his conviction because there was not a specific threat made to Yates.

Although we have already reversed Stevenson's conviction for criminal threat, we are required to address Stevenson's argument that insufficient evidence exists to support his conviction. If sufficient evidence supports a conviction for intentional criminal threat, there is no Double Jeopardy Clause violation and Stevenson may be retried. As our Supreme Court has explained:

> "Because we have decided that the prosecutor's misconduct denied Pabst a fair trial, we must also address Pabst's sufficiency of the evidence argument. '[A] reviewing court must consider all of the evidence admitted by the trial court in deciding whether retrial is permissible under the Double Jeopardy Clause.' *Lockhart v. Nelson*, 488 U.S. 33, 41, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988); see *Burks v. United States*, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978)." *State v. Pabst*, 268 Kan. 501, 512, 996 P.2d 321 (2000).

In making such a determination, we do not attempt to substitute the jury's role at the retrial; rather, such an analysis is simply to safeguard Stevenson's double jeopardy rights. Our standard of review for this inquiry is well known:

> "'When sufficiency of the evidence is challenged in a criminal case, the 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).

It is only in rare cases where the testimony "was so incredulous no reasonable fact-finder could find guilt beyond a reasonable doubt" that a guilty verdict will be reversed. *State v. Torres*, 308 Kan. 476, 488, 421 P.3d 733 (2018). Given the jury's guilty verdict on criminal threat, we assume a conviction based upon intentional criminal threat and address the address the sufficiency of the evidence to support that conviction.

A review of some of the statements made by Stevenson is helpful:

- "Your ass is gonna get hung for this one."
- "Fuck up my corrections and I'll make your life just as bad as mine."
- "[My lawyer] is going to crawl up your fucking ass and choke you out."
- "Why don't you take your badge and your gun off, mother fucker? I'm gonna hang you by your fucking [inaudible]. I'm serious to fucking God."
- "Take off your fucking badge and your fucking gun and let's go in the back and leave the handcuffs on and I'll fuck you all up. Guarantee it."
- "Take your fucking hands off of me! I don't care if I got fucking handcuffs on or not!"

"[C]riminal threat is any threat to . . . [c]ommit violence communicated with intent to place another in fear . . . ." K.S.A. 2015 Supp. 21-5415(a)(1). "A person acts . . . 'with intent,' with respect to the nature of such person's conduct or to a result of such person's conduct when it is such person's conscious objective or desire to engage in the conduct or cause the result." K.S.A. 2015 Supp. 21-5202(h). A "threat" is made when the statement reveals intent to inflict physical or other harm on another's person or property. *State v. Cope*, 29 Kan. App. 2d 481, 486, 29 P.3d 974 (2001), *rev'd on other grounds* 273 Kan. 642, 44 P.3d 1224 (2002).

Stevenson argues his statements were not threats because they did not directly reference physical harm to Yates and they were

idle talk and comments in jest. For support, Stevenson cites to *State v. Williams*, 303 Kan. 750, 761, 368 P.3d 1065 (2016) (statements referenced direct physical harm to specific persons), and *State v. Phelps*, 266 Kan. 185, 196, 967 P.2d 304 (1998) (statements were idle talk and made in jest).

But a review of the record on appeal contradicts Stevenson's argument. Just one of Stevenson's statements to Yates—"Take off your fucking badge and your fucking gun and let's go in the back and leave the handcuffs on and I'll fuck you all up. Guarantee it."—is clearly a specific threat to Yates. Yates testified he was in fear from these statements and he "emphatic[ally]" called for backup because in his fear he wanted to make sure the situation did not escalate.

Stevenson essentially asks us to place more credence in his testimony that he was merely "talking shit" than in Yates' testimony that he was fearful. However, we are not permitted to reweigh the evidence. See *Chandler*, 307 Kan. at 668. As there was sufficient evidence for a reasonable juror to find Stevenson guilty of intentional criminal threat, a retrial would not violate Stevenson's double jeopardy rights. The case is remanded to the district court to allow the State to retry Stevenson on intentional criminal threat.

VI. DID THE DISTRICT COURT ERR IN NOT GIVING A JURY INSTRUCTION ON DISORDERLY CONDUCT?

Finally, Stevenson argues the district court erred in not instructing the jury on disorderly conduct because it is a lesser included offense of criminal threat.

When analyzing jury instruction issues, we employ a three-step process:

"(1) determining whether the appellate court can or should review the issue, *i.e.*, whether there is a lack of appellate jurisdiction or a failure to preserve the issue for appeal; (2) considering the merits of the claim to determine whether error occurred below; and (3) assessing whether the error requires reversal, *i.e.*, whether the error can be deemed harmless." *State v. Williams*, 295 Kan. 506, 510, 286 P.3d 195 (2012).

The "first and third step are interrelated in that whether a party has preserved a jury instruction issue will affect our reversibility inquiry at the third step." *State v. Bolze-Sann*, 302 Kan. 198, 209, 352 P.3d 511 (2015).

Applying the first step to Stevenson's alleged error, there is no dispute he did not request a disorderly conduct instruction. "When a party fails to object to or request a jury instruction at trial, K.S.A. 22-3414(3) limits appellate review to a determination of whether the instruction was clearly erroneous." *State v. Knox*, 301 Kan. 671, 680, 347 P.3d 656 (2015); see K.S.A. 2019 Supp. 22-3414(3).

In determining under the second step whether an error actually occurred, we "consider whether the subject instruction was legally and factually appropriate, employing an unlimited review of the entire record." *Williams*, 295 Kan. 506, Syl. ¶ 4.

At the third step, we assess whether the error requires reversal and "will only reverse the district court if an error occurred and we are '"firmly convinced that the jury would have reached a different verdict had the instruction error not occurred."' *Knox*, 301 Kan. at 680 (quoting *Williams*, 295 Kan. 506, Syl. ¶ 5)." *State v. McLinn*, 307 Kan. 307, 318, 409 P.3d 1 (2018). As the party claiming a clear error, Stevenson has the burden to demonstrate the necessary prejudice. See 307 Kan. at 318.

Whether a particular crime is a lesser included offense of a charged crime is a question of law subject to unlimited review. *State v. Carter*, 54 Kan. App. 2d 34, 37, 395 P.3d 458 (2017).

A lesser included offense is:

> "(1) A lesser degree of the same crime, except that there are no lesser degrees of murder in the first degree under subsection (a)(2) of K.S.A. 21-5402, and amendments thereto;
>
> "(2) a crime where all elements of the lesser crime are identical to some of the elements of the crime charged;
>
> "(3) an attempt to commit the crime charged; or
>
> "(4) an attempt to commit a crime defined under paragraph (1) or (2)." K.S.A. 2019 Supp. 21-5109(b).

An instruction on a lesser included crime is legally appropriate. *State v. Plummer*, 295 Kan. 156, 161, 283 P.3d 202 (2012).

A criminal threat, in relevant part, is "any threat to . . . [c]ommit violence communicated with intent to place another in fear . . . ."

K.S.A. 2019 Supp. 21-5415(a)(1). On the other hand, disorderly conduct is defined in K.S.A. 2019 Supp. 21-6203:

"(a) Disorderly conduct is one or more of the following acts that the person knows or should know will alarm, anger or disturb others or provoke an assault or other breach of the peace:

(1) Brawling or fighting;

(2) disturbing an assembly, meeting or procession, not unlawful in its character; or

(3) using fighting words or engaging in noisy conduct tending reasonably to arouse alarm, anger or resentment in others.

. . . .

"(c) As used in this section, 'fighting words' means words that by their very utterance inflict injury or tend to incite the listener to an immediate breach of the peace."

As Stevenson acknowledges, another panel of this court has held that disorderly conduct is not a lesser included offense of criminal threat. In *State v. Butler*, 25 Kan. App. 2d 35, 40, 956 P.2d 733 (1998), Butler argued the district court failed to instruct the jury on disorderly conduct (then K.S.A. 21-4101) as a lesser included offense of criminal threat (then K.S.A. 21-3419). The State argued criminal threat required the specific intent to terrorize, while disorderly conduct only required the general intent that certain acts would cause alarm, anger, or resentment in others. The State also argued criminal threat did not require the use of obscene or abusive language as was required for disorderly conduct.

Ultimately, the *Butler* panel held the district court did not err in failing to instruct the jury on disorderly conduct: "Disorderly conduct will not usually be a lesser included offense of criminal threat or battery. The elements of disorderly conduct are not all included in the elements of criminal threat." 25 Kan. App. 2d at 40.

Although *Butler* was decided under the previous version of the criminal threat statute, which required "terror" rather than fear, the specific intent remains the same. The current criminal threat statute still requires the specific intent to place another in fear, and the current disorderly threat statute only requires general intent that certain acts

will alarm, anger, disturb, or arouse resentment. Similarly, the elements of disorderly conduct are not all included in the elements of criminal threat. In order to commit a criminal threat, there must be a threat to commit violence. Disorderly conduct does not require a threat to commit violence.

Accordingly, we join the panel in *Butler* and conclude disorderly conduct is not a lesser included offense of criminal threat because all the elements of disorderly conduct are not included in the elements of criminal threat. A disorderly conduct jury instruction was not legally appropriate in this case.

Stevenson's conviction for criminal threat is reversed, and the case is remanded to the district court for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded with directions.

No. 120,339

STATE OF KANSAS, *Appellee*, v. GELDY GUTIERREZ-FUENTES, *Appellant*.

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Constitutional Right to Speedy Trial—Determination Based on Facts of Case*. Under the Sixth Amendment, whether a delay between arrest and trial is presumptively prejudicial for purposes of the defendant's constitutional right to a speedy trial is determined by the factual circumstances of each case rather than by a bright-line time frame. The delay analysis varies based on the complexity of the case.

2. TRIAL—*Third Party's Interpreted Statements for Declarant—Not Hearsay under Language Conduit Rule*. When the record contains no evidence of a motive to mislead by an interpreter or other evidence questioning an interpreter's neutrality and the declarant testifies at trial, evidence of a neutral third-party's interpreted statements is attributed to the declarant without an additional layer of hearsay under the language conduit rule.

3. SAME—*Jury Instructions—Invited Error Doctrine May Bar Instructional Error Claim on Appeal.* When a party submits a jury instruction on the elements of a charge with language broader than the charging document, and that instruction is later used by the court without objection, the invited error doctrine may bar an appellate court's consideration of that party's instructional error claim.

Appeal from Sedgwick District Court; DEBORAH HERNANDEZ MITCHELL, judge. Opinion filed November 25, 2020. Affirmed.

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

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

Before GARDNER, P.J., WARNER, J., and ROBERT J. WONNELL, District Judge, assigned.

WONNELL, J.: After law enforcement investigated personal injuries and property damage associated with an incident at an apartment complex on October 5, 2016, the State charged Geldy Gutierrez-Fuentes with one count of rape, one count of aggravated battery, one count of aggravated burglary, and one count of criminal threat. He was arrested on February 3, 2017, and the State

filed an amended information on March 29, 2017, adding a second count of aggravated battery. After a series of continuances, Gutierrez-Fuentes' jury trial began on August 21, 2018. The jury found Gutierrez-Fuentes not guilty of rape and guilty on the remaining charges. On October 12, 2018, the district court sentenced Gutierrez-Fuentes to a controlling sentence of 82 months' imprisonment. He timely appeals.

FACTUAL BACKGROUND

On October 5, 2016, the Wichita Police Department received two 911 calls asking for assistance at D.S.'s address and reporting that a woman had been hit in the face and was bleeding. When Officer Dane Myers arrived, he saw D.S. sitting on the stairs outside her apartment building with "blood all over her face and . . . on her hand." Because D.S. did not speak English, Myers obtained D.S.'s name and apartment number from a neighbor and went to the scene to find the door had been forced open and a piece of the door frame was lying on the ground. When Myers went into the apartment, he saw what appeared to be blood on the wall by a light-switch plate next to the door. D.S. was later transported to the hospital.

When Myers arrived at the hospital, D.S. was speaking with hospital personnel through an interpreter and with help from her Spanish-speaking neighbor. Myers relied on the hospital interpreter and D.S.'s neighbor to relay questions and answers between D.S. and himself. Ultimately, D.S. underwent surgical repairs for the injuries, including the implantation of six titanium plates in her face.

Myers testified that D.S. said that she had broken up with Gutierrez-Fuentes the day before—October 4, 2016—and she had been afraid he would come back to hurt her, so she had spent the previous night away from her apartment. After she returned home the next day, Gutierrez-Fuentes came to the apartment and said he was going to kill her and punched her in the face repeatedly. D.S. also testified that while hitting her, Gutierrez-Fuentes told her that "if [she] was not going to be with him that he could kill [her]," and D.S. was afraid that she was going to die. D.S. testified that she did not know why Gutierrez-Fuentes stopped hitting her and she

did not remember Gutierrez-Fuentes leaving; she thought that she blacked out and when she came to, she was on the floor in her living room, bleeding. Myers testified that during this conversation with D.S. he noticed her eye had begun to swell shut.

Through the use of an interpreter, D.S. was examined by forensic nurse Tracy Hess the day after the incident. D.S. described the incident and her violent relationship with Gutierrez-Fuentes and concluded the conversation by stating that "he finally stopped when he saw there was a lot of blood and he left and then she went out and the neighbor had called 911." D.S. also told Hess that earlier that week, Gutierrez-Fuentes had come to her home and "wanted sex and she was afraid to say no, so she said she just took a deep breath and let him have sex with her." D.S. said she felt like she was coerced to have sex with Gutierrez-Fuentes and that she only did so out of fear.

That same day, D.S. spoke with Wichita police officer Rick Peña, who speaks Spanish and is an interpreter for the Wichita Police Department. Peña testified that D.S. said she and Gutierrez-Fuentes had dated for about three months and that two days before the incident, Gutierrez-Fuentes came to her apartment, entered with a key she had given him, woke her up, and had sex with her "against her will."

A week later, Officer Peña and Detective Heather Huhman met with D.S. At this point, D.S. clarified that she had given Gutierrez-Fuentes a key to her apartment but she had "rigged" the door so that it could not be easily opened from the outside even with a key. She affirmed that "she felt like she was going to be killed" during the attack on October 5.

On October 31, 2016, the State charged Gutierrez-Fuentes with one count of rape, one count of aggravated battery, one count of aggravated burglary, and one count of criminal threat. Gutierrez-Fuentes was arrested on February 3, 2017, and the district court appointed counsel to represent him soon after. On March 29, 2017, the State filed an amended information, adding a second count of aggravated battery. Gutierrez-Fuentes pleaded not guilty to all charges.

After a series of continuances and two changes of appointed defense counsel, Gutierrez-Fuentes' jury trial began on August 21, 2018. The State presented evidence from Linda Ester, a Sedgwick

County 911 records custodian, and the two 911 calls from October 5, 2016. D.S., Peña, Huhman, and Myers also testified.

The jury viewed Myers' body camera footage of his actions at D.S.'s apartment, his conversation with D.S. at the hospital, and photographs of D.S.'s apartment. On cross-examination, Myers testified that D.S. did not state that Gutierrez-Fuentes forced her to have sex.

Doctor Timothy Benning testified about D.S.'s injuries and opined that such injuries do not commonly occur together as the result of a single impact. Rather, the cheekbone fracture was consistent with someone being punched on the cheekbone and the orbital fracture was consistent with a direct blow to the eyeball itself. Benning agreed that D.S.'s injuries amounted to "getting your face crushed" and that she suffered "significant" injuries.

Hess testified that D.S.'s genital examination showed no sign of acute injury, but "[i]t's fairly common that there's no injury with sexual intercourse." She stated that D.S. did not tell her that Gutierrez-Fuentes used force to rape her; rather, D.S. said she was overcome by fear. Hess testified that there was nothing in her examination of D.S. inconsistent with the history D.S. reported to her. On cross-examination, Hess acknowledged that there was nothing in her examination of D.S. inconsistent with the theory that D.S. had not been raped and she agreed that she had "no idea" whether D.S. was raped. The State introduced into evidence and published to the jury 27 photographs Hess took of D.S. during the examination.

D.S. said that she did not report the initial attack to police because she was afraid. When asked what she was afraid of, she replied, "I don't know. I just—I tell him to leave and he left and I thought that was the end of it." However, D.S. also said that Gutierrez-Fuentes came to the apartment on October 4 to retrieve his belongings and she asked Gutierrez-Fuentes for his key to the apartment, but he said that he had lost it.

Gutierrez-Fuentes presented no evidence. During closing argument, defense counsel focused on the rape charge, arguing insufficient evidence and emphasizing the inconsistencies in the evidence. After less than three hours of deliberation, the jury reached a verdict, finding Gutierrez-Fuentes not guilty of rape, guilty of

the two counts of aggravated battery, guilty of aggravated burglary, and guilty of criminal threat. On October 12, 2018, the district court sentenced Gutierrez-Fuentes to a controlling sentence of 82 months' imprisonment. He timely appeals.

DID THE STATE VIOLATE GUTIERREZ-FUENTES' CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL?

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." This provision applies in state court through the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *State v. Owens*, 310 Kan. 865, 869, 451 P.3d 467 (2019) (citing *Klopfer v. North Carolina*, 386 U.S. 213, 222-23, 87 S. Ct. 988, 18 L. Ed. 2d 1 [1967]). The Kansas Supreme Court recently found that a 19-month delay did not violate a defendant's constitutional right to a speedy trial. 310 Kan. at 866. The court reached this decision after applying the four nonexclusive factors of length of delay, reason for delay, the defendant's assertion of his right, and prejudice. 310 Kan. at 869 (citing *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 [1972]).

Courts consider these factors together with all relevant circumstances and none of the four factors is an independently sufficient reason to find a violation. See 310 Kan. at 869. That being said, "the United States Supreme Court has explained the [length of] delay factor is 'to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.'" 310 Kan. at 872 (quoting *Barker*, 407 U.S. at 530).

The State first filed charges against Gutierrez-Fuentes on October 31, 2016, but he was not brought to trial until August 21, 2018. Gutierrez-Fuentes argues that this length of time violated his constitutional right to a speedy trial. The State disagrees.

Preservation

Gutierrez-Fuentes contends that he properly preserved the constitutional speedy trial issue for appellate review because defense counsel asserted his right to a speedy trial and because

Gutierrez-Fuentes "personally repeatedly objected to delays in his trial process." The record is unclear on when exactly Gutierrez-Fuentes objected to the delay in the proceedings. Gutierrez-Fuentes argues two places in the record on appeal, both of which occurred more than 18 months after charges were filed. First, he cites a June 15, 2018 hearing at which defense counsel stated: "I just want to make sure the record reflects that we are not acquiescing into this continuance, we still are asserting our right to a speedy trial and we want to make sure that this is preserved for the record in case this ends up on appeal." Second, he cites a July 18, 2018 hearing when his counsel was ill and not able to attend, at which he personally informed the court: "I've been here for a year and five months and nothing." And he asked the court about his pro se motion regarding speedy trial. With these two statements, Gutierrez-Fuentes asserts on appeal that "[b]ecause [he] objected to continuances and invoked his right to a speedy trial, this issue is properly before this court."

Speedy trial is both a statutory and constitutional claim. See K.S.A. 2019 Supp. 22-3402. Gutierrez-Fuentes argues in his brief that the delay violated his constitutional right to a speedy trial. As Gutierrez-Fuentes does not argue that his statutory right to speedy trial was violated, we deem this issue abandoned for the purposes of appeal. See *State v. Littlejohn*, 298 Kan. 632, 655-56, 316 P.3d 136 (2014). The constitutional argument was not raised in the district court at trial and is being presented for the first time on appeal. Accordingly, Gutierrez-Fuentes did not properly preserve a constitutional speedy trial right for appellate review. See *State v. Godfrey*, 301 Kan. 1041, 1043, 350 P.3d 1068 (2015) (holding that a party generally may not raise constitutional grounds for reversal for the first time on appeal).

That being said, there are several exceptions to the general rule that a new legal theory may not be asserted for the first time on appeal, including when appellate courts must consider the theory to prevent the denial of fundamental rights. See *State v. Phillips*, 299 Kan. 479, 493, 325 P.3d 1095 (2014). Supreme Court Rule 6.02(a)(5) (2020 Kan. S. Ct. R. 34) requires an appellant to explain why an appellate court should consider for the first time an issue not raised below. Gutierrez-Fuentes argues that this court

should consider his constitutional speedy trial issue for the first time on appeal because "failure to reach the issue would result in the denial of a fundamental right." The United States Supreme Court has held that "the right to a speedy trial is 'fundamental.'" *Barker*, 407 U.S. at 515. So Gutierrez-Fuentes may raise the issue on appeal despite his failure to raise it in the district court at trial.

Standard of Review

The parties agree that this court exercises unlimited review over constitutional speedy trial claims. But in December 2016, more than 10 years after either of the cases the parties cite for the standard of review, the Kansas Supreme Court noted that "while the district court's application of *Barker* to a particular set of facts is a question of law, *what the set of facts is seems to be a question for the district court*." (Emphasis added.) *In re Care & Treatment of Ellison*, 305 Kan. 519, 533, 385 P.3d 15 (2016). Thus, "[t]he factual findings underpinning a district court's decision regarding a defendant's constitutional speedy trial right are reviewed for substantial competent evidence, but the ultimate legal conclusion drawn from those facts is reviewed de novo." *Owens*, 310 Kan. at 868 (citing *In re Care & Treatment of Ellison*, 305 Kan. at 533-34).

Because Gutierrez-Fuentes did not raise a constitutional speedy trial issue in the district court at trial, the district court had no opportunity to make any factual findings related to the *Barker* factors. And "it is not our job to engage in fact-finding." *State v. Rizal*, 310 Kan. 199, 204, 445 P.3d 734 (2019). However, for the reasons stated below, a remand is not required for additional factual findings as the delay in this case was not presumptively prejudicial and Gutierrez-Fuentes makes no argument that he suffered any actual prejudice as required.

Analysis regarding prejudice

Whether the length of delay between arrest and trial is presumptively prejudicial depends on the peculiar circumstances of each case, and the mere passage of time is not determinative. *State v. Weaver*, 276 Kan. 504, Syl. ¶ 3, 78 P.3d 397 (2003). Additionally, the "tolerable delay for an ordinary crime is less than for a

complex one." 276 Kan. at 511. As stated above, the *Owens* court instructs us that this threshold must first be met prior to a discussion of the *Barker* factors.

Under the Sixth Amendment, whether a delay is presumptively prejudicial is determined by the factual circumstances of each case rather than by a bright-line time frame. The delay analysis is different based on the complexity of the crime. See *Owens*, 310 Kan. at 872-73 (citing *Barker*, 407 U.S. at 530-31). In its brief, the State argues that all of the continuances, save the last three-and-one-half months, were attributable to the defendant and the delay was not presumptively prejudicial. However, the length of delay is a factor for consideration after the threshold has been met, and *Owens* points out that we are not to blur the lines between the two levels of analysis.

The Kansas Supreme Court has found a 23-month delay was not presumptively prejudicial in a complex murder trial. See *State v. Mathenia*, 262 Kan. 890, 895, 942 P.2d 624 (1997). Here, the case involved investigations into rape, aggravated battery, and criminal threat. The trial included testimony from multiple police officers and physicians and involved significant questions regarding the facts related to each charged crime. Trial occurred approximately 22 months after charging and approximately 18 months after arrest. Based on the complexity of the case, we hold that the 18-month delay was not presumptively prejudicial.

However, even if the delay was presumptively prejudicial, Gutierrez-Fuentes offers no explanation or argument regarding actual prejudice suffered. He argues that he was appointed three different attorneys during his time in custody and the last one was appointed less than one month before trial. However, Gutierrez-Fuentes makes no argument as to why having three attorneys or when the appointment occurred impaired the defense or resulted in prejudice.

The State makes three arguments regarding this issue. First, Gutierrez-Fuentes does not identify any specific prejudice. Second, an immigration hold was in place for Gutierrez-Fuentes. Lastly, there was no claim that the defense was impaired by the length of the delay. Gutierrez-Fuentes did not file a reply brief rebutting or addressing these points. The State correctly points out

that incidentally mentioning a point is insufficient. See *Brubaker v. Branine*, 237 Kan. 488, 490, 701 P.2d 929 (1985). As a result, Gutierrez-Fuentes has abandoned any argument regarding actual prejudice from the delay, which is dispositive of this issue, and no further fact-finding from the district court is necessary. The district court did not violate Gutierrez-Fuentes' Sixth Amendment right to a speedy trial.

WAS THERE SUFFICIENT EVIDENCE TO SUPPORT GUTIERREZ-FUENTES' AGGRAVATED BURGLARY CONVICTION?

Gutierrez-Fuentes argues that there was insufficient evidence to support his aggravated burglary conviction. The State charged Gutierrez-Fuentes with aggravated burglary under K.S.A. 2016 Supp. 21-5807(b)(1), which prohibits "without authority, entering into . . . any . . . [d]welling in which there is a human being, with intent to commit a felony, theft or sexually motivated crime therein." Gutierrez contends that the State failed to prove that he was legally unauthorized to be in D.S.'s apartment. The State disagrees.

"Appellate courts review sufficiency claims in a criminal case to determine whether '"a rational factfinder could have found the defendant guilty beyond a reasonable doubt."' In making this determination, appellate courts view the evidence in the light most favorable to the State, which means the court '"does not reweigh evidence, resolve evidentiary conflicts, or make determinations regarding witness credibility." [Citations omitted].'" *State v. Williams*, 308 Kan. 1439, 1443, 430 P.3d 448 (2018).

Gutierrez-Fuentes argues that even under this standard of reviere is insufficient evidence to show that he was unauthorized to enter the apartment, citing *State v. Vasquez*, 287 Kan. 40, 194 P.3d 563 (2008). Among other things, Vasquez was charged with committing aggravated burglary in December 1998 by "entering into or remaining within [his wife] Robin's house with the intent to commit first-degree murder." 287 Kan. at 43. Vasquez and Robin married in 1996, but "by mid-1998, Robin was seeking a divorce." 287 Kan. at 44. In October 1998, Vasquez went to Mexico to harvest crops on his land; while there, he contacted Robin, who "told him she did not want him to return." 287 Kan. at 44. While Vasquez was gone, Robin "moved his belongings to the home of Vasquez' sister," and when Vasquez returned to Kansas in the first

week of December 1998, he stayed at his sister's home. 287 Kan. at 44. Vasquez was convicted of the aggravated burglary charge and on appeal he argued that there was insufficient evidence that he lacked authority to enter Robin's house.

The Kansas Supreme Court reasoned:

"Our opinion in *State v. Franklin*, 280 Kan. 337, 345-46, 121 P.3d 447 (2005), is helpful in deciding this issue. In that case, a majority of this court reversed the aggravated burglary conviction of a former live-in girlfriend who entered her former boyfriend's residence and attacked his current paramour. Evidence of lack of authority was insufficient when the defendant had testified that she had permission to be in the residence, and that she had clothes in the residence and a car in its garage. In response, the State had relied on the timing of the attack, 1:54 a.m., as well as the defendant's lack of conversation with residents on the night of the attack, her estrangement from the boyfriend, and her failure to visit the residence in the previous several weeks.

"Viewing all of the evidence in this case in the light most favorable to the prosecution, the State certainly demonstrated that Robin wanted nothing to do with Vasquez. She had asked him to stay in or go back to Mexico; and she had moved at least some of his belongings out of their house and into his sister's. Yet the State did not prove that on December 11, 1998, Vasquez was legally unauthorized to enter the house he and Robin had lived in together. Robin may have obtained a restraining order or may have planned to file a PFA action, as she told [the police officer], but there was no evidence that Vasquez had been served with any order of this type. He was still married to Robin. Although [the officer's] discouragement of contact with Vasquez' wife was good advice, it lacked the force of law. In keeping with our *Franklin* decision, we hold that the evidence at trial was insufficient to show Vasquez lacked authority to enter Robin's house. His conviction on aggravated burglary must therefore be reversed and its corresponding sentence vacated. [Citations omitted.]" *Vasquez*, 287 Kan. at 59-60.

Gutierrez-Fuentes argues that the evidence the State presented at his trial is analogous to that presented in *Vasquez*. There was evidence that D.S. and Gutierrez-Fuentes had lived together in the apartment for four months, and D.S. testified that she no longer wanted Gutierrez-Fuentes in the apartment after their breakup on October 4, 2016. He asserts that under *Vasquez*, this court must reverse his aggravated burglary conviction.

This case is distinguishable from *Vasquez*. Unlike the case at bar, the residence in *Vasquez* was a shared marital home. See 287 Kan. at 60. Vazquez had not been previously asked to return his key, as Gutierrez-Fuentes had been. D.S. and Gutierrez-Fuentes

were not married, and the record contains no evidence that he had any property rights in the residence.

The State requests this court to apply the Kansas Supreme Court's more recent holding in *Williams*. In that case, the defendant and victim were dating and the aggravated burglary in question occurred at the victim's home. The *Williams* court focused on the property rights of the *victim*, noting that "someone with a property interest—as an owner or lessee, for example—has the right to exclude others from the property." 308 Kan. at 1445. It acknowledged that in certain cases, such as *Vasquez*, it had held that the State failed to prove a lack of authority since both the defendant and the victim had a property interest in the residence. 308 Kan. at 1446. And the *Williams* court further acknowledged that "a close question exists" when the State does not present direct evidence about the defendant and victim's property interests in the residence where an aggravated burglary occurs. 308 Kan. at 1446. But circumstantial evidence can sufficiently support a factual conclusion that a defendant lacked authority to enter a residence. See 308 Kan. at 1446.

Forcible entry is a circumstance that can demonstrate a defendant lacked authority to enter. 308 Kan. at 1446. The *Williams* court reasoned:

> "Here, the State presented circumstantial evidence that Robinson had to give permission in order for Williams to enter and that Williams recognized or acquiesced in her right to exclude him. Robinson testified that Williams did not live with her and she had taken back his key a few days before the incident. This suggests she had the right to give and revoke permission. Williams called and talked about dropping by, which suggests he did not perceive he had a right to demand access to the residence. And Robinson asked Williams not to come over on the night of the incident and refused to let him in when he knocked on her door. Significantly, Williams did not try to enter, even though the door was initially unlocked. Once Robinson answered the door, she told Williams to leave and then locked the door. When Williams returned, he broke the door open to gain entry—evidently he did not have a key.
>
> "Based on this evidence, a rational fact-finder could conclude beyond a reasonable doubt that Williams entered the house without authority." 308 Kan. at 1446-47.

D.S. testified at trial that she ended her relationship with Gutierrez-Fuentes and had asked for his key. This suggests that

D.S. had the right to give and revoke Gutierrez-Fuentes' permission to enter the apartment. Her testimony that Gutierrez-Fuentes came to the apartment to retrieve his belongings suggests that he recognized that right. D.S. further testified that on the day of the aggravated burglary, Gutierrez-Fuentes first came to the window of her apartment, knocked, and said he wanted to speak to her. This suggests that he realized he needed her permission to enter the apartment. Moreover, when D.S. did not let Gutierrez-Fuentes in, he forcibly broke the door open to gain entry, which, as noted in *Williams*, suggests he lacked authorization to enter.

Based on the evidence set forth above, a rational fact-finder could conclude beyond a reasonable doubt that Gutierrez-Fuentes entered the apartment without authority. This court finds the evidence was sufficient to support the verdict on this issue.

DID THE DISTRICT COURT ERR BY ADMITTING INADMISSIBLE HEARSAY AT TRIAL?

Gutierrez-Fuentes argues that the district court erred in admitting hearsay testimony from Myers and Hess about statements D.S. made to them through an interpreter. Under K.S.A. 2019 Supp. 60-460, "[e]vidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated, is hearsay evidence and inadmissible" unless it falls within certain delineated exceptions.

When Myers began to testify about his conversation with D.S.—as facilitated by an interpreter—Gutierrez-Fuentes objected on foundation and hearsay grounds, arguing that the State had not shown that the interpretation was accurate and that the interpreter, not Myers, should testify about the statements. The district court overruled the objection, holding: "It's hearsay, but it's based upon what she said and she will be testifying and you can clarify that at a later time. She is going to be testifying, so she will be available for cross-examination." As the district court implicitly recognized, K.S.A. 2019 Supp. 60-460(a) allows hearsay evidence if it is "[a] statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the state-

ment would be admissible if made by the declarant while testifying as a witness." Nevertheless, the district court noted Gutierrez-Fuentes' request for a continuing objection.

Similarly, when the State asked Hess to testify about "what [D.S.] said was the reason for your consult with her," Gutierrez-Fuentes again objected on foundation and hearsay grounds. The district court overruled the objection and noted Gutierrez-Fuentes' request for a continuing objection. By objecting on hearsay grounds and obtaining a continuing objection, Gutierrez-Fuentes preserved this issue for appellate review. See *State v. Mattox*, 305 Kan. 1015, 1035, 390 P.3d 514 (2017) (noting that a continuing objection to the admission of evidence preserves the issue for appellate review).

Gutierrez-Fuentes concedes that "because D.S. testified, D.S.'s actual statements would not be hearsay." He tries to distinguish his argument by contending that he does not challenge Myers' and Hess' testimony about D.S.'s statements; rather, he asserts that the inadmissible hearsay occurred when they testified about what the interpreter had told them. Gutierrez-Fuentes argues that because the unidentified interpreter was not available for cross-examination, Myers' and Hess' testimony about what the interpreter told them was inadmissible hearsay. He contends that the erroneous admission of hearsay requires reversal of his convictions and remand for a new trial. The State replies that the statements were not inadmissible hearsay and, even if the district court erred by allowing the testimony, any error was harmless.

As the parties agree, Kansas appellate courts "review a trial court's determination regarding whether hearsay is admissible under a statutory exception for an abuse of discretion." See *State v. Jones*, 306 Kan. 948, 957, 398 P.3d 856 (2017). A district court abuses its discretion by taking an action that is arbitrary, fanciful, or unreasonable; based on an error of law; or based on an error of fact. 306 Kan. at 957. Yet even if a district court errs by admitting inadmissible evidence, the result is not necessarily reversal of the defendant's convictions and remand for a new trial. See *State v. Sean*, 306 Kan. 963, 986, 399 P.3d 168 (2017) ("Even if we assume all of the testimony was erroneously admitted, our analysis below demonstrates its admission amounted to harmless error.").

The State directs this court to persuasive authority from the Georgia Court of Appeals regarding the admissibility of testimony from an interpreter as a "language conduit." See *Lopez v. State*, 281 Ga. App. 623, 636 S.E.2d 770 (2006). In *Lopez*, the interpreter did not testify at trial. The court allowed the testimony from the witness who used the interpreter after finding that the overall circumstances showed the interpreter had no motive to distort the interpretation and it was otherwise accurate. That court ultimately held that the statements should be relied on as the declarant's statement themselves without an added layer of hearsay unless a motive to mislead or distort was present. 281 Ga. App. at 625-26.

The Kansas Supreme Court has not directly addressed the issue of whether or not a neutral third-party's interpreter's statements are inadmissible hearsay if the interpreter does not testify at trial. In discussing competency challenges to court-appointed interpreters, the Kansas Supreme Court discussed the role of the interpreter as more than a "mere witness" and commented that interpreters are presumed to have acted regularly in the performance of their official duty. See *State v. Van Pham*, 234 Kan. 649, 662, 675 P.2d 848 (1984). In *Van Pham*, the court explicitly complimented the district court on its procedural framework for handling objections to the court interpreter's interpretation outside the presence of the jury, stating that hearing variations or arguments on actual word meanings stated by the interpreter may confuse the jury. 234 Kan. at 665.

State and federal courts across the country are split on the language conduit rule, although a majority of jurisdictions have generally applied the rule favorably when addressing interpreted statements from a defendant. See *State v. Lopez-Ramos*, 929 N.W.2d 414, 420 (Minn. 2009) (holding that the interpreted statements are the statements of the declarant and not the interpreter). The Ninth Circuit upheld its prior adoption of the language conduit rule regarding interpreters after it was requested to review the rule under a Confrontation Clause analysis. See *U.S. v. Orm Hieng*, 679 F.3d 1131, 1140-1141 (9th Cir. 2012) (discussing *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 [2004]). In *Orm Hieng*, the defendant spoke in his native Cambodian language to a special agent of the United States Drug

Enforcement Administration through the use of a Cambodian-English interpreter. Prior to the selection of the jury, the question arose as to whether the interpreter, who was also serving as an interpreter during the trial, would need to be excluded from the courtroom with the other witnesses. The trial court concluded that "'the interpreter is obviously not a percipient or a fact witness to any of the events'" and allowed the interpreter to remain in the courtroom. 679 F.3d at 1137.

Under the language conduit rule, the *Orm Hieng* court found that a district court must consider all relevant factors, "'such as which party supplied the interpreter, whether the interpreter had any motive to mislead or distort, the interpreter's qualifications and language skill, and whether actions taken subsequent to the conversation were consistent with the statements as translated.'" 679 F.3d at 1139. The Ninth Circuit found that by applying this threshold analysis to the interpreter, the matter stems from the law of evidence, divorced from the Sixth Amendment, regarding whether the interpreted statements are attributed directly to the original speaker or to the interpreter who literally utters the words. 679 F.3d at 1140. The defendant in *Orm Hieng* made no objection at trial and could not identify anything in the record that suggested the interpreter was anything other than a language conduit under the purview of the factors listed above. Accordingly, the interpreter's statements were not considered hearsay, and the interpreter was simply a language conduit. 679 F.3d at 1139.

Based on the Kansas Supreme Court's guidance in *Van Pham* that interpreters are more than mere witnesses and are presumed to have acted regularly in the performance of their duty, and that trial courts may handle challenges to the accuracy of an interpreter's interpretation outside the presence of a jury, this panel agrees with the state and federal courts that have favorably applied the language conduit rule. We thus adopt the language conduit rule that "'[e]xcept in unusual circumstances, an interpreter is "no more than a language conduit and therefore [the] translation"'" is viewed as the declarant's own. *United States v. Cordero*, 18 F.3d 1248, 1253 (5th Cir. 1994).

This panel must now consider all relevant factors to determine whether the interpreted statements were made by an interpreter acting simply as a language conduit of the victim.

In this case, the record reveals that the interpreter was supplied to the officer as an employee of the hospital. The record contains no evidence, or argument, of a motive to mislead by the interpreter. Furthermore, the statements interpreted to the officers were consistent with the testimony provided at trial, as discussed in more detail below. Accordingly, we find that the language conduit rule applies, and the statements of D.S. to officers through an interpreter should be attributed as D.S.'s direct statements without an additional layer of hearsay.

Gutierrez-Fuentes argues: "The district court improperly admitted evidence that falls squarely under the hearsay rule set out in K.S.A. 60-460. As a result, this court should reverse and remand for a new trial." The Kansas Supreme Court has held that "[e]rror in the admission of evidence that does not implicate a defendant's constitutional rights is harmless if there is no reasonable probability the error affected the trial's outcome in light of the entire record." *State v. Chapman*, 306 Kan. 266, 276, 392 P.3d 1285 (2017). The party benefitting from the error bears the burden to show harmlessness. 306 Kan. at 276. Courts may "simply mov[e] to harmlessness without deciding whether the [district] court erred" in admitting certain evidence if the harmlessness analysis is dispositive. See 306 Kan. at 277.

Although we have already found that admitting the evidence was not in error, even if error did exist, it was harmless. Gutierrez-Fuentes does not point to specific statements by Myers or Hess. Generally, the challenged portion of Myers' testimony was D.S. relating—through an interpreter—that she had broken up with Gutierrez-Fuentes on October 4, 2016, and then spent the night away from her apartment because she was afraid Gutierrez-Fuentes would return and hurt her. D.S. said that she did not want Gutierrez-Fuentes in her apartment. D.S. said that after she returned to her apartment the next day, Gutierrez-Fuentes came into her apartment, told her he was going to kill her, and punched her several times in the face. She said that she was scared for her life and that Gutierrez-Fuentes stopped punching her when he heard someone outside the apartment.

Hess' testimony was similar and added details. Hess also testified that D.S. said—again, through an interpreter—that the Monday before the attack, Gutierrez-Fuentes had come to the apartment and D.S. had sex with him even though she did not want to. Hess said that D.S. also testified that before the day Gutierrez-Fuentes broke into the apartment, he had grabbed her by her neck and thrown her during an argument.

But all of the material facts related through Hess' or Myers' testimony that Gutierrez-Fuentes challenges as inadmissible hearsay came in through other, unchallenged witness testimony as well. Peña spoke directly with D.S.—without an interpreter—and Peña testified that D.S. told him about having sex with Gutierrez-Fuentes "against her will." Peña further testified that D.S. said that during an argument, Gutierrez-Fuentes "grabbed [D.S.] by the neck and threw her down on the couch." And he testified that D.S. told him that on October 5, 2016, Gutierrez-Fuentes "forced his way into her apartment" and hit her multiple times with his fist. Huhman, who spoke with D.S. using Peña as an interpreter, testified that D.S. told her "she felt like she was going to be killed" during the October 5 events. And D.S. also testified at length about these events.

Even if the district court had erred by allowing Myers and Hess to testify about statements from the interpreter that were attributed to D.S., in light of the entire record, there is not a reasonable probability that Myers' and Hess' testimony affected the trial's outcome. So reversal is not warranted.

DID THE ELEMENTS INSTRUCTION FOR COUNT TWO ALLOW THE JURY TO CONVICT GUTIERREZ-FUENTES OF AGGRAVATED BURGLARY BASED ON UNCHARGED CONDUCT?

In his final issue, Gutierrez-Fuentes argues that the district court erred when it instructed the jury on the elements of aggravated battery as charged in count two.

With respect to count two, the amended information alleged in relevant part that Gutierrez-Fuentes "did then and there unlawfully and knowingly cause physical contact with another person, to-wit: DS, in a manner whereby great bodily harm, disfigurement or death could have been inflicted, to-wit: strangulation." But the

district court instructed the jury on the charge in instruction number 7 that "[t]o establish this charge, each of the following claims must be proved: 1. The defendant knowingly caused bodily harm to D.S. in any manner whereby great bodily harm, disfigurement or death can be inflicted."

Gutierrez-Fuentes asserts that the district court committed reversible error by giving this instruction because it was broader than the operative information and thus it allowed the jury to convict him based on uncharged conduct. He asserts two ways in which the instruction was improperly broad. First, he contends that the jury instruction as given allowed his conviction if the State merely showed that he knowingly caused great bodily harm, rather than requiring the State to show that he caused physical contact in a rude, insulting, or angry manner and that this contact could have inflicted great bodily harm, as required under the statutory citation in the charging document. Second, he contends that the jury instruction as given allowed his conviction if the State merely showed he knowingly caused great bodily harm, rather than conforming to the charging document's narrower assertion that he knowingly caused great bodily harm by strangulation.

The State replies that the invited error doctrine bars this claim and, in the alternative, that the argument fails on its merits. Gutierrez-Fuentes did not file a reply brief or otherwise respond to the State's invited error argument. And that argument resolves this issue—the invited error doctrine bars Gutierrez-Fuentes' challenge to jury instruction number 7.

Review of jury instructions is a multistep process, beginning with reviewability. Regarding this step, "'[w]hether the invited error doctrine applies is a question of law over which this court has unlimited review.'" *State v. Cottrell*, 310 Kan. 150, 161, 445 P.3d 1132 (2019). Further,

"'the invited-error 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. Instead, appellate courts must engage in a searching analysis of the facts of the case to determine whether the complaining party truly invited the error.'

"There is no 'bright-line rule' for applying the invited error doctrine, and context matters. On the one hand, 'the mere failure to object to a proposed instruction at the instructions conference does not trigger the doctrine.' 'On the

other hand, when a defendant actively pursues what is later argued to be an error, then the doctrine most certainly applies.' The fact that a defendant submitted a proposed instruction before trial does not prevent applying the invited error doctrine if the error 'was as obvious before trial as after trial.' [Citations omitted.]" 310 Kan. at 162.

In this case, Gutierrez-Fuentes submitted his proposed jury instructions on August 17, 2018, four days before the jury trial began. For count two, he proposed a jury instruction that did not include the language Gutierrez-Fuentes now asserts should have been in the instruction as given. Moreover, during the jury instruction conference on the final day of the trial defense counsel stated that he had "no objection" to instruction number 7.

As the State points out in its brief, this case is materially indistinguishable from *State v. Fleming*, 308 Kan. 689, 423 P.3d 506 (2018). Because *Fleming* also addressed the invited error doctrine's application to a jury instruction that was broader than the charging document, its analysis controls this case. See *State v. Hall*, 298 Kan. 978, 983, 319 P.3d 506 (2014) (holding that the Court of Appeals must follow Kansas Supreme Court precedent absent some indication that the Kansas Supreme Court intends to depart from that position).

In *Fleming*, the charging document specified that the aggravated robbery charge was based on the taking of a cell phone and a wallet from the victim's presence, while the theft charge was based on the taking of a television, a PlayStation, a laptop computer, and watches. But the jury instruction ultimately given on aggravated robbery did not specifically identify the taken property on which the charge rested. After his conviction for aggravated robbery, Fleming challenged the instruction on appeal, arguing that it was "broader than the charge set out in the complaint against him." 308 Kan. at 691.

Like Gutierrez-Fuentes, the proposed jury instruction Fleming submitted to the district court did not mirror the charging document. It removed the language specifying that Fleming took "'property, to-wit: cell phone, wallet'" and stated only that Fleming took "'property from the presence of'" his victim. 308 Kan. at 691-92. The State's proposed jury instruction and the district court's instruction—to which Fleming did not object—also used the term

"property" and did not identify the specific property taken. 308 Kan. at 692.

On appeal, the Kansas Supreme Court agreed with Fleming that a defendant submitting proposed jury instructions at pretrial that included an instruction later given by the district court did not always bar an appellate challenge to that instruction. 308 Kan. at 701-02. Rather, the determining factor is "the nature of the error." 308 Kan. at 702. For example, an alternative means challenge to a jury instruction could not be invited error by a defendant's pretrial proposed jury instructions "'because the trial had not yet occurred'" when the defendant proposed the instruction. 308 Kan. at 702. In other words, "'counsel could not appreciate before trial that the instruction would be overbroad—as measured by the State's evidence—until that evidence was submitted.'" 308 Kan. at 702. But when "'a lawyer submits a pretrial instruction on the elements of an offense that defines the offense more expansively than it is charged by the State,'" the invited error doctrine applies because the expansion of the crime as charged is "as obvious before trial as after trial." 308 Kan. at 702-03. Thus, "'[t]he defendant's actions in causing the alleged error and the context in which those actions occurred must be carefully reviewed in deciding whether to trigger this doctrine.'" 308 Kan. at 701.

Turning to the facts of the case before it, the Kansas Supreme Court noted that the charging document was clear that the aggravated burglary charge was based on the taking of only two items, and

> "Fleming's counsel had notice of the particular facts the State alleged supported its case and that those facts could be of particular significance to different charges brought. Yet Fleming's counsel proposed an instruction that used the pattern language rather than proposing a modification limiting the jury's consideration to the specific property alleged [in the complaint] and did not at any later point object or request a modification. [Citation omitted.]" 308 Kan. at 707.

Under these circumstances, the *Fleming* court held that "invited error precludes our review of Fleming's asserted jury instruction error on these facts." 308 Kan. at 707.

Similarly, when Gutierrez-Fuentes' counsel submitted the proposed instruction to the district court, he was aware of the par-

ticular facts on which the charges rested and the theory of aggravated battery upon which he was charged. Yet his proposed instruction used language broader than that in the charging document and did not include the language which Gutierrez-Fuentes now asserts was required. Furthermore, Gutierrez-Fuentes did not request that the district court modify the jury instruction to better align it with the charging document at the jury instruction conference. Thus, under *Fleming*, the invited error doctrine applies and bars Gutierrez-Fuentes' claim that the jury instruction requires reversal.

For the reasons stated above, the decision of the district court is affirmed.