

24-128336-A

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**IN THE COURT OF APPEALS OF THE STATE OF KANSAS**

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**STATE OF KANSAS,**

**Plaintiff / Appellee,**

**vs.**

**JOHN DAVID BEE,**

**Defendant / Appellant.**

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**On Appeal from the District Court of Riley County  
Honorable Grant D. Bannister, District Court Judge  
District Court Case No. RL-2023-CR-000217**

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**BRIEF OF THE APPELLANT**

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**ORAL ARGUMENT REQUESTED**

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## Nature of the Case

This is a direct appeal from a criminal conviction and sentence. The State originally charged John Bee with one count of violating a protection from abuse (“PFA”) order by having impermissible contact with his ex-wife, Kimberly Bee. The order permitted contact between them, primarily through the TalkingParents application including about parenting time for their son.

The State later amended the complaint to charge Mr. Bee with 27 counts of violating the PFA order. Mr. Bee sought a bill of particulars so he could identify the messages for the 27 counts and how the State believed those messages violated the PFA order. The court denied the request, which prevented Mr. Bee from being prepared to present his defense by explaining the context of the messages and how they complied with the PFA order. The court also denied Mr. Bee’s motion to dismiss for lack of speedy trial.

At trial, the State presented multiple messages for ten of the counts. None of the messages made threats toward Ms. Bee or their son. The court did not instruct the jury that it had to unanimously agree on a particular act in order to convict Mr. Bee. The State supported venue in Riley County only with evidence that Mr. Bee had a house there and sometimes lived there. The district court denied Mr. Bee’s original and renewed motions for judgment of acquittal for lack of venue.

The jury acquitted Mr. Bee on ten and convicted him on seventeen counts, all misdemeanors. The district court sentenced him to an underlying jail term of 60 months, but ordered him to serve 30 days in jail followed by 12 months of probation. Mr. Bee appeals his convictions and sentence.

## Statement of the Issues

I. The district court erred in denying Mr. Bee's motion for judgment of acquittal because the State presented insufficient evidence to support an inference that he sent the charged messages while present in Riley County.

II. Insufficient evidence supported the convictions because the State did not introduce evidence of the order or orders in the divorce case (21DM87) to which the PFA order referred, or evidence to prove the venue element for each charge.

III. The district court erred in failing to give a unanimity instruction for counts 7, 10, 11, 18, 20, 23, 24, and 25.

IV. The district court erred in denying Mr. Bee's motion for a bill of particulars because this left Mr. Bee unable to prepare his defense as he was never informed of which acts or messages out of 136 pages of message transcripts the State alleged were criminal.

V. The district court erred in denying Mr. Bee's motion to dismiss for violation of constitutional right to speedy trial.

## Statement of Facts

### **A. Background and underlying divorce and PFA cases**

John David Bee and Kimberly Bee were previously married. They had two children, D.B. and A.B. (R3 at 16). D.B. died at a young age (R3 at 16).

In 2021, Ms. Bee filed a petition for an order of protection from abuse (“PFA order”) (Riley County Case No. 21-DM-66), and Mr. Bee filed a petition for divorce (Riley County Case No. 21-DM-87). Ms. Bee was represented by an attorney in both matters; Mr. Bee was self-represented (R3 at 1).

The District Court of Riley County heard both cases over two days in May, 2022, including nearly 11 hours of “pretty dense testimony and data” (R3 at 1-4; R9 at 124-26). The court issued final orders in both cases: it awarded primary residential custody of A.B. to Ms. Bee, with Mr. Bee having parenting time on three Sundays per month (R3 at 40; R9 at 126). It also granted Ms. Bee’s petition, and issued a PFA order (R3 at 24-32 (ruling on and discussion of order); R11 at 178-82 (Exhibit 28, PFA order)). A copy of the PFA order is in the appendix to this brief at pp. A5-8.

The court’s written PFA order prohibits Mr. Bee from having contact with Ms. Bee “except as authorized by the court in Paragraph 8(b) of this order” (R11 at 179; App. A6). Paragraph 8(b), which is part of the section titled “Parentage, Support, and Custody,” is blank but the court handwrote the judge notes that “21DM87 divorce governs” at the top of the section (R11 at 181; App. A8). Paragraph 14 of the order states, “Defendant may communicate with Petitioner by TalkingParents App regarding parenting

time + exchange. Also regarding return of property ordered in 21DM87” (R11 at 182; App. A9).

The court stated orally at a hearing that it would enter a PFA order “restraining Mr. Bee from direct contact with the exception being the TalkingParents application” then elaborating:

Maybe for clarity in the record, the Court makes that exception acknowledging that partly it's at Ms. Bee's request, but to be clear about it, although communication is allowed, that TalkingParents app is to be utilized for discussions pertaining to the child AB, and while in that respect as far as a component of parenting time, of course each parent needs to be civil and respectful.

It should be clear from having lived under it for a while, the no contact order applies in one direction otherwise, though. Ms. Bee is not prohibited from having communications with Mr. Bee outside the Talking app, but I don't expect or know why she would.

The additional exception is beyond the children, part of the proposal for wrapping up the exchange of personal property was to be done through that means, and that's satisfactory with the Court to have communications to effectuate that.

The Court will prepare that order, itself. I think as indicated earlier, that is a standardized form. There will be additional provisions set forth therein that will be part of the order. I think it's deductive to understand that if there's no contact then that also means that any abuse, molesting, interfering with privacy rights would be prohibited, since no contact is allowed other than by the means of TalkingParents, but that will be part of the order.

(R3 at 28-29). (This transcript was not introduced at Mr. Bee's trial.)

The written order was served on Mr. Bee at his then-residence in Ogden, Riley County (R9 at 113, R11 at 183).

**B. Events leading to the proceedings below**

Mr. Bee and Ms. Bee exchanged hundreds of messages over the TalkingParents application from May 2022 to May 2023 (R9 at 129; R11 at 1-136 (Trial Exhibit 30)). In January, 2023, Ms. Bee made a complaint to the Riley County Police Department alleging Mr. Bee was violating the PFA order against him (R9 at 164).

Officer Mark Cusimano interviewed Ms. Bee and ultimately executed an affidavit for application for warrant (R2 at 1-3).

**C. Proceedings below**

The State filed an original complaint/information in May, 2023, charging Mr. Bee with one count of violating a protective order in violation of K.S.A. § 21-5924(a)(1) “on or between the 27th day of May, 2022 and the 22nd day of January, 2023, in Riley County, Kansas ...” (R1 at 1).

The Court issued summonses for two first appearance dates, rather than a warrant, but process server officers were unable to serve Mr. Bee at his Ogden address – a neighbor told them nobody lived there (R1 at 6-7). After two appearance dockets on June 6 and July 18, 2023, without service on Mr. Bee, the Court issued a warrant (R1 at 3, 8-9). Mr. Bee was arrested on the warrant and released on his own recognizance on August 2, 2023, at which time his home address was in Abilene, Kansas (R1 at 12).

On August 15, 2023, Mr. Bee appeared, with counsel, before the District Court for his first appearance and he pleaded not guilty; the court set his case for September 5, 2023 (R1 at 13-14). Mr. Bee did not request and was not asked to consent to or agree to this continuance (R14 at 3).

On September 5, 2023, Mr. Bee’s counsel requested a status hearing request so that a transcript of the hearing at which the Court issued the PFA order could be made (R13 at 3). On October 30, 2023, Mr. Bee’s counsel requested a setover to November 13, 2023 due to ongoing plea negotiations (R15 at 3). On November 13, 2023, Mr. Bee demanded a jury trial, which was set for February 13, 2024 (R1 at 24).

**1. Amended charges and motion for bill of particulars**

On January 19, 2024, the State amended its complaint to charge Mr. Bee with 27 separate counts of violation of a protective order; each count alleged a violation “on or about” a particular date ranging from June 1, 2022 to May 23, 2023 – a different range from that in the original, single count complaint (R1 at 56-61). The counts are summarized along with their relevant dates, verdicts, and supporting exhibits at trial are summarized in Table 1, below at p. 13. A copy of the amended complaint is in the appendix to this brief at pp. A10-15.

Mr. Bee moved for a bill of particulars under K.S.A. § 22-3201(f) (R1 at 75-77). At a hearing, the district court found the amended complaint was adequate and denied his motion (R12 at 28).

On February 8, 2024, the State moved to continue the jury trial, due to one of its prosecutors’ illness (R1 at 87-88). The court granted the continuance and reset the case for trial on April 2, 2024 (R1 at 129). That trial setting also was cancelled, and the case set for a status conference on April 22, 2024 (R2 at 46). That day, the case was again set for trial on July 3, 2024 (R1 at 139; R2 at 46).

## **2. Motion to dismiss due to lack of speedy trial**

Mr. Bee moved to dismiss the case against him on the eve of trial, in July 2024, arguing that 252 days of delay were chargeable to the State, which delay violated his right to a speedy trial under the United States and Kansas Constitutions (R1 at 148-49). Before voir dire, the court denied the motion; it also declined to rule on the amount of time chargeable to the state (R9 at 8).

## **3. Trial**

The case was tried in a one-day jury trial on the amended complaint alleging 27 counts of violating a protective order (R9).

### **a. State's case**

The State's case-in-chief, including opening statements by both parties and testimony from two witnesses, comprises just 69 pages of transcript (R9 at 103-172).

The State first called Matt Gambrel, previously employed with the Riley County Police Department (R9 at 110). Mr. Gambrel testified that he served a copy of the PFA order on Mr. Bee on June 22, 2022 at his home in Ogden, Riley County (R9 at 114-15). The court admitted State's Exhibit 29, the service log for the PFA order, and State's Exhibit 28, the PFA order itself (R9 at 115, 117).

Next, the State called Kimberly Bee (R9 at 123). She identified Mr. Bee and discussed the background to the PFA order and her understanding of its content (R9 at 124-28). She said she and Mr. Bee were allowed to use the TalkingParents application "to communicate about our son, and I understood that as things going on with him. Behaviors. We were potty training. How

we were doing things. Trying to coparent. Do the same thing at each other's houses so there was consistency" (R9 at 128). Ms. Bee described how the TalkingParents application works: the user sets up a topic or thread for a conversation and messages from each parent show up there and trigger a notification e-mail to the other user (R9 at 128-29).

The State then admitted Exhibits 1 through 27 (R9 at 133). These contain excerpts of TalkingParents messages corresponding to the dates in the respectively numbered counts of the amended complaint (R11 at 137-176). For example, Exhibit 1 contains messages dated June 1, 2022, the same date charged in count 1 (R11 at 137; R1 at 56). But some dates are reflected in multiple sub-exhibits rather than a single exhibit: for example, there is no Exhibit 7, but Exhibits 7.1 and 7.2 each have messages dated October 8, 2022 (R11 at 143-144). The exhibits/sub-exhibits, dates, number of messages in each, their corresponding charges, and the jury's verdict for each are summarized a table below at p. 13.

The State later introduced the full TalkingParents transcript as Exhibit 30, which showed the threaded nature of the conversations, while cross-examining Mr. Bee in the defense case; but this exhibit was not admitted during the State's case-in-chief (R9 at 196 (admission); R11 at 1-136 (Exhibit 30)).

**b. Motion for judgment of acquittal**

At the close of the State's evidence, Mr. Bee moved for judgment of acquittal, arguing the State had presented no evidence to support the element of venue – that is, that the events alleged occurred within Riley

County (R9 at 174). Mr. Bee's counsel argued the state had not presented evidence that any of the permissible bases for venue in K.S.A. § 22-2619 had occurred or were in Riley County: (1) the location of any requisite acts to the commission of the crime, (2) the victim's residence, (3) the victim's location at the time of the crime, or (4) where property affected by the crime was obtained (R9 at 174). Although counsel initially referred to jurisdiction, he later clarified this was a challenge to venue (R9 at 175).

In response, the State argued a venue challenge should have been brought sooner (R9 at 178). The State argued its evidence supporting venue in Riley County was testimony that Mr. Bee's residence at the time the messages were sent was in Ogden, which is in Riley County, he had been found at the Ogden house when law enforcement questioned him after Ms. Bee reported the messages, and he had been unemployed for at least some period (R9 at 178). The State argued a reasonable factfinder could infer from these facts that Mr. Bee sent messages from his home and "there's nothing been presented to the contrary that anything was not sent in Riley County" (R9 at 178-79). The district court discussed its thought process, then denied the motion for judgment of acquittal (R9 at 182-86).

**c. Defense case-in-chief**

The defense called two witnesses: Mr. Bee (R9 at 188-213) and Officer Gage Whitmore (R9 at 214-220).

Mr. Bee testified he shared Ms. Bee's understanding that the PFA order permitted communication "as long as it was about A.J. and it was respectful" or about property exchanges (R9 at 188-89). He admitted he had

sent the messages reflected in State's Exhibits 1-27, explained they were not all of the messages sent between himself and Ms. Bee, and had to be understood in the context of the rest of the conversations (R9 at 189-93). He explained that while the application might show the latest message, messages about other topics would be in their own conversation or thread and a user would have to navigate in the application to get to that thread (R9 at 190). He denied any intent to threaten or harass Ms. Bee and stated that the messages were "about my son. It was always about my son. Everything was about my son" (R9 at 193).

The State cross-examined Mr. Bee about that context, beginning by introducing Exhibit 30, the full 136-page transcript of messages from the TalkingParents application (R9 at 195-96). The State began questioning him about the individual messages introduced in its own exhibits, asking how they were about his son (R9 at 198-200). Mr. Bee responded he could not remember every detail of messages sent years ago and to explain the context he would have to comb through the transcript and look at messages in other topics to be able to explain the context of a particular message, which "would take a lot of time" (R9 at 198-99).

Mr. Bee was able to respond to some of this inquiry, for example explaining that discussing allegations of drug use by Ms. Bee was relevant to parenting time and exchanges because things that aggravate his son cause him to spend significant portions of his parenting time helping his son calm down (R9 at 202). Other times, he was unable to provide the specific context

for a message and instead could only agree with the State that the transcript provided the context (R9 at 204).

The State elicited testimony from Mr. Bee that he had lived at places other than the house in Ogden during the relevant time period (R9 at 201, 203). Mr. Bee also testified he was employed in Morris County driving a loader (R9 at 203).

Officer Whitmore briefly testified regarding a meeting with Mr. Bee at his residence on January 22, 2023, which was also attended by Officer Cusimano who the State called as a rebuttal witness (R9 at 214-15). Officer Whitmore was investigating separate matter from Officer Cusimano and testified he did not hear Mr. Bee make certain statements that Officer Cusimano later testified Mr. Bee made (R9 at 216). This meeting previously had been a subject of dispute due to the deletion of body camera footage of the meeting (R1 at 42-55 (motion to strike or dismiss due to deletion of footage)).

**d. Renewed motion for judgment, rebuttal, and verdict**

Mr. Bee renewed his motion for judgment of acquittal at the close of all evidence (R9 at 222-23). The grounds were the same as his previous motion (R9 at 222-23). The court reserved ruling on the motion (R9 at 227).

The State then presented rebuttal testimony from Officer Cusimano relating to the January 22, 2023 meeting with Mr. Bee at his residence (R9 at 229-43). After an instruction conference (R9 at 246-53), the jury was instructed (R9 at 253-66), the State and defense presented closing arguments (R9 at 267-79), and the jury retired for deliberation (R9 at 281).

The jury returned a verdict of not guilty on 10 of the charges, and found Mr. Bee guilty on 17 of the charges (R9 at 283-85; R1 at 189-98 (verdict form)). The court reserved entering judgment based on the verdicts until it could decide the motion for judgment of acquittal on which it previously had reserved ruling (R9 at 288).

In a later hearing, the court denied the renewed motion for judgment of acquittal and entered judgment based on the jury's verdict (R17, 1-9). The court reasoned that the PFA order's issuance was an element of the charge in the jury instruction and therefore was an act "requisite to the commission of the crime" under K.S.A. § 22-2603 (R17 at 7-9). It held that as the PFA order had been issued in Riley County, venue was proper there (R17 at 7-9).

#### **4. Sentencing and appeal**

The district court sentenced Mr. Bee to a 12-month underlying jail sentence on each of the 17 convictions (R11 at 28, R1 at 233). It ran the sentences on counts 2, 3, 5, 7, and 8 consecutively and the remaining ones concurrently for a total underlying sentence of 60 months in jail (R11 at 31, R1 at 233). It ordered Mr. Bee to serve 30 days of the sentence in jail, followed by 12 months' probation (R11 at 28, R1 at 233).

Mr. Bee timely appealed (R1 at 212).

*Table 1.* Summary of counts, the charged date for each count, the verdict, the exhibits the State used to support each count, and the total number of messages in the full transcript on that date.

<b>Ct.</b>	<b>Date</b>	<b>Ver.</b>	<b>Exhibits</b>	<b>Msgs in transcript this date</b>		
				<b>From JB</b>	<b>From KB</b>	<b>Total</b>
1	6/1/2022	NG	1	11	7	18
2	6/22/2022	G	2	7	7	14
3	8/3/2022	G	3	2	1	3
4	8/22/2022	NG	4	1	1	2
5	8/30/2022	G	5	2	2	4
6	10/2/2022	NG	6	2	2	4
7	10/8/2022	G	7.1, 7.2	9	11	20
8	11/26/2022	G	8	8	5	13
9	11/27/2022	G	9	9	3	12
10	11/28/2022	G	10.2, 10.2	3	2	5
11	11/29/2022	G	11.1, 11.2	5	3	8
12	12/1/2022	NG	12.1, 12.2	4	0	4
13	12/2/2022	NG	13	1	0	1
14	12/5/2022	NG	14	1	0	1
15	12/7/2022	G	15	9	6	15
16	12/10/2022	G	16	9	5	14
17	12/11/2022	NG	17	12	9	21
18	12/17/2022	G	18.1, 18,2	9	5	14
19	12/22/2022	G	19	3	4	7
20	12/25/2022	G	20.1, 20.2, 20.3	20	17	37
21	12/28/2022	NG	21	5	2	7
22	1/1/2023	NG	22.1, 22.2, 22.3	15	9	24
23	1/5/2023	G	23.1, 23.2, 23.3	6	5	11
24	1/19/2023	G	24	8	6	14
25	2/5/2023	G	25.1, 25.2, 25.3	4	3	7
26	5/17/2023	G	26	1	1	2
27	5/23/2023	NG	27	1	0	1

## Argument and Authorities

**First issue: The district court erred in denying Mr. Bee’s motion for judgment of acquittal because the State presented insufficient evidence to support an inference that he sent the charged messages while present in Riley County.**

### *Record Location Where Raised*

Mr. Bee moved for judgment of acquittal at the close of the State’s evidence, arguing the State failed to present sufficient evidence to prove the element of venue in Riley County (R9 at 174). Both sides presented argument (R9 at 174-81). The district court denied the motion (R9 at 182-86). Mr. Bee renewed his motion for judgment of acquittal on the same grounds at the close of all evidence (R9 at 222-23). The court denied the renewed motion and entered judgment based on the jury’s verdict (R17, 1-9).

### *Standard of Appellate Review*

The standard of review for a challenge to a denial of a motion for judgment of acquittal “is substantively identical to the standard for reviewing challenges concerning the insufficiency of the evidence.” *State v. Taylor*, 54 Kan. App. 2d 394, 412, 401 P.3d 632 (2017). This court reviews whether the evidence would permit a rational factfinder to find proof beyond a reasonable doubt as to each element of the offense. *Id.* It does not reweigh evidence, assess credibility, or resolve conflicting evidence. *Id.* Verdicts may be upheld based solely on circumstantial evidence “so long as that circumstantial evidence provides a basis for the factfinder to make a reasonable inference on the elements at issue.” *Id.* at 412-13. The reviewing court only considers evidence in the record at the time the motion for judgment of acquittal was made. *State v. Murdock*, 286 Kan. 661, 668, 187 P.3d 1267 (2008).

\* \* \*

**A. Summary**

The law of Kansas is that for an act to be “requisite to the commission” of a crime, sufficient to support venue as an element of the offense, the act itself must be an unlawful act of the defendant, rather than a mere status or condition of the defendant. Here, however, the district court held venue was established because the act of the PFA order being issued occurred in Riley County was “requisite to the commission” of the offense of violating that PFA order. This was error. That issuance was not an unlawful act of Mr. Bee. Instead, no evidence supported venue in Riley County beyond a reasonable doubt.

**B. In every criminal prosecution, the State must present evidence to prove venue is appropriate.**

Until recently, the law of Kansas considered venue a jurisdictional fact. *See State v. Kendall*, 300 Kan. 515, 530, 331 P.3d 763 (2014), *overruled by State v. Barnes*, 563 P.3d 1255, 1266-71 (Kan. Feb. 21, 2025). One ramification of this was that challenges to venue could be raised at any time. *Id.*

While Mr. Bee’s appeal was pending, the Kansas Supreme Court held venue is no longer jurisdictional, abrogating a long line of cases. *Barnes*, 563 P.3d at 1266-71. For the appellant in *Barnes*, that meant his challenges to venue and vicinage failed because they were unpreserved. *Id.* at 1271.

But the *Barnes* decision did not alter the requirement for the State to prove venue to establish the offense. Unlike Mr. Barnes, Mr. Bee preserved his challenge to venue in the proper manner. He ensured that the venue

element was included in the jury instructions, each of which directed the jury it could only convict if it found “[t]his act occurred on or about [date] in Riley County, Kansas” (R1 at 158-84). *See* PIK-Crim. 4th 59.190 (pattern instruction for violation of a protective order). He also moved for judgment of acquittal at the close of the State’s evidence (R9 at 172) and renewed that motion after the defense rested (R9 at 220).

On a defendant’s motion, a court “*shall* order the entry of judgment of acquittal of one or more crimes charged ... after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such crime or crimes.” K.S.A. § 22-3419(1) (emphasis added). So, when Mr. Bee moved for judgment of acquittal at the close of the State’s evidence, the district court was obligated to grant that motion unless the State had introduced evidence sufficient to show beyond a reasonable doubt that venue was proper in Riley County.

### **C. Kansas law on venue**

The basic venue rule in a criminal prosecution is that venue is proper “in the county where the crime was committed.” K.S.A. § 22-2602. Other statutes expand permissible venues in certain situations. When “two or more acts are requisite to the commission of any crime and such acts occur in different counties,” venue is proper in either county where the acts occurred. K.S.A. § 22-2603. The act of communication with another person has been interpreted to occur at both ends of the communication – i.e. from where it is sent, and where it is received. *Kendall*, 399 Kan. at 530-31.

For a crime committed with an electronic device, venue is also proper in any county in which “(1) Any requisite act to the commission of the crime

occurred; (2) the victim resides; (3) the victim was present at the time of the crime; or (4) property affected by the crime was obtained or was attempted to be obtained.” K.S.A. § 22-2619(b). This venue statute applies in addition to the other venue statutes, but also overlaps with them to a degree – for example, the first item uses similar language to K.S.A. § 22-2603’s phrase “acts requisite to the commission.”

When it later ruled on Mr. Bee’s *renewed* motion for judgment of acquittal, the district court concluded the court’s own issuance of the PFA order was an act that was requisite to the commission of the crime (R17 at 7-8). Since the order was issued in Riley County it held that alone satisfied venue (R17 at 7-8). The district court relied on *State v. Briones*, in which the defendant was charged with tampering with an electronic monitoring device ordered as part of a prior criminal case in Johnson County. No. 119,760, 2019 WL 3980652 at \*1 (Kan. App. Feb. 27, 2020) (unpublished). There, this Court held venue was proper in Johnson County because the ordering of the monitoring “was a requisite act to the commission of the crime.” *Id.* at \*7.

The district court’s holding was incorrect as a matter of law. Requisite acts only refer to the *unlawful acts of the accused*. The panel in *Briones* stated it was unable to find “any Kansas appellate decisions that... provide a precise definition of the term ‘acts’ as used in K.S.A. 22-2603.” *Briones* at \*6. But there *is* a Kansas Supreme Court case directly on point to this issue, which the court in *Briones* even cited for a different proposition. *See Addington v. State*, 199 Kan. 554, 431 P.2d 532 (1967).

In *Addington*, the petitioner challenged his conviction in Reno County for issuing false grain receipts. *Id.* at 555-56. The receipts falsely attested to grain received at his warehouse in Hutchinson, Reno County, but the petitioner had issued the receipts from his corporate offices in Sedgwick County, which he then used to secure loans with a bank in Shawnee County. *Id.* The petitioner argued the acts comprising the offense occurred in Sedgwick County, and none of them occurred in Reno County. *Id.* at 559-60. The State contended the lack of grain in the warehouse in Reno County was a requisite act to the crime. *Id.* at 560.

The Kansas Supreme Court disagreed with the State. *Id.* at 561. Because the statute used common-law terms, the interpretation of those terms was informed by their common-law definition. *Id.* Interpreted through that lens, the Court held in order for the multiple-acts venue provision to apply, “the offense must be divisible, and *each part must be unlawful in and of itself*, and committed at a different time and place, or the offense must consist of more than one act, *each of which must constitute an unlawful element of the offense* without the presence of which the crime would not be completed.” *Id.* at 563 (emphasis added). The lack of grain in the Reno County warehouse was not itself an unlawful element of the offense, so Reno County was not a proper venue. *Id.* In other words, “[t]he mere existence in some county of acts or conditions of the accused, lawful in and of themselves, but necessary to be alleged and proven in order to establish the crime as charged, does not ... permit the trial of the defendant in such other county.” *Addington*, 199 Kan. at 563.

The multiple-acts venue provision at issue in *Addington* was slightly different than the current form of K.S.A. § 22-2603, reading “When ... the act or effects constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county.” *Addington*, 199 Kan. at 563. But these changes were made in a general recodification and restyling of Kansas criminal procedure in 1970 and did not alter the result in *Addington*. If anything, the use of the current K.S.A. § 22-2603 phrase “requisite to the commission” of a crime, rather than the “requisite to the consummation” in *Addington* is even more restrictive in what acts may be considered for venue. *Addington* still applies and controls the result on this issue.

Here, the issuance of the PFA order in Riley County is not an unlawful element of the offense. Instead, it is simply a condition of the accused – that Mr. Bee was subject to the PFA order. So, just like the level of grain in the warehouses in *Addington*, the issuance of the order cannot be a requisite act that permits venue in Riley County. *See id.*

**D. The State failed to present evidence to prove venue in Riley County in its case-in-chief, so the district court should have granted Mr. Bee’s motion for judgment of acquittal at the close of the State’s case.**

Taking all the venue statutes together, the State could have established proper venue in the county or counties: (1) from where the messages were sent, (2) where the messages were received, (3) where Ms. Bee’s resided, or (4) where property was affected by the crime. *See* K.S.A. §§ 22-2602, 22-2603, 22-2619. It did not prove any of these.

**1. The State relied solely on the first venue option: that a requisite act occurred in Riley County.**

The State never asserted, argued, relied on, or introduced any evidence to show Ms. Bee was present in Riley County when she received any of the messages. *See* K.S.A. §§ 22-2602, 22-2603, 22-2619. Instead, Ms. Bee testified that from June to December 2022, she worked for Every first in Topeka and then in St. Mary's, placing her either in Shawnee, Waubaussee, or Pottawatomie Counties when she received the TalkingParents messages (R9 at 154). That time period covered counts 1 through 21, and Ms. Bee provided no testimony at all regarding her location when she received the messages for the remaining counts.

Similarly, the State never asserted, argued, relied on, or introduced any evidence to show the third and fourth options – that Ms. Bee's county of residence or property affected were in Riley County. *See* K.S.A. §§ 22-2602, 22-2603, 22-2619. No property was alleged to have been affected by the messages at all. And, while there was no direct testimony regarding Ms. Bee's residence, she appears to have lived in Pottawatomie County: Mr. Bee's trial counsel acknowledged this in his motion for judgment of acquittal (R9 at 177), the court noted it had transferred the domestic case to Pottawatomie County (R9 at 292), and custody exchanges took place in Wamego, which is in Pottawatomie County (R9 at 164). So, Pottawatomie County may have been an appropriate venue for the prosecution, but the prosecution was not brought there.

This leaves only the first option, the county from where the messages were sent. *See* K.S.A. §§ 22-2602, 22-2603, 22-2619.

**2. The State did not present evidence in its case-in-chief that would permit a rational factfinder to find beyond a reasonable doubt that Mr. Bee sent the messages while in Riley County.**

As explained above, this Court reviews a denial of a motion for judgment of acquittal for whether the evidence would permit a rational factfinder to find each element of the offense beyond a reasonable doubt. *Taylor*, 54 Kan. App. at 412. An element may be proven by circumstantial evidence so long as it “provides a basis for the factfinder to make a *reasonable* inference on the elements at issue.” *Id.* at 412-13 (emphasis added). To be reasonable, an inference must be derived by reason and logic. *State v. Slusser*, 317 Kan. 174, 188, 527 P.3d 565 (2023). And because Mr. Bee moved for judgment of acquittal at the close of the State’s case-in-chief, the district court was required to decide that motion based on the evidence in the record at that time. *See Murdock*, 286 Kan. at 668.

The State argued below that the jury could infer Mr. Bee sent the messages from Riley County because he lived in Ogden, which is in Riley County, during that time and “at times he was unemployed” (R9 at 178-79). But the evidence did not support the claim that Mr. Bee was unemployed, and evidence of a person’s place of residence – with or without evidence of unemployment – cannot, without more, support this inference.

The State’s claim that Mr. Bee was unemployed was not supported by evidence at the time Mr. Bee moved for judgment of acquittal, so it cannot be considered. *See Murdock*, 286 Kan. at 668. The only inquiry into Mr. Bee’s employment *in the State’s case-in-chief* took place during direct examination of Ms. Bee:

Q. Just over the period that we've gone over thus far, June 1st to December 25th, were you working at that time?

A. Yes.

[...]

Q. The period we just described, was John working at that time?

A. Not that I know of.

Q. But at times he claimed he was self-employed and also living at his home in Ogden, in Riley County, Kansas. Is that correct?

A. Yes.

(R9 at 154-55).

So, Ms. Bee testified she did not know of Mr. Bee working, but she did not say he was unemployed. She then agreed he claimed he was self-employed.

This does not support the State's assertion that Mr. Bee was unemployed. At best, it may suggest Mr. Bee was unemployed *for some period* in the range of June 1 to December 25 – a period that matches the range of dates charged in the 27 counts. But a rational factfinder would have no way to determine beyond a reasonable doubt on which of those dates Mr. Bee was unemployed.

No reasonable factfinder could infer from only the evidence that Mr. Bee lived at a house in Riley County that Mr. Bee was at home when he sent a particular message. *See Taylor*, 54 Kan. App. 2d at 412. To draw this inference from this fact, a factfinder would have to believe that a person spends all his time at home, never going to the grocery store or work (or, if unemployed, to job interviews or training), never visiting family or friends,

never socializing outside the home. That is unrealistic and not rooted in any form of logic or reason. It is speculation, not an inference.

Even if a factfinder inferred Mr. Bee was unemployed on a particular date, a subsequent inference as to his whereabouts could not be drawn. “Presumptions and inferences may be drawn from established facts, but a presumption may not rest on presumption or inference on inference.” *State v. Chandler*, 307 Kan. 657, 670, 414 P.3d 713 (2018). “Reasonable inferences ‘cannot be drawn from facts and conditions merely imagined or assumed.’” *Id.* (quoting *State v. Burton*, 235 Kan. 472, 477, 681 P.2d 646 (1984)).

Moreover, any inference to be drawn from an inference that Mr. Bee was unemployed on a particular date itself would be irrational. Unemployed does not mean bedridden or homebound, and unemployed people do not spend all their time at home. They apply for jobs. They go to the grocery store. They visit friends and family. They pursue educational opportunities and engage in recreation. All of these take them out of their house, and in Ogden, Kansas – halfway between Manhattan and Junction City and right on the border of Geary County – that will often mean being outside of Riley County.

Other evidence points to other counties as well. Ms. Bee testified that custody exchanges occurred at the Wamego Police Department, which is in Pottawatomie County (R9 at 164). The timing of those exchanges is not clear, but to the extent the jury could infer from the context of the messages that they were sent near in time to a custody exchange, this would suggest the message was sent in that county, not Riley County.

Accordingly, there was no evidence in the State's case-in-chief to support venue in Riley County beyond a reasonable doubt. The district court erred in denying acquittal of the close of the State's case. This Court should reverse the district court's judgment.

**E. The district court also should have granted Mr. Bee's renewed motion for judgment of acquittal at the close of the defense case because the evidence still failed to prove venue.**

What little changed between the original and renewed motion offered no help to the State. Mr. Bee had testified that he had in fact lived other places than the Ogden house – with girlfriends (R9 at 201). He kept the Ogden house for when he had parenting time with AJ so the child would not be exposed to strange new adults (R9 at 213). Nothing in Mr. Bee's testimony or the rest of the defense case provided any additional facts that supported venue in Riley County.

Accordingly, there was no evidence even at the close of all evidence to support venue in Riley County beyond a reasonable doubt. The district court erred in denying the renewed motion for judgment of acquittal. This Court should reverse the district court's judgment.

**Second issue: Insufficient evidence supported the convictions because the State did not introduce evidence of the order or orders in the divorce case (21DM87) to which the PFA order referred, or evidence to prove the venue element for each charge.**

*Record Location Where Raised*

“There is no requirement that a criminal defendant challenge the sufficiency of the evidence before the trial court in order to preserve it for appeal.” *State v. Farmer*, 285 Kan. 541, 545, 175 P.3d 221 (2008). Therefore, this issue is properly before this Court.

*Standard of Appellate Review*

In reviewing whether sufficient evidence supported a conviction, this Court considers whether the evidence viewed in the light most favorable to the State “supports that a rational factfinder could find proof beyond a reasonable doubt as to each element of the offense.” *Taylor*, 54 Kan. App. 2d at 412.

\* \* \*

**A. Summary**

The no-contact provision in the PFA order is qualified by the proviso that “21DM87 divorce governs.” But the State never introduced any evidence of what the “21DM87 divorce” stated. This, and the lack of evidence to support the venue element in the verdict director instruction for each count means the convictions were not supported by sufficient evidence.

**B. There was no evidence of the actual modification of the no-contact provision of the PFA order.**

The State charged Mr. Bee under K.S.A. § 21-5924(a)(1), so it had to prove he knowingly violated a “protection from abuse order issued pursuant

to K.S.A. 60-3105, 60-3106, or 60-3107.” *Id.* To prove Mr. Bee violated an order, the State had to prove the existence and terms of that order.

The State introduced the PFA order as Exhibit 28 (R11 at 178-82). The order is based on the Kansas Judicial Council form for a PFA final order.<sup>1</sup> The order is completed by initialing provisions the court deems applicable and, at times, filling in details where provided.

The operative no-contact provision of the order commands that “[Mr. Bee] shall not contact [Ms. Bee], either directly or indirectly, in any way, **except as authorized by the court in Paragraph 8(b) of this order.**” (R11 at 179 (emphasis added)). Paragraph 8(b) is in a section titled “Parentage, Support, and Custody,” but has no initials in the line next to it – instead, at the top of that section, the district court wrote in “N/A 21DM87 divorce governs” (R11 at 181). The catch-all paragraph 14, which has blanks for “[o]ther orders necessary to promote the safety of the Protected Person,” has initials and a checked box next to “Defendant may communicate with Petitioner by TalkingParents App[] regarding parenting time + exchange. Also regarding return of property ordered in 21DM87” (R11 at 182). This entry is what the State, and therefore Mr. Bee’s defense, focused on at trial.

The PFA order is a legal instrument, and like any other legal instrument it is interpreted not by “isolating a particular sentence or provision, but by construing and considering the entire instrument from its

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<sup>1</sup> The PFA order at issue in this case can be compared with the Judicial Council’s current version of the form for a PFA final order at <https://www.kjc.ks.gov/legal-forms/protection-from-abuse/-folder-624-431>. *See also* K.S.A. § 60-3104(c) (Judicial Council to create form orders).

four corners.” *City of Arkansas City v. Bruton*, 284 Kan. 815, 833, 166 P.3d 992 (2007). When the PFA order is construed as a whole and its nature as a form order taken into account, the court’s intent to qualify the no-contact provision in paragraph 14 – despite no reference to that paragraph in the operative no-contact language – is clear. But this does not mean that paragraph 14’s qualification is exclusive. The 21DM87 case – which had since been transferred to Pottawatomie County, and the district court was not aware of whether orders in that case had changed (R9 at 292) – still applied.

The State presented no evidence of orders in the 21DM87 case. Without that, the jury had no basis to fully interpret the PFA order. It could only speculate what the 21DM87 case said or how it had changed since the PFA order had been issued. It could not find beyond a reasonable doubt that Mr. Bee’s communications with Ms. Bee violated the order. Therefore, this Court should reverse his convictions for lack of sufficient evidence.

**C. Insufficient evidence supported the venue element of each verdict instructor.**

As Mr. Bee explained in his first issue on appeal, the evidence presented by the state to support venue does not support a rational inference that Mr. Bee was present in Riley County, Kansas when he sent any of the messages. This argument differs from Mr. Bee’s first issue because, unlike at the time of the motion for judgment of acquittal, the jury instructions were finalized when the case was submitted to the jury.

Those jury instructions did not instruct the jury that it could find venue based on the PFA order being issued by a Riley County court (R1 at 158-84).

Instead, the verdict directors for each count instructed the jury that it could only find Mr. Bee guilty if the State proved two claims:

1. The defendant knowingly violated a protection from abuse order issued under Kansas law.
2. This act occurred on or about [date], in Riley County.

(R1 at 158-84). “This act” in the second claim can only be read to reference the act alleged in the first claim. And that act is *not* the issuance of a PFA order, but rather the *defendant’s knowing violation* of a PFA order.

The State offered this language in its amended jury instructions (R1 at 90-127), did not object to this language, and has not cross-appealed. So, it cannot argue this instructional language is improper. Since a rational factfinder could not have found proof beyond a reasonable doubt on the second claim for each count, Mr. Bee’s convictions were not supported by sufficient evidence and should be reversed.

This Court should reverse Mr. Bee’s convictions outright without remand.

**Third issue: The district court erred in failing to give a unanimity instruction for counts 7, 10, 11, 18, 20, 23, 24, and 25.**

*Record Location Where Raised*

Mr. Bee acknowledges he did not raise this issue at trial, so he requests review of this issue for clear error. *See State v. Berkstresser*, 316 Kan. 597, 605, 520 P.3d 718 (2022).

*Standard of Appellate Review*

Analysis of a multiple-acts instructional error follows a “particularized three-step test.” *State v. Harris*, 310 Kan. 1026, 1039, 453 P.3d 1172 (2019). First, the court exercises unlimited review to determine whether the case is a multiple-acts case. *Id.* Second, the court determines whether an error occurred – i.e., whether the State or the trial court informed or instructed the jury which act to rely on, and whether the trial court instructed the jury that it must unanimously agree on the particular act supporting a conviction. *Id.* Finally, the reviewing court determines whether the error was reversible. *Id.*

When a defendant does not request a jury instruction regarding unanimity at trial, this Court reviews for clear error. *Berkstresser*, 316 Kan. at 605; K.S.A. § 22-3414(3). Instructions are clearly erroneous when “the reviewing court is firmly convinced the jury would have reached a different verdict had the instructional error not occurred.” *Berkstresser*, 316 Kan. at 605.

\* \* \*

**A. Summary**

For eight of Mr. Bee’s 17 convictions, the State introduced multiple sub-exhibits reflecting messages at different times or in different topic threads

from the TalkingParents application. These separate messages made those counts multiple-acts counts, as each message could have supported a conviction. The court was required to instruct the jury that it must unanimously agree on which particular act constituted a violation, which it did not. Had it done so, the jury would have reached a different conclusion. A new trial is required.

**B. Eight of Mr. Bee’s convictions were multiple-acts counts that required a unanimity instruction.**

A “multiple-acts” count is one in which several acts are alleged and any one of them could constitute the crime charged. *State v. Davis*, 275 Kan. 107, 115, 61 P.3d 701 (2003). “The jury must be unanimous as to which act or incident constitutes the crime in such a case.” *Id.* Whether a case is a multiple acts case is a question of law over which this court exercises unlimited review. *Id.*

To determine whether a defendant’s acts constitute multiple acts, the court assesses “whether the conduct was unitary – that is, whether the conduct was either part of one act or multiple acts separate and distinct from one another.” *Harris*, 310 Kan. at 1039. It considers four factors: “(1) whether the acts occurred at or near the same time; (2) whether the acts occurred at the same location; (3) whether an intervening event occurred between the acts; and (4) whether a fresh impulse motivated some acts.” *Id.*

Here, counts 7, 10, 11, 18, 20, 23, 24, and 25 were multiple-acts counts and led to guilty verdicts. Counts 12 and 22 were also multiple-acts counts, but Mr. Bee was acquitted of these.

The State clearly believed a single message could constitute a violation of the PFA order, as it charged single message violations for many of the counts. And in a pretrial hearing on Mr. Bee’s motion for a bill of particulars, the State acknowledged it could have filed more charges for each message (R12 at 16 (“and the State honestly still showed some restraint by limiting it to one violation for each day”)).

For these multiple-acts counts, the State supported each with multiple sub-exhibits or multiple messages from Mr. Bee in a single exhibit, as summarized in Table 1, above at p. 13.

Some of these messages had to be presented in sub-exhibits because they are drawn from entirely different topics in the TalkingParents transcript. This points to fresh impulses, akin to occurring in different “locations,” i.e., different places in the application. Exhibit 18.1 is a 6:44 p.m. message in a conversation regarding “Significant Others” and does in fact deal with that topic (R11 at 68 (message), 66 (topic header)). Exhibit 18.2 is a 4:55 p.m. message in a conversation about “Sundays” and has no substantive relationship to the topic discussed in Exhibit 18.1 (R11 at 112 (message), 110 (topic header)). Count 20 is similar: Exhibit 20.3 contains messages from the topic “Interactions during exchange,” at 5:55 p.m. and 6:11 p.m. (R11 at 56 (messages), 48 (topic header)). Exhibits 20.1 and 20.2, though, contain messages from 10:45 a.m., 11:14 a.m., and 5:53 p.m., all in the topic “Swapping days” started by Ms. Bee (R11 at 11-12 (messages), 3 (topic header)). Exhibits 11.1 and 11.2 contain messages from different threads, as

well (R11 at 66 (ex. 11.1 messages in “Significant others” thread), 81 (ex 11.2 topic header), 93 (ex. 11.2 messages)).

As the timestamps on these messages show, they were often significantly separated from each other in time. Counts 7 and 10 each contain two messages about an hour apart (R11 at 40, 92). Count 11’s four messages are sent between 1:24 p.m. and 7:48 p.m. (R11 at 66, 93). Count 23’s three messages were sent between 12:55 a.m. and 6:07 a.m. (R11 at 62-63). Count 24’s two messages were sent nearly two hours apart at 3:01 p.m. and 4:54 p.m. (R11 at 18). Count 25’s three messages are sent over more than 12 hours – 7:15 a.m. to 7:20 p.m. (R11 at 36-37). Even where these messages are in the same topic thread, the time gaps tend to have occurred because of intervening messages from Ms. Bee back to Mr. Bee, indicating a fresh impulse motivated the later messages. So, these were multiply-acts counts.

Because these were multiple-acts counts, the jury had to be instructed that it must unanimously agree on the *specific act* that constituted the crime. *See State v. King*, 297 Kan. 955, 982, 305 P.3d 641 (2013). It was not. The district court only instructed the jury its “verdict in this case must be unanimous” (R9 at 265). This instruction was not sufficient because it did not tell the jury it must “unanimously agree upon the specific act which constituted each count.” *See State v. Voyles*, 284 Kan. 239, 244, 160 P.3d 794 (2007).

Had the jury been instructed appropriately, it likely would have decided the matter differently. In effect, the jury was making a judgment call

about each and every message and the context in which that message was sent. Was the message about an approved topic? Was it appropriate in tone and tenor or was it instead harassing? Without a unanimity instruction, we cannot know which of the messages the jury relied on to convict Mr. Bee or whether the jury agreed that a particular message was or was not about acceptable topics or was or was not harassing.

The impact can be seen statistically: the State was more successful in persuading the jury when the jury could choose from several acts without any instruction their verdict had to be unanimous. For multiple acts counts, the State batted .800, getting a verdict in 8 out of 10 counts (R9 at 283-85; R1 at 189-98 (verdict forms)). That contrasts to the record for non-multiple acts counts, for which the State achieved guilty verdicts in just 9 of 17 counts, an average of .529 (R9 at 283-85; R1 at 189-98 (verdict forms)).

The failure to give the jury a multiple-acts unanimity instruction on counts 7, 10, 11, 18, 20, 23, 24, and 25 was clear error. A new trial is required.

**Fourth issue:** The district court erred in denying Mr. Bee’s motion for a bill of particulars because this left Mr. Bee unable to prepare his defense as he was never informed of which acts or messages out of 136 pages of message transcripts the State alleged were criminal.

*Record Location Where Raised*

Mr. Bee moved the district court for a bill of particulars (R1, 75-77). The court denied the motion in a hearing in February, 2022 (R12 at 28).

*Standard of Appellate Review*

When “the charging instrument itself is insufficient to inform the accused of the charge against which he or she must defend,” on a defendant’s motion a district court must order a bill of particulars. *State v. Webber*, 260 Kan. 263, 284, 918 P.2d 609 (1996); *see also State v. Rojas-Marceleno*, 295 Kan. 525, 534, 285 P.3d 361 (2012); *State v. Ashton*, 175 Kan. 164, 174-75, 262 P.2d 123 (1953); *State v. Reno*, 41 Kan. 674, 679, 21 P. 803 (1889).

Whether the charging instrument is sufficient is based upon written evidence in the form of pleadings, so this Court’s review is unlimited. *See Heiman v. Parrish*, 262 Kan. 926, 927, 942 P.2d 631 (1997).

If a district court is not required to order a bill of particulars because the charging instrument is sufficient, it may still do so, but a denial in that circumstance is reviewed for abuse of discretion. “A judicial action constitutes an abuse of discretion if (1) it is arbitrary, fanciful, or unreasonable; (2) it is based on an error of law; or (3) it is based on an error of fact.” *State v. Levy*, 313 Kan. 232, 237, 485 P.3d 605 (2021) (citation omitted).

\* \* \*

## **A. Summary**

The district court was required to order a bill of particulars because the charging instrument, even with discovery, failed to specify the conduct or legal theory on which the State relied for the charged offenses. Without a bill of particulars, Mr. Bee could not present a meaningful defense because he was left guessing at which messages or other conduct allegedly violated the PFA order, and in what way that conduct constituted a violation.

## **B. When a charging instrument is insufficient to inform a defendant of the charge he must defend, on defendant's motion a court must order a bill of particulars.**

Kan. Const. Bill of Rights § 10 provides that “[i]n all prosecutions, the accused shall be allowed... to demand the nature and cause of the accusation against him.” Similarly, the U.S. Constitution protects an accused’s right “to be informed of the nature and cause of the accusation” against her. U.S. Const. Amend. VI; *Cole v. Arkansas*, 333 U.S. 196, 201 (1948) (“No principle of procedural due process is more clearly established than that notice of the specific charge ... [is] among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.”).

These rights mean that “an indictment or information must be drawn with sufficient clearness and completeness to show a violation of law, to enable the accused to know the nature and cause of the charge against him and to enable him to make out his defense.” *State v. Loudermilk*, 221 Kan. 157, 159, 557 P.2d 1229 (1976).

To protect these rights, a defendant is entitled to request a bill of particulars. K.S.A. § 22-3201(f). A bill of particulars serves two functions: “(1) to inform the defendant of the nature of the charges and the evidence to

enable him or her to prepare a defense and (2) to prevent further prosecution for the same offense.” *Rojas-Marceleno*, 295 Kan. at 534. If a charging instrument fails to achieve these functions, a bill of particulars is necessary and must be ordered. *Id.*

This Court recently held a district court erred in denying a motion for a bill of particulars. *See State v. Panjada*, No. 125,259, 2023 WL 3143658 at \*7 (Kan. App. Apr. 28, 2023) (unpublished). Sarah Panjada was a detective with the Kansas City Police Department (“KCKPD”). *Id.* at \*1. The KCKPD and Kansas Highway Patrol (“KHP”) were investigating reports of an erratic driver on I-70. *Id.* The vehicle was believed to belong to the Wyandotte County Sheriff’s Office (“WCSO”). *Id.* Detective Panjada assisted with the investigation by checking several addresses for the vehicle but reported she did not locate the vehicle at the addresses; when a KHP trooper asked which addresses she checked, she “didn’t respond with words” but eventually agreed the trooper should get those from WCSO Major Andrew Carver. *Id.* at \*1-2. KHP troopers eventually located WCSO Detective Michael Simmons, who they believed was the driver of the vehicle, and detected signs of intoxication. *Id.* at \*2. They were unable to obtain a blood sample from Detective Simmons because it had been more than three hours since the reports of erratic driving. *Id.*

Apparently suspecting that Detective Panjada had deliberately delayed the investigation, the KHP sought and received warrants for her phone records and later her phone itself. *Id.* When they sought to execute the warrant for the phone, KHP troopers believed that Detective Panjada first

manipulated the phone before handing it over. *Id.* Analysis of the phone showed she had not deleted anything on it since the original investigation, but she had exchanged text messages with her supervisor discussing the investigation. *Id.* She also had made multiple calls and exchanged text messages with WCSO Captain Jeffrey Taylor and made multiple calls and text messages to Major Carver and Captain Taylor. *Id.*

The State charged Detective Panjada with interfering with a law enforcement investigation and official misconduct. *Id.* Detective Panjada moved for a bill of particulars, which the district court denied. *Id.* at \*7.

The State's complaint recited the elements of the offense but "fail[ed] to specify the conduct on which the State relied." *Id.* The official misconduct charge may have been based on either her communications to Major Carver or Captain Taylor, or it may have been based on her failure to give a clear answer to the KHP trooper about what addresses she had checked. *Id.*

On appeal, the State relied on some of the same cases it argued below in this case, including *Webber* and *State v. Young*, 26 Kan. App. 2d 680, 683, 11 P.3d 55 (1999). *Id.* It argued that Det. Panjada was not entitled to a bill of particulars because she received full discovery and in any event she knew who she called or texted on the night in question. *Id.* This Court rejected that argument, noting that *Webber* dealt with a challenge to the *sufficiency* of a bill of particulars that already had been granted. *Id.* It rejected the *Young* argument because *Young* was "lacking in its explanation of its factual and procedural background, and the nature of the charges and the arguments for why a bill of particulars should have been granted therein are fairly

distinguishable.” *Id.* at \*8. Panjada’s case involved allegations that certain communications with other people were unlawful – just as in the present case; *Young*, in contrast, involved allegations of mistreating a dependent adult. *Id.* The narrow distinction between permissible conversations and illegal ones – and the difficulty for the defendant to know, from the face of the complaint, which was which – was key to the distinction between the cases, though the timing of discovery in each case also played a role. *Id.*

This Court agreed with Detective Panjada that the district court should have granted her motion for a bill of particulars because “[t]he pertinent concern is whether the State was alleging that *specific* calls and texts to *specific* individuals were, in whole or in part, criminal acts. Panjada should not have been left guessing what acts or omissions constituted the crime charged.” *Id.* (emphasis in original).

**C. The district court was required to order a bill of particulars because the complaint was insufficient to inform Mr. Bee of the charge against which he had to defend.**

Here, the charging instrument against Mr. Bee contains 27 counts which, other than a different date, are worded identically. (R1 at 56-60). Each alleged “on or about” a particular day, Mr. Bee “did unlawfully and knowingly violate a protection from abuse order issued pursuant to K.S.A. 60-3105, 60-3106, or 60-3107, and amendments thereto, in Riley County District Court Case No. RL-2021-DM-000066, a class A person misdemeanor, in violation of K.S.A. 21-5924(a)(1) & (b)(1)” (R1 at 56-60; App. A10-15). But none of the charges identified the actual conduct the State was relying on for each one.

Based on the charging document alone, Mr. Bee had no way to know which act (or acts) the State alleged violated the PFA order, or even whether that act was an in-person interaction, an electronic message outside of the TalkingParents application, or a message within the TalkingParents application. Even if Mr. Bee correctly guessed that the State was solely focused on the messages from the TalkingParents application, he still would have had to sift through hundreds of messages between himself and Ms. Bee, as illustrated by the number of messages on each charged date summarized in Table 1 above at p. 13.

Even while sifting through the transcript of the messages, Mr. Bee would have no way to know the State's theory for how a particular interaction violated the PFA order. The PFA order was not intended to be a blanket no-contact order. Though its terms are not perfectly clear, as explained above in Mr. Bee's second issue, it certainly allowed *some* contact.

So, the State could proceed on a number of theories for any given interaction. It may have been made outside of TalkingParents. It may have related to subjects not permitted in the order. It may have violated other prohibitions found in the written order itself or prohibitions orally pronounced by the judge when he originally issued the order. It may have transgressed the order in some other way left to the imagination and creativity of the State.

Further, any such analysis by Mr. Bee or his defense counsel would be complicated by the written order's own internal inconsistency and its inconsistency with Mr. and Ms. Bee's mutual understanding of what the

district court had actually ordered based upon its oral pronouncement of the order. They thought the order generally permitted conversations about A.J. and “things going on with him” (R9 at 128 (Ms. Bee), 188-89 (Mr. Bee)).

The order is based on a form with numerous checkboxes and blanks for details. On its face, the order prohibits any contact, direct or indirect, “except as authorized by the court in Paragraph 8(b)” (R11 at 179). But paragraph 8(b) is not checked or filled in at all and does not authorize any contact (R11 at 181). Instead, the court wrote *in paragraph 14* that “Defendant may communicate with Petitioner by TalkingParents App regarding parenting time & exchange. Also regarding return of property ordered in 21DM87” (R11 at 182).

Because Mr. Bee received no bill of particulars, he did not know the State’s theory until the prosecuting attorney stated it in opening at trial (R9 at 105). Even then, Mr. Bee did not know which messages (from among the thousands in the full transcript) the State alleged were improper until its 27 exhibits were introduced during Ms. Bee’s testimony. The additional definition of dates for each charge generally did not narrow things down, either.

There was no burden on the State to provide the information. It would have needed to do no more than provide the exhibits it later presented at trial and note its theory for how each one violated the PFA order. And “full discovery” did not provide Mr. Bee with the necessary information, either. It just provided him a haystack and required him to guess whether the State thought a particular piece of hay looked like a needle.

In other words, without this information, Mr. Bee was left “guessing what acts ... constituted the crime charged.” *Panjada*, 2023 WL 3143658 at \*8. He could not investigate and present his own information how each message fit within the scope of the contact between him and Ms. Bee that the PFA order permitted.

This handicap is evident in the State’s cross-examination of Mr. Bee. The State repeatedly demanded he explain how each message related to the subjects the PFA order permitted. Mr. Bee explained that because messages from the same timeframe may be split across topic threads, doing so would require looking through the whole transcript and that would take a lot of time (R9 at 198-99). It simply was not practical for Mr. Bee to conduct that analysis on the fly on the witness stand.

Had the court instead ordered the State provide a bill of particulars, Mr. Bee would have known the messages and legal theory on which the State relied to argue those messages violated the PFA order. He would have then been able to assess that context and more effectively prepare his defense prior to trial. Because he did not have that, he was prejudiced in presenting his defense.

As a matter of law, Mr. Bee was entitled to a bill of particulars. The district court erred in denying his request. If the Court does not reverse outright, it should remand this case for a new trial.

**Fifth issue: The district court erred in denying Mr. Bee’s motion to dismiss for violation of constitutional right to speedy trial.**

*Record Location Where Raised*

Mr. Bee moved to dismiss the case against him based on a statutory and constitutional speedy trial violation prior to trial (R1 at 148-150). He called the motion for hearing on the first day of trial, and the court denied the motion (R1 at 4-8).

*Standard of Appellate Review*

“As a matter of law, appellate courts have unlimited review when deciding if the State has violated a defendant's constitutional right to a speedy trial.” *State v. Shockley*, 314 Kan. 46, 61, 494 P.3d 832 (2021).

\* \* \*

**A. Summary**

Mr. Bee was denied his constitutional right to a speedy trial when it took 335 days to bring him to trial on a simple misdemeanor charge. Not only was the length of delay presumptively prejudicial, but Mr. Bee in fact was prejudiced because he was unable to interact with his child during the pendency of the case lest he be accused of further violations of the PFA order.

**B. Mr. Bee was denied his constitutional right to speedy trial when it took 335 days to bring him to trial on simple misdemeanors.**

Both Kan. Const. Bill of Rights § 10 and U.S. Const. Amend. VI guarantee defendants in criminal cases the right to a speedy trial. A speedy trial challenge under both provisions is analyzed through the four-point *Barker* balancing test, which considers: (1) the length of delay; (2) the reason for delay; (3) the defendant’s assertion of the right; and (4) the prejudice to

the defendant. See *Barker v. Wingo*, 407 U.S. 514 (1972); *Shockley*, 314 Kan. at 62 (noting Kansas’s adoption of the *Barker* analysis). Here, these factors show that Mr. Bee’s right to a speedy trial was violated.

*Length of delay.* The length of delay may be determinative, as if the delay is not presumptively prejudicial, no further inquiry is required. *Shockley*, 314 Kan. at 62. This question necessarily considers the complexity of the case to be tried: “the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.” *Barker*, 407 U.S. at 530-31. In *State v. Weaver*, the court found a 15-month (or approximately 450 days) delay from date of arrest to trial presumptively prejudicial in a case with one count of possession of cocaine with intent to sell. 276 Kan. 504, 510-11, 78 P.3d 397 (2003). The state’s case against Mr. Weaver consisted of just 64 transcript pages of testimony. *Id.* at 511-12.

Here, the delay between Mr. Bee’s arrest on August 2, 2022 (R1 at 12) and his trial on July 3, 2023 (R9 at 1; R2 at 46) was 335 days, or just over 11 months. This case was even simpler than *Weaver* because originally it was a single count of a violation of a protective order. Even as amended, however, the State’s case-in-chief against Mr. Bee was presented in just 62 pages of testimony and two witnesses (R9 at 110-172).

*Reason for delay.* Reasons for delay may weigh more heavily or lightly against the State depending on the nature of the reason. *Barker*, 407 U.S. at 531. “A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but

nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.” *Id.*

Here, 20 days elapsed between Mr. Bee’s arrest and his first appearance (R148). He requested or agreed to continuances at the September 5 and October 30, 2023 status hearings, but demanded a jury trial on November 13, 2023, which the court set for 92 days later on February 13, 2024 (R1 at 24). That trial date was continued to April 2, 2024 (49 days later) on the State’s motion due to the illness of one of the State’s prosecutors (R1 at 87-88, R1 at 129). The April 2, 2024 trial date was continued to a status conference on April 22, 2024 (20 days later), when it was set for its final trial date on July 3, 2024 (71 days later) (R1 at 139; R2 at 46).

Unlike a widespread public health emergency, the illness of a prosecutor for the State does not require continuance of the trial. *See State v. Contreras-Avila*, No. 125,485, 2024 WL 4002824 at \*7-8 (Kan. App. Aug. 30, 2024) (unpublished) (weighing delays due to government responses to COVID-19 Pandemic neutrally but holding 281 days of delay due to prosecutor’s individual health concerns “a choice made by the state,” weighing against State). A prosecutor’s office in a larger county such as Riley County employs multiple attorneys. For a case like this, triable in a single day, another prosecutor easily could substitute in. The State’s preference to maintain a single prosecutor on the case may be permissible, but it should be weighed against the State since its purpose is to benefit the State.

There was no court order to continue the April 2, 2024 trial date, but it appears due to being set in with another case (*see* R1 at 148 (defendant's motion to dismiss reciting reason for continuance)). Since this reflects overcrowded courts, this delay should be weighed less heavily but must still be considered. *See Barker*, 407 U.S. at 531.

*Assertion of right.* Mr. Bee asserted his right to a jury trial quickly, filing the statutorily required demand for jury trial on September 4, 2023 (R1 at 17). Although he consented to continuances at two status hearings after his first appearance, Mr. Bee's operative demand for a jury trial that led to the first trial setting came just 90 days after his arrest (R1 at 24), and he continued to assert his right to speedy trial thereafter.

*Prejudice to defendant.* Mr. Bee was prejudiced by the delay because during the pendency of the criminal case against him he stopped seeing his son because he did not want to risk incurring any new charges (*see* R10 at 19-20 (testimony of witness at sentencing)). For nearly a year prior to his trial, and for a total of more than a year when the time for post-trial proceedings is included, Mr. Bee could not risk seeing his son because that would require communicating with Ms. Bee. Since Mr. Bee did not know what the State considered to violate the PFA order, it would have been a significant risk to continue those interactions.

Accordingly, these factors show the State's unnecessary delays violated Mr. Bee's right to a speedy trial. This Court should vacate his convictions without remand.

**Conclusion**

The Court should reverse Mr. Bee's convictions without remand. Alternatively, it should reverse his convictions on all counts and order a new trial.

Respectfully submitted,

*Jonathan Sternberg, Attorney, P.C.*

by /s/Jonathan Sternberg

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COUNSEL FOR APPELLANT

JOHN DAVID BEE

**Certificate of Service**

I certify that on May 5, 2025, I electronically filed a true and accurate Adobe PDF copy of the foregoing and its appendix with the Clerk of the Court by using the electronic filing system, which will send notice of electronic filing to the following:

Mr. Kris Kobach, Kansas Attorney General 120 SW 10th Avenue, Room 200 Topeka, Kansas 66612-1597 (785) 296-2215 ksagappealsoffice @ag.ks.gov	Counsel for Appellee
--	----------------------

Mr. Michael Blackburn Riley County Attorney's Office 105 Courthouse Plaza Manhattan, KS 66502 (785) 537-6390	Counsel for Appellee
--	----------------------

/s/Jonathan Sternberg  
Attorney

## Appendix

Journal Entry – Misdemeanor Case (Oct. 4, 2024) (R1 at 232) .....	A1
State’s Exhibit 28: PFA Order (May 27, 2022) (R11 at 178) .....	A5
Amended Complaint/Information (Jan. 18, 2024) (R1 at 56) .....	A9
<i>State v. Briones</i> , No. 119,760, 2019 WL 3980652 (Kan. App. Feb. 27, 2020) (unpublished) .....	A16
<i>State v. Panjada</i> , No. 125,259, 2023 WL 3143658 (Kan. App. Apr. 28, 2023) (unpublished) .....	A24
<i>State v. Contreras-Avila</i> , No. 125,485, 2024 WL 4002824 (Kan. App. Aug. 30, 2024) (unpublished) .....	A35

ELECTRONICALLY FILED  
2024 Oct 04 AM 8:46  
CLERK OF THE RILEY COUNTY DISTRICT COURT  
CASE NUMBER: RL-2023-CR-000217  
PII COMPLIANT



**Court:** Riley County District Court  
**Case Number:** RL-2023-CR-000217  
**Case Title:** State of Kansas vs. John David Bee  
**Type:** ORD: Sentencing Misdemeanor Sentencing Journal Entry

SO ORDERED,

A handwritten signature in black ink, reading 'Grant D. Bannister'. The signature is written in a cursive, somewhat stylized font.

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/s/ Honorable Grant D. Bannister,  
District Court Judge

Electronically signed on 2024-10-04 08:46:38

page 1 of 4

**IN THE DISTRICT COURT OF RILEY COUNTY  
TWENTY-FIRST JUDICIAL DISTRICT OF KANSAS  
CRIMINAL DIVISION**

**STATE OF KANSAS**

**Plaintiff**

**v.**

**Case No. RL-2023-CR-000217**

**JOHN DAVID BEE**

**Defendant**

**KDR Transaction Number: 3081A2301072**

**JOURNAL ENTRY – MISDEMEANOR CASE**

On **August 19, 2024**, this matter comes on for Sentencing on the following Counts:

The State by: Michael J. Blackburn  via zoom

The defendant being present personally & by counsel, Joshua K. Douglass.

On verdict of guilty, the said defendant is sentenced to confinement in the jail of Riley County, Kansas and payment of fines as follows:

**COUNT 2:** Violation of a Protective Order; 21-5924(a)(1) & (b)(1) – 12 months RCJ  
**COUNT 3:** Violation of a Protective Order; 21-5924(a)(1) & (b)(1) – 12 months RCJ  
**COUNT 5:** Violation of a Protective Order; 21-5924(a)(1) & (b)(1) – 12 months RCJ  
**COUNT 7:** Violation of a Protective Order; 21-5924(a)(1) & (b)(1) – 12 months RCJ  
**COUNT 8:** Violation of a Protective Order; 21-5924(a)(1) & (b)(1) – 12 months RCJ  
**COUNT 9:** Violation of a Protective Order; 21-5924(a)(1) & (b)(1) – 12 months RCJ  
**COUNT 10:** Violation of a Protective Order; 21-5924(a)(1) & (b)(1) – 12 months RCJ  
**COUNT 11:** Violation of a Protective Order; 21-5924(a)(1) & (b)(1) – 12 months RCJ  
**COUNT 15:** Violation of a Protective Order; 21-5924(a)(1) & (b)(1) – 12 months RCJ  
**COUNT 16:** Violation of a Protective Order; 21-5924(a)(1) & (b)(1) – 12 months RCJ  
**COUNT 18:** Violation of a Protective Order; 21-5924(a)(1) & (b)(1) – 12 months RCJ  
**COUNT 19:** Violation of a Protective Order; 21-5924(a)(1) & (b)(1) – 12 months RCJ  
**COUNT 20:** Violation of a Protective Order; 21-5924(a)(1) & (b)(1) – 12 months RCJ  
**COUNT 23:** Violation of a Protective Order; 21-5924(a)(1) & (b)(1) – 12 months RCJ  
**COUNT 24:** Violation of a Protective Order; 21-5924(a)(1) & (b)(1) – 12 months RCJ  
**COUNT 25:** Violation of a Protective Order; 21-5924(a)(1) & (b)(1) – 12 months RCJ  
**COUNT 26:** Violation of a Protective Order; 21-5924(a)(1) & (b)(1) – 12 months RCJ

**Counts 2, 3, 5, 7 & 8 to run consecutive.**

**Counts 9, 10, 11, 15, 16, 18, 19, 20, 23, 24, 25 & 26 to run concurrent.**

**For a total sentence of: 60 months underlying Riley County Jail, 12 months immediate probation with Riley County Court Services after serving an immediate 30 days in the Riley County Jail and costs.**

It is by the court ordered that the director of this county shall cause said defendant to be confined in accordance with the above sentence and to obtain and deliver to the jailer a certified copy of this judgement.

**PROBATION, PAROLE OR SUSPENSION OF SENTENCE**

**SUSPENSION OF SENTENCE:** On August 19, 2024, the above-named defendant having been found guilty at trial. The court finds that the interests of the public and of the defendant will best be served by suspension of sentencing this case  for a period of 12 months  after service of 30 days.

IT IS THEREFORE BY THE COURT ORDERED that the imposition of sentence shall be suspended for a period of  one year  two years  \_\_\_\_\_ the defendant is released subject to the conditions imposed below.

**CONDITIONS ON SUSPENSION OF SENTENCE, PROBATION OR PAROLE:** IT IS FURTHER ORDERED as a condition of the above release from confinement, the defendant shall:

- Report to the probation office of this court – Riley County Court Services
  - Follow all Standard Conditions of Probation
  - At the expense of the defendant, obtain a Drug and Alcohol assessment and follow all recommendations. You will schedule and participate in any recommended treatment as directed by your probation officer. If assessment has been completed prior to sentencing, follow all recommendations.**
  - You will not possess or consume alcohol (including over-the-counter medication and mouthwash containing alcohol) and will not enter a business such as a bar or tavern where alcohol is a primary source of income. You may enter a business, such as a restaurant, where alcohol may be sold but is not the primary focus of the business. You will submit to any form of random alcohol testing at the request of Court Services or any law enforcement officer.**
  - Court Costs:**  \$158.00  \$108.00
  - \$\_\_\_\_\_ Fine due to Domestic Battery, which will be waived upon obtaining a Domestic Violence Assessment and following all recommendations.
  - Probation Fee:** \$60.00
  - TOTAL AMOUNT DUE (court costs, fines, fees, & restitution) \$218.00**
  - Other: Obtain a Mental Health Evaluation and follow all recommendations**
  - Other: Defendant to successfully complete Anger Management**
  - Other: No Contact with victim**
  - Other: Defendant advised of right to appeal/expunge**
  - Other: Motion for appeal bond denied**

Prepared by:



---

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Approved by:

*/s/ Joshua K. Douglass, #23282*

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josh@jdlawoffice.com

IN THE DISTRICT COURT OF RILEY COUNTY, KANSAS  
 Protection from Abuse (K.S.A. 60-3101 *et seq.*)

**Final Order of Protection from Abuse**

Judge or Division: The Honorable Grant D Bannister	Case Number: RL-2021-DM-000066 Court ORI Number:																														
Plaintiff: Kimberly Ann Bee  Relationship to Defendant: <input type="checkbox"/> are or <input type="checkbox"/> have been in a dating relationship <input type="checkbox"/> reside together <input checked="" type="checkbox"/> formerly resided together <input checked="" type="checkbox"/> have a child in common <input type="checkbox"/> Plaintiff is filing on behalf of a minor child vs.	Plaintiff Identifiers:  Year of Birth: 1988  Sex: <input checked="" type="checkbox"/> Female <input type="checkbox"/> Male																														
Defendant: John David Bee  Address: 220 13th St Ogden KS 66517	Defendant Identifiers: <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 15%;">SEX</td> <td style="width: 15%;">RACE</td> <td style="width: 15%;">YOB</td> <td style="width: 15%;">HT</td> <td style="width: 15%;">WT</td> </tr> <tr> <td style="text-align: center;">M</td> <td style="text-align: center;">W</td> <td style="text-align: center;">1981</td> <td></td> <td></td> </tr> <tr> <td>HAIR</td> <td>EYES</td> <td colspan="3" style="text-align: center;">LAST 4 DIGITS OF SSN</td> </tr> <tr> <td></td> <td></td> <td></td> <td></td> <td></td> </tr> <tr> <td colspan="2">DRIVER LICENSE #</td> <td>DL STATE</td> <td colspan="2">DL EXP. DATE</td> </tr> <tr> <td></td> <td></td> <td></td> <td></td> <td></td> </tr> </table>	SEX	RACE	YOB	HT	WT	M	W	1981			HAIR	EYES	LAST 4 DIGITS OF SSN								DRIVER LICENSE #		DL STATE	DL EXP. DATE						
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HAIR	EYES	LAST 4 DIGITS OF SSN																													
DRIVER LICENSE #		DL STATE	DL EXP. DATE																												

Appearances:  Plaintiff  Defendant *pro se*  Defendant Does Not Appear  
 Plaintiff's Attorney  Defendant's Attorney  Other \_\_\_\_\_

**Protected Person(s):** (Only the party, or parties, initialed by the judge are Protected Person(s).)

*KB*  
 Plaintiff, Kimberly Ann Bee  
 The following child(ren):

Child's Name	Sex	Year of Birth

**This Final Order and its terms are directed at and apply to Defendant only.**  
 (This form shall NOT be used for Mutual Protection from Abuse Orders.)

This Final Order shall be effective until: MAY 25, 2023.  
**ONLY THE COURT CAN CHANGE THIS FINAL ORDER.**

NOTE:



CERTIFIED COPY  
 The above is a true and correct copy of the document which is on file or of record in this court.  
 Dated this 3rd day of July, 2024  
*M. O. B. McCallister*  
 Clerk of the District Court of Riley County, Kansas *Deputy*

RL-2021-DM-000066



The Court Finds: (Only the provision(s) initiated by the judge apply) *Am. 3-18-21*

GB Plaintiff filed a written verified petition on 2-3, 2021 requesting an Order of Protection from Abuse. Prior to this hearing, Defendant was given reasonable notice of the date set for the hearing, together with a copy of the petition and any ex parte order of protection from abuse, by personal service on Feb 10, 2021.

GB This Court has jurisdiction over Plaintiff, Defendant and subject matter *& April 22, 2021.*

This court has child custody jurisdiction because  it is home state,  there is no home state and Kansas has significant connections with the child(ren),  temporary emergency jurisdiction,  other: RL 21 DM 87 governs child issues

GB The matter was heard and submitted to the Court which finds

Defendant was personally served and failed to appear; therefore, the court grants the petition by default.

the allegations of abuse are proven by a preponderance of the evidence as required by K.S.A. 60-3106.

GB Defendant represents a credible threat to the physical safety of the Protected Person(s).

The plaintiff's  address and  telephone number shall remain confidential for the protection of the Protected Person(s).

### Order

#### The Court Orders:

- This Final Order of Protection from Abuse ("Final Order") replaces any previous Temporary Order of Protection from Abuse entered by the Court and serves as notice of termination of that Temporary Order upon service of this Final Order on Defendant.
- Defendant shall not assault, threaten, abuse, harass, follow, stalk, or interfere with the privacy of the Protected Person(s) wherever they may be. [ NCIC 01 & 02 ]
- Defendant shall not use, attempt to use, or threaten to use physical force, that would reasonably be expected to cause bodily injury, against the Protected Person(s), nor shall the Defendant engage in other conduct that would place any Protected Person(s) in reasonable fear of bodily injury. [ NCIC 01 & 02 ]
- Defendant shall not threaten a member of the Protected Person's(s)' family or household. [ NCIC 02 ]
- Defendant shall not enter or come on or around the premises, the residence, property, school, or place of employment of the Protected Person(s) or other family or household members of the Protected Person. [ NCIC 04 ]
- Defendant shall not contact the Protected Person(s), either directly or indirectly, in any way, except as authorized by the court in Paragraph 8(b) of this order. [ NCIC 05 ]
- Defendant shall not contact, in any manner, the Protected Person's(s)' employer, employees, fellow workers, or others with whom the communication would be likely to cause annoyance or alarm to the Protected Person. [ NCIC 05 ]
- Defendant shall not direct or request another to contact the Protected Person(s), either directly or indirectly, in any manner, except as authorized by the court in Paragraph 8(b) of this order. [ NCIC 05 ]
- Law enforcement officers are directed to grant any assistance necessary to protect the Protected Person(s) from abuse by Defendant, and to provide any other assistance necessary to enforce these orders, including the order excluding Defendant from the Protected Person(s) place of residence, wherever it may be. [ NCIC 08 ]

**CERTIFICATE OF COMPLIANCE WITH THE VIOLENCE AGAINST WOMEN ACT (VAWA):** This order meets all the requirements of the Violence Against Women Act, 18 U.S.C. § 2265. This Court has jurisdiction of the parties and the subject matter; the defendant has been afforded notice and a timely opportunity to be heard as provided by the laws of Kansas. This Order is enforceable in all 50 states, the District of Columbia, all Indian tribal courts and all United States territories and shall be enforced as if it were an order of that jurisdiction pursuant to 18 U.S.C. § 2265.

Additional terms of this Final Order are set forth below. (Only the provision(s) initialed by the parties apply.)

Housing and Property: *N/A. Divorce 21 Jan 87 governs.*

*If the parties to this action are not married to each other and one party owns the residence or household, the Court shall not grant possession of the residence or household to the exclusion of the party who owns it. K.S.A. 60-3107(d). The Protection from Abuse Act does not prohibit granting possession of a leasehold to either party.*

\_\_\_\_\_ 1. Defendant owns the residence in which Plaintiff and Defendant lived together and Plaintiff and Defendant are not married to each other so the Court cannot grant Plaintiff possession of the residence. Defendant is not excluded from that residence but has an exclusive right to possession of that residence under K.S.A. 60-3107(d). Defendant is entitled to the return of any means of access to that residence including residence keys and garage door openers. Plaintiff may remove the following items:

\_\_\_\_\_

\_\_\_\_\_ [ NCIC 08 ]

\_\_\_\_\_ 2. Defendant shall provide suitable alternate housing for Plaintiff and/or the minor child(ren) by paying rent in the amount of \$ \_\_\_\_\_ per \_\_\_\_\_ to \_\_\_\_\_, with the first payment due \_\_\_\_\_ (date), or as follows: \_\_\_\_\_

\_\_\_\_\_ 3. Plaintiff is granted exclusive possession of the residence located at: \_\_\_\_\_ [ NCIC 03 ] Defendant shall immediately move from the residence and may take only personal effects and clothing for Defendant and any child(ren) in Defendant's custody. Law enforcement officials are directed to enter the residence with Defendant to prevent abuse from occurring while Defendant is present to remove those personal effects and clothing. When Defendant has finished removing those items, law enforcement officials shall remove Defendant from the residence, and ensure that Defendant does not enter or re-enter the premises or any other residence that the Protected Person(s) may occupy. [ NCIC 08 ]

\_\_\_\_\_ 4. Defendant shall not cancel any utilities to the residence granted to Plaintiff. The terms of this paragraph expire 60 days from this Final Order's date of entry. [ NCIC 08 ]

\_\_\_\_\_ 5. Defendant shall immediately surrender to Plaintiff the following items: [ NCIC 08 ]

- The garage door opener for the residence;
- All keys to the residence;
- Mailbox keys;
- Keys to the \_\_\_\_\_ automobiles;
- Other: \_\_\_\_\_

\_\_\_\_\_ 6. The personal property of the parties is divided as follows: \_\_\_\_\_

\_\_\_\_\_

Law enforcement officers are directed to assist in securing possession of the personal property as described above. [ NCIC 08 ]

Parentage, Support, and Custody: *N/A 21 PM 87 divorce governs.*

- 7. Defendant shall pay spousal support to Plaintiff in the amount of \$ \_\_\_\_\_ each month for the duration of this order, with the first payment due \_\_\_\_\_ (date).
- 8. For this paragraph, the Court shall initial subparagraph (a) OR subparagraph (b), but not both.
- a. Defendant's parentage of the child(ren) has not been established through a marriage of the parties or pursuant to the Kansas Parentage Act, K.S.A. 23-2201 *et seq.*, and Defendant has no right to custody or parenting time with the following named child(ren): \_\_\_\_\_, [ NCIC 09 ]

OR

- b. Defendant's parentage of child(ren) has been established through the marriage of the parties or pursuant to the Kansas Parentage Act, K.S.A. 23-2201 *et seq.*, and the following custody and parenting time orders are entered:
  - i. Temporary legal custody and residency of the following named minor child(ren): \_\_\_\_\_ shall be:
    - Joint legal custody between Plaintiff and Defendant until this Final Order expires [ NCIC 06 ]; or,
    - Sole legal custody granted to  Plaintiff [ NCIC 09 ]  Defendant [ NCIC 06 ] until this Final Order expires.
  - ii. Rights of temporary parenting time shall be as follows:
    - Defendant shall have no parenting time [ NCIC 09 ];
    - Defendant shall have supervised parenting time as follows: \_\_\_\_\_, [ NCIC 06 & 08 ]
    - Plaintiff and Defendant shall have parenting time as follows: \_\_\_\_\_, [ NCIC 06 ]
  - iii.  Plaintiff and Defendant shall exchange the minor child(ren) for parenting time at: \_\_\_\_\_, [ NCIC 08 ]

- 9. Defendant is the presumed or established parent and child support is ordered in accordance with the attached Child Support Addendum. *Ordered in divorce 21 PM 87.*
- 10. Law Enforcement shall assist Plaintiff in obtaining physical custody of the minor child(ren).

**Other Provisions:**

- \_\_\_\_\_ 11. The Court orders the transfer of one or more wireless service numbers as contained in the Order Transferring Wireless Services Number(s) from Defendant to Plaintiff.
- \_\_\_\_\_ 12. Defendant shall seek counseling to aid in the cessation of abuse.
- \_\_\_\_\_ 13. Defendant shall pay the following attorney fees and costs: \_\_\_\_\_
- 63 14. Other orders necessary to promote the safety of the Protected Person(s): | NCIC 08 |  
 Defendant shall surrender any firearms to \_\_\_\_\_ | NCIC 07 |  
 \_\_\_\_\_  
63  Defendant may communicate with Petitioner by Talking Parents App. regarding parenting time & exchange. Also regarding return of property ordered in 51 pm 87.  
 \_\_\_\_\_  
 \_\_\_\_\_

**SO ORDERED:**

5.26.22 \_\_\_\_\_ LEWIS D. BATHLESTER  
Date Judge of the District Court

**WARNINGS TO DEFENDANT**

- This Final Order is effective when signed by the judge. Law enforcement officials shall immediately enforce this order.
- Violation of this Final Order may constitute: violation of a protective order as provided in K.S.A. 21-5924, and amendments thereto; assault as provided in K.S.A. 21-5412(a), and amendments thereto; battery as provided in K.S.A. 21-5413(a), and amendments thereto; and domestic battery as provided in K.S.A. 21-5414, and amendments thereto, and may result in prosecution and conviction under Kansas criminal statutes.
- If possession of the residence is granted to Plaintiff, violation of this Final Order by Defendant constitutes criminal trespass pursuant to K.S.A. 21-5808(a)(1)(C), and amendments thereto, and may result in prosecution and conviction under Kansas criminal statutes.
- Violation of this Final Order could result in the order being extended for up to the lifetime of Defendant.
- Violation of this Final Order may also be punishable as contempt of this court.
- If Defendant has a concealed carry license, that license is subject to revocation pursuant to K.S.A. 75-7c07, and amendments thereto. After Defendant's concealed carry license has been revoked, continuing to carry a concealed weapon may constitute a violation of K.S.A. 21-6302, and amendments thereto.
- This Final Order may subject Defendant to prosecution for criminal use of weapons under K.S.A. 21-6301.
- This Final Order may subject Defendant to federal firearms restrictions under 18 U.S.C. § 922(g)(8), and violation of this order may subject Defendant to prosecution for such federal crimes, including but not limited to: firearms possession; interstate travel to commit domestic violence; interstate stalking; and interstate violation of a protection order.

**Notice of Extension of this Final Consent Order  
(Pursuant to K.S.A. 60-3107)**

This Final Consent Order of Protection from Abuse may be extended for additional periods of time upon motion of Plaintiff. Violation of this order could result in the Final Order being extended for up to the lifetime of Defendant.

ELECTRONICALLY FILED  
2024 Jan 18 PM 2:33  
CLERK OF THE RILEY COUNTY DISTRICT COURT  
CASE NUMBER: RL-2023-CR-000217  
**IN THE DISTRICT COURT OF RILEY COUNTY**  
**TWENTY-FIRST JUDICIAL DISTRICT OF KANSAS**  
**CRIMINAL DIVISION**

**STATE OF KANSAS**  
**Plaintiff**  
v.

**Case No. RL-2023-CR-000217**

**JOHN DAVID BEE**  
**Defendant**

**AMENDED COMPLAINT/INFORMATION**

Michael J. Blackburn, #27685, Assistant Riley County Attorney, the undersigned, of lawful age, being first duly sworn on oath, for complaint against the above shown defendant, in the name and by the authority on behalf of the State of Kansas, gives the Court to understand and be informed:

**COUNT 1: VIOLATION OF PROTECTIVE ORDER**

That on or about June 1, 2022, in Riley County, Kansas, **JOHN DAVID BEE** did unlawfully and knowingly violate a protection from abuse order issued pursuant to K.S.A. 60-3105, 60-3106, or 60-3107, and amendments thereto, in Riley County District Court Case No. RL-2021-DM-000066, **a class A person misdemeanor**, in violation of K.S.A. 21-5924(a)(1) & (b)(1).

**COUNT 2: VIOLATION OF PROTECTIVE ORDER**

That on or about June 22, 2022, in Riley County, Kansas, **JOHN DAVID BEE** did unlawfully and knowingly violate a protection from abuse order issued pursuant to K.S.A. 60-3105, 60-3106, or 60-3107, and amendments thereto, in Riley County District Court Case No. RL-2021-DM-000066, **a class A person misdemeanor**, in violation of K.S.A. 21-5924(a)(1) & (b)(1).

**COUNT 3: VIOLATION OF PROTECTIVE ORDER**

That on or about August 3, 2022, in Riley County, Kansas, **JOHN DAVID BEE** did unlawfully and knowingly violate a protection from abuse order issued pursuant to K.S.A. 60-3105, 60-3106, or 60-3107, and amendments thereto, in Riley County District Court Case No. RL-2021-DM-000066, **a class A person misdemeanor**, in violation of K.S.A. 21-5924(a)(1) & (b)(1).

**COUNT 4: VIOLATION OF PROTECTIVE ORDER**

That on or about August 22, 2022, in Riley County, Kansas, **JOHN DAVID BEE** did unlawfully and knowingly violate a protection from abuse order issued pursuant to K.S.A. 60-3105, 60-3106, or 60-3107, and amendments thereto, in Riley County District Court Case No. RL-2021-DM-000066, **a class A person misdemeanor**, in violation of K.S.A. 21-5924(a)(1) & (b)(1).

**COUNT 5: VIOLATION OF PROTECTIVE ORDER**

That on or about August 30, 2022, in Riley County, Kansas, **JOHN DAVID BEE** did unlawfully and knowingly violate a protection from abuse order issued pursuant to K.S.A. 60-3105, 60-3106, or 60-3107, and amendments thereto, in Riley County District Court Case No. RL-2021-DM-000066, **a class A person misdemeanor**, in violation of K.S.A. 21-5924(a)(1) & (b)(1).

**COUNT 6: VIOLATION OF PROTECTIVE ORDER**

That on or about October 2, 2022, in Riley County, Kansas, **JOHN DAVID BEE** did unlawfully and knowingly violate a protection from abuse order issued pursuant to K.S.A. 60-3105, 60-3106, or 60-3107, and amendments thereto, in Riley County District Court Case No. RL-2021-DM-000066, **a class A person misdemeanor**, in violation of K.S.A. 21-5924(a)(1) & (b)(1).

**COUNT 7: VIOLATION OF PROTECTIVE ORDER**

That on or about October 8, 2022, in Riley County, Kansas, **JOHN DAVID BEE** did unlawfully and knowingly violate a protection from abuse order issued pursuant to K.S.A. 60-3105, 60-3106, or 60-3107, and amendments thereto, in Riley County District Court Case No. RL-2021-DM-000066, **a class A person misdemeanor**, in violation of K.S.A. 21-5924(a)(1) & (b)(1).

**COUNT 8: VIOLATION OF PROTECTIVE ORDER**

That on or about November 26, 2022, in Riley County, Kansas, **JOHN DAVID BEE** did unlawfully and knowingly violate a protection from abuse order issued pursuant to K.S.A. 60-3105, 60-3106, or 60-3107, and amendments thereto, in Riley County District Court Case No. RL-2021-DM-000066, **a class A person misdemeanor**, in violation of K.S.A. 21-5924(a)(1) & (b)(1).

**COUNT 9: VIOLATION OF PROTECTIVE ORDER**

That on or about November 27, 2022, in Riley County, Kansas, **JOHN DAVID BEE** did unlawfully and knowingly violate a protection from abuse order issued pursuant to K.S.A. 60-3105, 60-3106, or 60-3107, and amendments thereto, in Riley County District Court Case No. RL-2021-DM-000066, **a class A person misdemeanor**, in violation of K.S.A. 21-5924(a)(1) & (b)(1).

**COUNT 10: VIOLATION OF PROTECTIVE ORDER**

That on or about November 28, 2022, in Riley County, Kansas, **JOHN DAVID BEE** did unlawfully and knowingly violate a protection from abuse order issued pursuant to K.S.A. 60-3105, 60-3106, or 60-3107, and amendments thereto, in Riley County District Court Case No. RL-2021-DM-000066, **a class A person misdemeanor**, in violation of K.S.A. 21-5924(a)(1) & (b)(1).

**COUNT 11: VIOLATION OF PROTECTIVE ORDER**

That on or about November 29, 2022, in Riley County, Kansas, **JOHN DAVID BEE** did unlawfully and knowingly violate a protection from abuse order issued pursuant to K.S.A. 60-3105, 60-3106, or 60-3107, and amendments thereto, in Riley County District Court Case No. RL-2021-DM-000066, **a class A person misdemeanor**, in violation of K.S.A. 21-5924(a)(1) & (b)(1).

**COUNT 12: VIOLATION OF PROTECTIVE ORDER**

That on or about December 1, 2022, in Riley County, Kansas, **JOHN DAVID BEE** did unlawfully and knowingly violate a protection from abuse order issued pursuant to K.S.A. 60-3105, 60-3106, or 60-3107, and amendments thereto, in Riley County District Court Case No. RL-2021-DM-000066, **a class A person misdemeanor**, in violation of K.S.A. 21-5924(a)(1) & (b)(1).

**COUNT 13: VIOLATION OF PROTECTIVE ORDER**

That on or about December 2, 2022, in Riley County, Kansas, **JOHN DAVID BEE** did unlawfully and knowingly violate a protection from abuse order issued pursuant to K.S.A. 60-3105, 60-3106, or 60-3107, and amendments thereto, in Riley County District Court Case No. RL-2021-DM-000066, **a class A person misdemeanor**, in violation of K.S.A. 21-5924(a)(1) & (b)(1).

**COUNT 14: VIOLATION OF PROTECTIVE ORDER**

That on or about December 5, 2022, in Riley County, Kansas, **JOHN DAVID BEE** did unlawfully and knowingly violate a protection from abuse order issued pursuant to K.S.A. 60-3105, 60-3106, or 60-3107, and amendments thereto, in Riley County District Court Case No. RL-2021-DM-000066, **a class A person misdemeanor**, in violation of K.S.A. 21-5924(a)(1) & (b)(1).

**COUNT 15: VIOLATION OF PROTECTIVE ORDER**

That on or about December 7, 2022, in Riley County, Kansas, **JOHN DAVID BEE** did unlawfully and knowingly violate a protection from abuse order issued pursuant to K.S.A. 60-3105, 60-3106, or 60-3107, and amendments thereto, in Riley County District Court Case No. RL-2021-DM-000066, **a class A person misdemeanor**, in violation of K.S.A. 21-5924(a)(1) & (b)(1).

**COUNT 16: VIOLATION OF PROTECTIVE ORDER**

That on or about December 10, 2022, in Riley County, Kansas, **JOHN DAVID BEE** did unlawfully and knowingly violate a protection from abuse order issued pursuant to K.S.A. 60-3105, 60-3106, or 60-3107, and amendments thereto, in Riley County District Court Case No. RL-2021-DM-000066, **a class A person misdemeanor**, in violation of K.S.A. 21-5924(a)(1) & (b)(1).

**COUNT 17: VIOLATION OF PROTECTIVE ORDER**

That on or about December 11, 2022, in Riley County, Kansas, **JOHN DAVID BEE** did unlawfully and knowingly violate a protection from abuse order issued pursuant to K.S.A. 60-3105, 60-3106, or 60-3107, and amendments thereto, in Riley County District Court Case No. RL-2021-DM-000066, **a class A person misdemeanor**, in violation of K.S.A. 21-5924(a)(1) & (b)(1).

**COUNT 18: VIOLATION OF PROTECTIVE ORDER**

That on or about December 17, 2022, in Riley County, Kansas, **JOHN DAVID BEE** did unlawfully and knowingly violate a protection from abuse order issued pursuant to K.S.A. 60-3105, 60-3106, or 60-3107, and amendments thereto, in Riley County District Court Case No. RL-2021-DM-000066, **a class A person misdemeanor**, in violation of K.S.A. 21-5924(a)(1) & (b)(1).

**COUNT 19: VIOLATION OF PROTECTIVE ORDER**

That on or about December 22, 2022, in Riley County, Kansas, **JOHN DAVID BEE** did unlawfully and knowingly violate a protection from abuse order issued pursuant to K.S.A. 60-3105, 60-3106, or 60-3107, and amendments thereto, in Riley County District Court Case No. RL-2021-DM-000066, **a class A person misdemeanor**, in violation of K.S.A. 21-5924(a)(1) & (b)(1).

**COUNT 20: VIOLATION OF PROTECTIVE ORDER**

That on or about December 25, 2022, in Riley County, Kansas, **JOHN DAVID BEE** did unlawfully and knowingly violate a protection from abuse order issued pursuant to K.S.A. 60-3105, 60-3106, or 60-3107, and amendments thereto, in Riley County District Court Case No. RL-2021-DM-000066, **a class A person misdemeanor**, in violation of K.S.A. 21-5924(a)(1) & (b)(1).

**COUNT 21: VIOLATION OF PROTECTIVE ORDER**

That on or about December 28, 2022, in Riley County, Kansas, **JOHN DAVID BEE** did unlawfully and knowingly violate a protection from abuse order issued pursuant to K.S.A. 60-3105, 60-3106, or 60-3107, and amendments thereto, in Riley County District Court Case No. RL-2021-DM-000066, **a class A person misdemeanor**, in violation of K.S.A. 21-5924(a)(1) & (b)(1).

**COUNT 22: VIOLATION OF PROTECTIVE ORDER**

That on or about January 1, 2023, in Riley County, Kansas, **JOHN DAVID BEE** did unlawfully and knowingly violate a protection from abuse order issued pursuant to K.S.A. 60-3105, 60-3106, or 60-3107, and amendments thereto, in Riley County District Court Case No. RL-2021-DM-000066, **a class A person misdemeanor**, in violation of K.S.A. 21-5924(a)(1) & (b)(1).

**COUNT 23: VIOLATION OF PROTECTIVE ORDER**

That on or about January 5, 2023, in Riley County, Kansas, **JOHN DAVID BEE** did unlawfully and knowingly violate a protection from abuse order issued pursuant to K.S.A. 60-3105, 60-3106, or 60-3107, and amendments thereto, in Riley County District Court Case No. RL-2021-DM-000066, **a class A person misdemeanor**, in violation of K.S.A. 21-5924(a)(1) & (b)(1).

**COUNT 24: VIOLATION OF PROTECTIVE ORDER**

That on or about January 19, 2023, in Riley County, Kansas, **JOHN DAVID BEE** did unlawfully and knowingly violate a protection from abuse order issued pursuant to K.S.A. 60-3105, 60-3106, or 60-3107, and amendments thereto, in Riley County District Court Case No. RL-2021-DM-000066, **a class A person misdemeanor**, in violation of K.S.A. 21-5924(a)(1) & (b)(1).

**COUNT 25: VIOLATION OF PROTECTIVE ORDER**

That on or about February 5, 2023, in Riley County, Kansas, **JOHN DAVID BEE** did unlawfully and knowingly violate a protection from abuse order issued pursuant to K.S.A. 60-3105, 60-3106, or 60-3107, and amendments thereto, in Riley County District Court Case No. RL-2021-DM-000066, **a class A person misdemeanor**, in violation of K.S.A. 21-5924(a)(1) & (b)(1).

**COUNT 26: VIOLATION OF PROTECTIVE ORDER**

That on or about May 17, 2023, in Riley County, Kansas, **JOHN DAVID BEE** did unlawfully and knowingly violate a protection from abuse order issued pursuant to K.S.A. 60-3105, 60-3106, or 60-3107, and amendments thereto, in Riley County District Court Case No. RL-2021-DM-000066, **a class A person misdemeanor**, in violation of K.S.A. 21-5924(a)(1) & (b)(1).

**COUNT 27: VIOLATION OF PROTECTIVE ORDER**

That on or about May 23, 2023, in Riley County, Kansas, **JOHN DAVID BEE** did unlawfully and knowingly violate a protection from abuse order issued pursuant to K.S.A. 60-3105, 60-3106, or 60-3107, and amendments thereto, in Riley County District Court Case No. RL-2021-DM-000066, **a class A person misdemeanor**, in violation of K.S.A. 21-5924(a)(1) & (b)(1).

**WITNESSES:** Kimberly Bee, 911 Dispatcher, Matt Gambrel, Evidence Custodian, Ofc. Richard Umble, Ofc. Mark Cusimano

I verify under penalty of perjury that the foregoing is true and correct.

Executed on January 18, 2024.

/s/ Michael J. Blackburn, #27685

Assistant Riley County Attorney  
105 Courthouse Plaza  
Manhattan, KS 66502  
T: (785) 537-6390 F: (785) 537-6334  
mblackburn@rileycountyks.gov

**CERTIFICATE OF SERVICE**

I hereby certify that on this day JANUARY 18, 2024, a true and correct copy of the above and foregoing AMENDED COMPLAINT/INFORMATION was delivered by:

- the United States Mail/Federal Express, postage pre-paid, addressed to:
- personally placed in Courthouse box to:
- email to: **Joshua K. Douglass, 23282, Attorney at Law, 555 Poyntz Avenue, Suite #225, , Manhattan, KS 66502, (785) 431-3375, email: josh@jdlawoffice.com**
- E-flex: **Joshua K. Douglass, Attorney at Law**

and the original was E-filed with:

**Clerk of the District Court, Riley County Courthouse, Manhattan, Kansas 66502**  
and  
**Grant D. Bannister, Division III, 3rd Floor, Riley County District Court**

Michael J. Blackburn, #27685

Assistant Riley County Attorney  
105 Courthouse Plaza  
Manhattan, KS 66502  
T: (785) 537-6390 F: (785) 537-6334  
mblackburn@rileycountyks.gov

446 P.3d 1116 (Table)

Unpublished Disposition

This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.

NOT DESIGNATED FOR PUBLICATION

Court of Appeals of Kansas.

STATE of Kansas, Appellee,

v.

Brian Anthony BRIONES, Appellant.

No. 119,760

|

Opinion filed August 23, 2019

|

Review Denied February 27, 2020

Appeal from Johnson District Court; THOMAS KELLY RYAN, judge.

**Attorneys and Law Firms**

Kasper Schirer, of Kansas Appellate Defender Office, for appellant.

Shawn E. Minihan and Kendall Kaut, assistant district attorneys, Stephen M. Howe, district attorney, and Derek Schmidt, attorney general, for appellee.

Before Bruns, P.J., Malone, J., and Steven E. Johnson, District Judge, assigned.

## MEMORANDUM OPINION

Per Curiam:

\*1 In a prior criminal case, the Johnson County District Court ordered Brian Anthony Briones to wear a GPS ankle bracelet as a condition of his felony bond. Without permission, Briones removed that ankle bracelet in Wyandotte County, where it was then recovered. The State charged Briones in Johnson County District Court with unlawfully tampering with electronic monitoring equipment. Under a plea agreement, he pled guilty and was sentenced to 28 months' imprisonment, to be served consecutively to the sentence in the case in which he was ordered to wear the ankle bracelet. Briones appeals, arguing (1) that Johnson County lacked jurisdiction over his prosecution because venue lay only in Wyandotte County and (2) that the district court

misunderstood its authority under the relevant sentencing statutes and erroneously believed that it had to run the sentences consecutive when it could have ordered them to run concurrent. We find no error and affirm the district court's judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

The Johnson County District Court placed Briones on house arrest in case 15CR1370. To satisfy the GPS monitoring condition, he had to wear an ankle bracelet, which Johnson County house arrest officers monitored. Although the records from that case are not in the record on appeal, our record is clear that Briones was on felony probation in 15CR1370 when he was ordered to wear the ankle bracelet.

On September 5, 2016, in communication with the Johnson County house arrest office, the Kansas City, Kansas, Police Department responded to a "possible house arrest tamper alert" and found Briones' ankle bracelet in two pieces in Wyandotte County. Briones was not present, but when he turned himself in to the Johnson County house arrest office later that day, he was not wearing his ankle bracelet.

On October 6, 2016, the State charged Briones in Johnson County District Court case 16CR2548 with one count of unlawfully tampering with electronic monitoring equipment in violation of *K.S.A. 2018 Supp. 21-6322*. Briones later filed a pro se motion to dismiss, arguing that it was undisputed that the alleged offense had occurred in Wyandotte County, rendering Wyandotte County the appropriate venue and leaving the Johnson County District Court without jurisdiction over the prosecution of the offense. Briones' counsel also filed a motion to dismiss based on the same argument. The State responded that venue was proper and the Johnson County District Court had jurisdiction because the ankle bracelet was ordered in a Johnson County case, Briones was in Johnson County when he signed the agreement not to tamper with it, and the ankle bracelet was monitored in Johnson County.

The district court held a hearing on the motion on November 6, 2017, and the parties rested on their written motions. The district court ruled:

"The primary argument in the Defendant's motion to dismiss is that the actual alleged act, which would be the crime itself of removing electronic monitoring bracelet,

presumably occurred in Wyandotte County, and therefore, that would be the proper venue, the only venue for this case to be prosecuted.

\*2 “But as pointed out in the State's response, and there are two or more possible places in which a prosecution can occur in different counties when separate acts make up a particular crime; it can be brought in either or multiple counties.

“The crime of unlawful tampering of electronic monitoring device requires both that the device is activated or installed, if you will, because of a Court order for supervising a particular person, in this case Mr. Briones, and the removal or damage of the equipment that's done without authorization is another part.

“The underlying case for which Mr. Briones was on this monitoring equipment was from—as ordered here in Johnson County, and on that basis I will find that Johnson County is an appropriate jurisdiction, appropriate venue for pursuing this charge against Mr. Briones, so the Defendant's motion to dismiss will be denied.”

On February 16, 2018, Briones pled guilty to unlawfully tampering with electronic monitoring equipment in exchange for the State dismissing a third pending criminal case against him in 17CR2666. At the plea hearing, Briones also stipulated to violating his probation in 15CR1370, in part by tampering with the electronic monitoring equipment as charged in 16CR2548. The court accepted the stipulation and found that “the probation previously granted in this matter on October 14, 2015, is hereby revoked.” The presentence investigation (PSI) report in 16CR2548 showed that Briones previously had been convicted of failure to register in 15CR1370 and that case was a felony.

On March 8, 2018, Briones filed a motion to withdraw his plea in 16CR2548, arguing that when he pled guilty, he did not understand the restrictions on his right to appeal. But at a hearing on March 23, 2018, Briones withdrew the motion.

On April 12, 2018, the district court sentenced Briones for unlawful tampering with electronic monitoring equipment, imposing the mitigated presumptive sentence agreed to by the parties of 28 months' imprisonment, to be served consecutively to his sentence in 15CR1370. The district court stated: “This sentence by operation of law being committed while on bond in the earlier case, this sentence will be consecutive to any sentence remaining as previously ordered

in the case under [*sic*] 15CR1370.” Briones timely appealed the district court's judgment.

Briones filed a brief with this court challenging both his conviction and sentence. Briones first claims that the Johnson County District Court lacked jurisdiction over his prosecution because venue lay only in Wyandotte County. He also claims the district court misunderstood its authority under the relevant sentencing statutes and erroneously believed that it had to run the sentences consecutive when it could have ordered them to run concurrent. The State argues that venue was proper in Johnson County. On the sentencing issue, the State argues that we lack jurisdiction to review Briones' presumptive sentence, but alternatively, the State argues that the district court was required by statute to run the sentences consecutive.

After the briefs were filed, this court issued an order directing the parties to show cause why this court has jurisdiction over Briones' venue argument given his failure to pursue a motion to withdraw his plea in district court. Both parties responded to the show cause order, and this court retained the issue “on present showing, to be addressed by the panel of judges when the case is decided.”

#### WAS VENUE PROPER IN JOHNSON COUNTY?

\*3 We will first address whether Briones is barred from appealing his conviction. The right to appeal is entirely statutory and is not contained in the United States or Kansas Constitutions. “ ‘Appellate courts have only such jurisdiction as is provided by law.’ ” *State v. Marinelli*, 307 Kan. 768, 774, 415 P.3d 405 (2018). In Kansas, criminal defendants are granted an appeal as a matter of right from any judgment against them. See *K.S.A. 2018 Supp. 22-3602(a)*. But *K.S.A. 2018 Supp. 22-3602(a)* broadly prohibits a defendant's appeal of his or her conviction following a guilty plea:

“No appeal shall be taken by the defendant from a judgment of conviction before a district judge upon a plea of guilty or nolo contendere, except that jurisdictional or other grounds going to the legality of the proceedings may be raised by the defendant as provided in *K.S.A. 60-1507*, and amendments thereto.”

Briones' claim that venue was not proper in Johnson County is a challenge to his conviction. Generally, *K.S.A. 2018 Supp. 22-3602(a)* would bar Briones from appealing his conviction

given his guilty plea. The Kansas Supreme Court has held that to challenge a conviction following a guilty plea, a “defendant must first file a motion to withdraw plea in the district court. If that motion is denied, a direct appeal may follow. The defendant's failure to file a motion to withdraw plea in the district court ... deprives this court of appellate jurisdiction.” *State v. Hall*, 292 Kan. 862, Syl. ¶ 1, 257 P.3d 263 (2011). K.S.A. 2018 Supp. 22-3210(d) allows a defendant to file a motion to withdraw a plea of guilty or nolo contendere at any time before sentencing. Such a motion can be filed after sentencing to correct manifest injustice provided the motion is filed within one year of the sentence becoming final, and even that deadline can be extended upon a showing of excusable neglect by the defendant. K.S.A. 2018 Supp. 22-3210(d)(2), (e).

Briones argues that an exception applies here that allows this court to review his venue claim on appeal because he is challenging the district court's subject matter jurisdiction to preside over his prosecution and eventually convict and sentence him. But K.S.A. 2018 Supp. 22-3602(a) expressly provides “that jurisdictional or other grounds going to the legality of the proceedings may be raised by the defendant as provided in K.S.A. 60-1507.” So Briones has two paths to bring his venue claim before the court. First, he could file a motion to withdraw his guilty plea, and if it was denied, he could appeal that decision to this court. Second, he could file a K.S.A. 60-1507 motion, and any decision in that action would be subject to appellate review.

Another point to consider is that as part of Briones' agreement to plead guilty in 16CR2548, the State dismissed a separate criminal case against him in 17CR2666. Now Briones wants to have this court set aside his conviction in 16CR2548 without the State being able to reinstate the charge or charges in 17CR2666. It only makes sense for the courts to require Briones to move to set aside his guilty plea, thereby nullifying the plea agreement, if he wants to seek relief from his conviction after a guilty plea.

The plain language of K.S.A. 2018 Supp. 22-3602(a) appears to bar Briones' attempt to challenge the district court's venue and overturn his conviction in this direct appeal following his guilty plea. Nevertheless, in this unpublished opinion, we will assume without deciding that we have appellate jurisdiction to address Briones' first issue on appeal. The State also argues that we lack jurisdiction to review Briones' sentence and his second issue on appeal. We will address that argument later in this opinion.

\*4 Turning to the merits of the first issue, the Johnson County District Court ordered Briones to wear the GPS monitoring ankle bracelet and he unlawfully removed that bracelet in Wyandotte County. Briones now argues that Kansas' venue statutes allow his prosecution only in Wyandotte County, leaving the Johnson County District Court without subject matter jurisdiction to preside over his prosecution and eventually convict and sentence him. The State disagrees, arguing that because the monitoring was ordered in Johnson County, Johnson County was a permissible venue under the applicable statutes and the Johnson County District Court had subject matter jurisdiction over the prosecution. The State argues in the alternative that K.S.A. 2018 Supp. 22-2619, which concerns venue for crimes committed with electronic devices, operates to provide venue in Johnson County for prosecution of Briones' crime.

Kansas appellate courts have long held that venue implicates subject matter jurisdiction. See *State v. Dunn*, 304 Kan. 773, 816, 375 P.3d 332 (2016). “ ‘Subject matter jurisdiction is the power of the court to hear and decide a particular type of action.’ The existence of subject matter jurisdiction cannot be waived, and its nonexistence may be challenged at any time. A conviction obtained in a court without subject matter jurisdiction is void. [Citation omitted.]” 304 Kan. at 784.

Whether subject matter jurisdiction exists is a question of law subject to unlimited review on appeal. *Dunn*, 304 Kan. at 784. Most venue challenges frame venue as “a question of fact to be determined by the jury.” See *State v. Hunt*, 285 Kan. 855, 859, 176 P.3d 183 (2008). But when the relevant facts are undisputed, all that remains is to “determine[ ], as a matter of law from the admitted facts, the proper venue for the trial of the action.” See *Addington v. State*, 199 Kan. 554, 557, 431 P.2d 532 (1967). Here, the relevant facts are undisputed, so we consider de novo the legal question of whether venue was proper in Johnson County. And to the extent that the analysis requires interpretation of the venue statutes, our review is also unlimited. See *State v. Alvarez*, 309 Kan. 203, 205, 432 P.3d 1015 (2019) (“We review issues of statutory interpretation de novo.”).

The Kansas statutes governing jurisdiction and venue for criminal prosecutions are found in Article 26 of the Kansas Code of Criminal Procedure. K.S.A. 22-2602 states: “Except as otherwise provided by law, the prosecution shall be in the county where the crime was committed.” Under K.S.A. 22-2603, “[w]here two or more acts are requisite to the

commission of any crime and such acts occur in different counties the prosecution may be in any county in which any of such acts occur.”

The State focuses on this court's decision in *State v. Briones*, No. 117,939, 2018 WL 6424298 (Kan. App. 2018) (unpublished opinion), *petition for rev. filed* December 20, 2018, so we will begin by reviewing that case. We will refer to the defendant in that case, Eddy Briones, as Eddy to distinguish him from the appellant here. After Eddy was convicted of theft, the Overland Park Municipal Court in Johnson County, Kansas, ordered him to complete 60 days of house arrest. As part of his house arrest, Eddy was issued a monitoring bracelet and “signed a Johnson County Department of Corrections Electronic Monitoring Contract.” 2018 WL 6424298, at \*1. The next day, after house arrest staff received an alert that the bracelet had been tampered with, police found the bracelet in Kansas City, Missouri. During his eventual bench trial in Johnson County for unlawfully tampering with electronic monitoring equipment, Eddy argued that because the tampering occurred in Missouri, the Johnson County District Court lacked jurisdiction over his prosecution. The district court disagreed and convicted Eddy of the charge.

On appeal, this court noted that *K.S.A. 2017 Supp. 21-5106* established the parameters for jurisdiction under the *Kansas Criminal Code*. 2018 WL 6424298, at \*2. Under that statute:

\*5 “(a) A person is subject to prosecution and punishment under the law of this state if:

(1) The person commits a crime wholly or partly within this state;

....

“(b) A crime is committed partly within this state if:

(1) An act which is a constituent and material element of the offense;

(2) an act which is a substantial and integral part of an overall continuing criminal plan; or

(3) the proximate result of such act, occurs within the state.”

This court also noted that it had summarized the elements of unlawfully tampering with electronic monitoring equipment as:

“ ‘(1) intentionally removing, disabling, altering, tampering with, damaging, or destroying (2) any electronic monitoring equipment used (3) pursuant to court order or as a condition of parole. Stated differently, the elements are (1) the act of intentionally tampering with electronic monitoring equipment, (2) by someone under a court order or who is on parole, (3) which requires him or her to wear electronic monitoring equipment.’ ” 2018 WL 6424298, at \*2 (quoting *State v. Thacker*, 48 Kan. App. 2d 515, 519-20, 292 P.3d 342 [2013]).

Because it was clear that the crime did not occur wholly within Kansas, the question for this court was whether the crime was committed partly within Kansas, which would establish Kansas jurisdiction under *K.S.A. 2017 Supp. 21-5106(b)*. 2018 WL 6424298, at \*3. Even more specifically stated, this court considered whether “the act of supervision and the court order issuing from” Johnson County constituted “a constituent and material element of the offense of tampering with electronic monitoring equipment.” 2018 WL 6424298, at \*3. This court held:

“[A]t the time the electronic monitoring bracelet was removed, Briones was under court ordered supervision which required him to wear the bracelet. In the language of *Thacker*, the stipulated facts proved the second and third constituent and material elements of the offense: ‘(2) any electronic monitoring equipment used (3) pursuant to court order ....’ These two elements both occurred in Johnson County, Kansas, meaning this crime was partially committed within the state under *K.S.A. 2017 Supp. 21-5106(b)(1)*. As a result, the Johnson County District Court did not err in ruling that it had jurisdiction to hear the case and render a verdict.” 2018 WL 6424298, at \*4.

The *Briones* court also held that the proximate result of the bracelet's removal was that “the Overland Park Municipal Court and Johnson County Community Corrections lost their ability to regulate [Eddy's] activities and insure compliance with the court order issued from a *Kansas municipal court*.” 2018 WL 6424298, at \*4. Because this act occurred in Kansas, the court held that Johnson County had jurisdiction under *K.S.A. 2017 Supp. 21-5106(b)(3)*. 2018 WL 6424298, at \*4.

Returning to our case, the State recites the facts and holdings in *Briones*, then generally argues that this case is indistinguishable, so this court should again find that *K.S.A. 2018 Supp. 21-5106(b)(1)* and (3) vest the Johnson County District Court with jurisdiction over Briones' prosecution. But

as Briones points out in his reply brief, this appeal does not rest on [K.S.A. 2018 Supp. 21-5106\(b\)](#). [K.S.A. 2018 Supp. 21-5106\(a\)](#) establishes the parameters for when “[a] person is subject to prosecution and punishment under the law of this state.” Briones does not argue that he is not subject to prosecution and punishment in Kansas; he argues that [K.S.A. 22-2602](#) and [22-2603](#), which identify the counties within Kansas in which his prosecution shall occur, allow his prosecution only in Wyandotte County. Thus, our court’s unpublished decision in *Briones* does not control the outcome of this appeal.

\*6 We will now focus on Briones’ claim that, under the Kansas venue statutes, the Johnson County District Court was not the proper venue for his prosecution of unlawfully tampering with electronic monitoring equipment. [K.S.A. 22-2603](#) states that where two or more acts are required to commit a crime and the acts occur in different counties, “the prosecution may be in any county in which any such acts occur.” So the question becomes whether Briones’ crime of unlawfully tampering with electronic monitoring equipment required at least one act that occurred in Johnson County.

[K.S.A. 2018 Supp. 21-6322\(a\)](#) defines unlawfully tampering with electronic monitoring equipment as “knowingly and without authorization, removing, disabling, altering, tampering with, damaging or destroying any electronic monitoring equipment used pursuant to court ordered supervision or as a condition of post-release supervision or parole.” Under PIK Crim. 4th 63.131 (2014 Supp.), the elements of the crime are:

“1. The defendant knowingly and without authorization (removed) (disabled) (altered) (tampered with) (damaged) (destroyed) electronic monitoring equipment.

“2. The electronic monitoring equipment was being used as a condition of (court-ordered supervision) (post-release supervision) (parole).

“3. This act occurred on or about the \_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, in \_\_\_\_\_ County, Kansas.”

[K.S.A. 22-2603](#) does not include a precise definition of “acts” that trigger venue within a county, other than to explain that they must be “requisite to the commission of any crime.” Nor do any Kansas appellate decisions that we can find provide a precise definition of the term “acts” as used in [K.S.A. 22-2603](#). But it seems to us that the commonly recognized “elements” of a crime are synonymous with the

“acts” of the crime that trigger venue under [K.S.A. 22-2603](#). If anything, “elements” may be a broader term than “acts” as there may be some crimes that include more than one act within each element. In any event, our Supreme Court has used the elements of a crime to analyze whether there were any “acts” to trigger venue under [K.S.A. 22-2603](#). See, e.g., *State v. Castleberry*, 301 Kan. 170, 176-78, 339 P.3d 795 (2014) (using elements of the crime of unlawful use of a communication facility to decide venue for prosecution of that crime).

The district court found that venue was proper in Johnson County because the electronic monitoring equipment was being used as a condition of court ordered supervision in Johnson County. This is an element of the crime of unlawfully tampering with electronic monitoring equipment the State had to prove to find Briones guilty of the charge, and it would constitute at least one act required to commit the crime. Under [K.S.A. 22-2603](#), Johnson County was a proper venue to prosecute Briones because one required act of the crime occurred in Johnson County.

But Briones argues that the court ordered supervision in Johnson County was a “status element” of the crime and, as such, it cannot establish venue. Briones is unclear on what he means by a “status element” of a crime, but the gist of his argument is that the *physical act* of committing a crime must take place within a county for that county to have proper venue to prosecute the crime. But Kansas courts have held that venue for the prosecution of a crime may be proper in a county even though the physical act of committing the crime occurred in a different county. For instance, in *State v. Doolin*, 216 Kan. 291, 532 P.2d 1080 (1975), the appellant, an inmate of the Kansas State Industrial School for Boys in Topeka, was convicted in Shawnee County of aggravated juvenile delinquency because he escaped from the control of school authorities while on a supervised trip to the Osage County State Lake. The *physical act* of escape occurred in Osage County, and the appellant was apprehended in Iowa. But our Supreme Court found that venue was proper in Shawnee County because the appellant had run away from the Topeka facility on a *prior* occasion, and the prior escape was one of the elements of the crime of aggravated juvenile delinquency. [216 Kan. at 291](#).

\*7 In *State v. Jones*, 9 Kan. App. 2d 106, 673 P.2d 455 (1983), the defendant was being held in the Allen County Jail awaiting trial when he became ill and was transported to a Kansas City, Missouri, hospital. When the defendant was

released from the hospital, he failed to return to Allen County and was later apprehended in another state. The State charged the defendant with aggravated escape from custody in Allen County District Court, and he contested the venue because he did not commit any act related to his escape in Allen County. On appeal, this court held that even though the *physical act* of escape occurred outside of Allen County, that county was the proper venue to prosecute the escape charge because that is the place where the defendant had to return to face the original charge. 9 Kan. App. 2d at 106-07.

In *State v. Boorigie*, 273 Kan. 18, 41 P.3d 764 (2002), the defendant was charged and convicted in Montgomery County with criminal solicitation of false testimony to avoid other criminal charges pending against him in Montgomery County. Although the defendant's *physical act* of soliciting false testimony occurred outside Montgomery County, our Supreme Court found that Montgomery County was the proper venue for the solicitation charges because the solicitation charges were a “direct outgrowth” of the original criminal charges in Montgomery County. 273 Kan. at 24. Citing this court's decision in *Jones*, our Supreme Court reasoned:

“In *Jones* and this case, the subsequent criminal charges were a direct outgrowth of the original charges committed in the county ultimately exercising jurisdiction to try the defendants. In both cases, the offenders had been taken into custody for crimes committed in that county and then transferred out of the county where they committed acts that gave rise to the subsequent charges. And, much as the appellant's escape in *Jones* was aimed at avoiding prosecution in Allen County, Boorigie's efforts to find someone to falsely testify were for the sole purpose of avoiding prosecution in Montgomery County. Comparing these similarities, and considering the direct link between the Montgomery County criminal charges and the crimes committed [elsewhere], it is logical that Montgomery County was a proper venue for the prosecution of the defendant's solicitations for false testimony.” 273 Kan. at 24-25.

Here, the charge of unlawfully tampering with electronic monitoring equipment was similarly a “direct outgrowth” of the Johnson County criminal case in which Briones was ordered to wear the electronic monitoring device. Briones' removal of that electronic monitoring device was an attempt to escape being monitored for pending criminal cases in Johnson County. Applying the rationale of *Boorigie*, Johnson County was a proper venue to prosecute Briones even though

his physical act of tampering with the equipment occurred in Wyandotte County.

Under K.S.A. 22-2603, when two or more acts are required to commit a crime, the prosecution may be in any county where at least one of the acts occurred. Kansas appellate decisions are clear that a requisite act to trigger venue is not restricted to the physical act of committing the crime. Here, the fact that the electronic monitoring equipment was being used as a condition of court ordered supervision in Johnson County was a requisite act to the commission of the crime for which Briones was convicted. As a result, we conclude that Johnson County was a proper venue to prosecute Briones for unlawfully tampering with electronic monitoring equipment. Based on this conclusion, we need not address the State's alternative argument that K.S.A. 2018 Supp. 22-2619 provides venue to prosecute Briones in Johnson County.

#### DID THE DISTRICT COURT ERR BY ORDERING CONSECUTIVE SENTENCES?

\*8 Briones argues that the district court misunderstood its authority under the relevant sentencing statutes and erroneously believed that it had to run the sentence in 16CR2548 consecutive to the sentence in 15CR1370 when it could have ordered them to run concurrent. The State argues that we lack jurisdiction to review Briones' presumptive sentence, but alternatively, the State argues that the district court was required by statute to run the sentences consecutive.

K.S.A. 2018 Supp. 22-3602(a) bars a direct appeal challenging a conviction following a guilty plea, but it does not similarly bar direct appeals challenging a sentence. See *State v. Key*, 298 Kan. 315, 321, 312 P.3d 355 (2013) (“A guilty or no contest plea surrenders a criminal defendant's right to appeal his or her *conviction* but not his or her *sentence*.”). Even so, the State relies on K.S.A. 2018 Supp. 21-6820(c)(1) and asserts that we lack jurisdiction to review Briones' presumptive sentence. K.S.A. 2018 Supp. 21-6820(c)(1) states that on appeal from a judgment or conviction entered for a felony committed on or after July 1, 1993, the appellate court shall not review “[a]ny sentence that is within the presumptive sentence for the crime.” The district court sentenced Briones to 28 months' imprisonment, which was a presumptive sentence for his crime of unlawfully tampering with electronic monitoring equipment. Generally,

we would lack jurisdiction to review this sentence under [K.S.A. 2018 Supp. 21-6820\(c\)\(1\)](#).

But Briones argues that “ ‘the district court wrongly interpreted its statutory authority and therefore refused to consider matters before it that were potentially relevant to the sentence.’ ” Our Supreme Court has held that despite the statutory prohibition on reviewing presumptive sentences, Kansas appellate courts have jurisdiction to consider a claim that a “district court wrongly interpreted its sentencing authority and therefore refused to consider matters before it that were potentially relevant to the sentence.” See [State v. Warren](#), 297 Kan. 881, 885, 304 P.3d 1288 (2013).

At Briones' sentencing hearing, the district court ordered the sentences in the two cases to run consecutive “by operation of law” because Briones committed the new crime in 16CR2548 while on felony bond in 15CR1370. Briones now argues that the district court misunderstood its authority under the relevant sentencing statutes and erroneously believed that it had to run the sentences consecutive when it could have ordered them to run concurrent. Because Briones is arguing that the district court wrongly interpreted its statutory sentencing authority, we conclude that we have appellate jurisdiction to address his claim on appeal. See [Warren](#), 297 Kan. at 885.

Briones did not object in the district court to the consecutive nature of his sentences. Generally, issues not raised before the district court cannot be raised on appeal. See [State v. Kelly](#), 298 Kan. 965, 971, 318 P.3d 987 (2014). But there are several exceptions to this general rule, including when the newly asserted theory involves only a question of law arising on proved or admitted facts and finally determines the case. [State v. Phillips](#), 299 Kan. 479, 493, 325 P.3d 1095 (2014). We agree with Briones that this exception applies here, so we will address his claim for the first time on appeal.

Our analysis requires review and interpretation of the Kansas Sentencing Guidelines Act. Interpretation of that statutory scheme is a question of law subject to unlimited review. [State v. Kinder](#), 307 Kan. 237, 240, 408 P.3d 114 (2018).

\*9 At Briones' sentencing hearing, the parties agreed that he committed his crime in 16CR2548 while he was released on felony bond in 15CR1370. After sentencing Briones to 28 months' imprisonment for unlawfully tampering with electronic monitoring equipment, the district court stated: “This sentence by operation of law being committed while

on bond in the earlier case, this sentence will be consecutive to any sentence remaining [in] 15CR1370.” Although the district court cited no statutory authority for imposing the mandatory consecutive sentences, it would appear the district court was relying on [K.S.A. 2018 Supp. 21-6606\(d\)](#), which states:

“Any person who is convicted and sentenced for a crime committed while on release for a felony pursuant to article 28 of chapter 22 of the Kansas Statutes Annotated, and amendments thereto, *shall* serve the sentence consecutively to the term or terms under which the person was released.” (Emphasis added.)

On appeal, Briones contends that [K.S.A. 2018 Supp. 21-6606\(d\)](#) conflicts with [K.S.A. 2018 Supp. 21-6604\(f\)\(4\)](#) and, when the two statutes are reconciled, the district court has the discretion to order concurrent or consecutive sentences for an offender who commits a crime while on felony bond. But we need not address that argument because our record reflects that Briones committed his crime in 16CR2548 while he was on felony probation in 15CR1370. The Johnson County District Court placed Briones on house arrest and ordered him to wear an ankle bracelet in 15CR1370. Briones removed the ankle bracelet on September 5, 2016, leading to the charge in 16CR2548. At the plea hearing on February 16, 2018, Briones also stipulated to violating his probation in 15CR1370, in part by tampering with the electronic monitoring equipment as charged in 16CR2548. The district court accepted the stipulation and found that “the probation previously granted in this matter on October 14, 2015, is hereby revoked.” The PSI report in 16CR2548 showed that Briones previously had been convicted of failure to register in 15CR1370 and that case was a felony.

At the sentencing hearing on April 12, 2018, the parties and the district court all agreed that Briones committed his crime in 16CR2548 while he was on felony bond in 15CR1370. Perhaps Briones had been released on bond on a probation violation warrant in 15CR1370 when he committed his new crime in 16CR2548, but we do not know that for sure because the records from 15CR1370 are not included in our record on appeal. But our record *does* show that Briones was on felony probation in 15CR1370 when he committed his new crime in 16CR2548. Because Briones committed his new crime in 16CR2548 while he was on felony probation in 15CR1370, the court needed to order consecutive sentences under [K.S.A. 2018 Supp. 21-6606\(c\)](#), which states:

“Any person who is convicted and sentenced for a crime committed while on probation, assigned to a community correctional services program, on parole, on conditional release or on postrelease supervision for a felony *shall* serve the sentence consecutively to the term or terms under which the person was on probation, assigned to a community correctional services program or on parole or conditional release.” (Emphasis added.)

Thus, even if Briones is correct that the provisions of [K.S.A. 2018 Supp. 21-6606\(d\)](#) conflict with the provisions of [K.S.A. 2018 Supp. 21-6604\(f\)\(4\)](#) and allow for concurrent sentences when a defendant commits a new crime while on felony bond, it does not change the outcome of this case. Because Briones was on felony probation in 15CR1370 when he committed his new crime in 16CR2548, [K.S.A. 2018 Supp. 21-6606\(c\)](#) required the district court to impose consecutive sentences. Likewise, [K.S.A. 2018 Supp. 22-6604\(f\)\(1\)](#) required the district court to impose consecutive sentences.

\*10 Briones also contends that [K.S.A. 2018 Supp. 21-6606](#) in its entirety only applies when sentences of imprisonment for different crimes are imposed on a defendant on the same date, and he was not sentenced in 15CR1370 and 16CR2548 on the same date. Our court recently considered and rejected this same argument in [State v. Al-Bureni](#), No. 119,274, 2019 WL 985979 (Kan. App. 2019) (unpublished opinion), *petition for rev. filed* April 1, 2019. After a lengthy analysis of the statute, the *Al-Bureni* court held:

“[W]hen [[K.S.A. 2017 Supp. 21-6606](#)] is read as a whole, it is evident that subsections (a) through (e) apply to different situations, and the entire statute is not restricted to multiple sentences for different crimes imposed on the same date. That specific situation is referred to explicitly in subsection (a), which is to be read and interpreted independently from the other subsections.” [2019 WL 985979](#), at \*4.

We agree with this analysis. [K.S.A. 2018 Supp. 21-6606\(a\)](#) applies when separate sentences of imprisonment for different crimes are imposed on a defendant on the same date, but this subsection is to be read and interpreted independently from the other subsections of the statute. Subsections (c), (d), and (e) describe circumstances under which the district court must impose consecutive sentences. [K.S.A. 2018 Supp. 21-6606\(c\)](#) not only allowed but required the district court to impose consecutive sentences when Briones committed a new crime while on felony probation.

Finally, we note that in [K.S.A. 2018 Supp. 21-6819\(a\)](#), our Legislature provided an exception to the statutory requirement for consecutive sentences in [K.S.A. 2018 Supp. 21-6606\(c\)](#), (d), and (e) “if such application would result in a manifest injustice.” In other words, the district court may deviate from the mandated consecutive sentencing requirement if it makes a finding that imposing consecutive sentences would result in a manifest injustice. Briones did not ask the district court to make a finding of manifest injustice at his sentencing hearing, and he makes no argument on appeal that the district court could have ordered concurrent sentences under [K.S.A. 2018 Supp. 21-6819\(a\)](#).

In summary, Briones committed his new crime in 16CR2548 while he was on felony probation in 15CR1370. The plain and unambiguous language of [K.S.A. 2018 Supp. 21-6606\(c\)](#) and [K.S.A. 2018 Supp. 21-6604\(f\)\(1\)](#) required the district court to run the sentences in the two cases consecutive. A district court's decision will be upheld if it is correct for any reason. [State v. Overman](#), 301 Kan. 704, 712, 348 P.3d 516 (2015). Thus, the district court did not err by ordering Briones to serve consecutive sentences.

Affirmed.

#### All Citations

446 P.3d 1116 (Table), 2019 WL 3980652

528 P.3d 279 (Table)

Unpublished Disposition

This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.

NOT DESIGNATED FOR PUBLICATION

Court of Appeals of Kansas.

STATE of Kansas, Appellee,

v.

Sarah G. PANJADA, Appellant.

No. 125,259

I

Opinion Filed April 28, 2023.

Appeal from Wyandotte District Court; AARON T. ROBERTS, judge.

**Attorneys and Law Firms**

[Michael Duma](#), of Duma Law Offices, of Olathe, for appellant.

Kayla Roehler, deputy district attorney, Mark A. Dupree Sr., district attorney, and [Derek Schmidt](#), attorney general, for appellee.

Before [Hurst](#), P.J., [Bruns](#) and [Schroeder](#), JJ.

## MEMORANDUM OPINION

Per Curiam:

\*1 Sarah G. Panjada timely appeals from her convictions and sentences of one count each of official misconduct and interference with law enforcement. She argues: (1) The evidence was insufficient to support her conviction for interference with law enforcement; (2) the district court erred in denying her motion for a bill of particulars; (3) the district court erred by failing to give a unanimity instruction; (4) the district court erred by denying her request for a continuance; (5) the State committed prosecutorial error; (6) the district court erred in responding to a jury request; and (7) cumulative error. After a careful review of the record, we find the evidence was insufficient to support Panjada's conviction for interference with law enforcement; therefore, we reverse her conviction and vacate her sentence for that charge. We further find cumulative error in the denial of Panjada's motion for bill of particulars, the district court's failure to give

a unanimity instruction, and the denial of her motion for judgment of acquittal on the charge of interference with law enforcement. Accordingly, we reverse her conviction for official misconduct and remand for a new trial on that charge.

## FACTS

Around 10:45 p.m. on December 13, 2019, Trooper Gustavo Ramirez of the Kansas Highway Patrol (KHP) received a report of an erratic driver on I-70. The vehicle was subsequently involved in a hit-and-run collision near I-435 and I-70 in Kansas City. The reporting party, Greta Fullerton, followed the vehicle, which parked in a residential garage at the intersection of 123rd Terrace and Parkview Avenue in Kansas City. Fullerton provided the vehicle's tag number to dispatch. Based on the reports of erratic driving, Ramirez suspected the driver may have been impaired. But Ramirez did not initially go to the intersection Fullerton reported to dispatch. Instead, he went to the home of the victims of the hit-and-run to obtain statements. Ramirez then met with three officers from the Kansas City, Kansas Police Department (KCKPD) who were initially investigating the same hit-and-run accident. The officers advised Ramirez they believed the vehicle belonged to the Wyandotte County Sheriff's Office. Ramirez then went to the intersection Fullerton reported to dispatch but could not locate the vehicle.

At approximately 12:05 a.m. on December 14, 2019, Panjada — a KCKPD detective—requested to meet with Ramirez at a nearby fire station to see how KCKPD could assist KHP with its investigation. Ramirez met Panjada and two other KCKPD officers at the fire station. There, Ramirez learned Detective Michael Simmons of the Wyandotte County Sheriff's Office was likely driving the vehicle. Panjada offered to check potential addresses to locate the vehicle. She called Ramirez around 12:30 a.m. and advised she had checked some addresses but could not locate the vehicle. Ramirez later met with Panjada at the fire station and asked her what addresses she investigated. According to Ramirez:

“Detective Panjada didn't respond with words. It was awkward for the short moment that it was. I kind of looked down and she made noises with her mouth and I broke that awkwardness and said or should I get those from Major [Andrew] Carver [of the Wyandotte County Sheriff's Office]. She said yeah, you should just get those from Major Carver.”

\*2 Panjada provided Ramirez with Carver's number. Ramirez spoke with Carver from whom he obtained Undersheriff Larry Roland's phone number. Roland provided Ramirez with Simmons' date of birth, which enabled Ramirez to find Simmons' address. Ramirez made contact with Simmons at his residence around 1:50 a.m. Ramirez observed signs of intoxication and believed he had probable cause to arrest Simmons for DUI but did not obtain a search warrant for an evidentiary blood draw because it had been more than three hours since the accident.

In January 2020, Agent Jeffrey Stokes of the Kansas Bureau of Investigation (KBI) applied for and obtained a search warrant for Simmons' and Panjada's phone records. After the records were analyzed, Stokes applied for and obtained a warrant to seize Panjada's cell phone in June 2020. KBI Agents Ronnie Burk and Jerrod Gill went to Panjada's home to serve the warrant.

Gill and Burk made contact with Panjada but did not initially tell her about the warrant. Instead, they made small talk for several minutes hoping to get a statement from her. When they disclosed they had a warrant, Panjada had some questions, which Gill did not interpret as Panjada being uncooperative. Panjada did not have the phone in her possession at that time. Gill felt Panjada was being uncooperative because she requested five minutes to call her husband before handing over her phone as she was eight months pregnant and home alone with her children with no other phone. Eventually, Panjada asked her son to retrieve the phone from elsewhere in the house. Gill and Burk believed Panjada manipulated the phone because they saw her touching the screen, which lit up prior to her giving Burk the phone. Panjada never left the agents' presence and never demanded they leave, which Gill admitted made their job significantly easier because they did not have to obtain a separate warrant to search Panjada's home for the phone. Panjada gave Burk her phone approximately 10 minutes after he informed her of the warrant.

Subsequent analysis of the phone by KBI Agent Chris Turner revealed Panjada had not deleted anything since the night of Ramirez' investigation. Turner's analysis of Panjada's phone reflected that during the relevant portion of Ramirez' investigation, Panjada exchanged multiple text messages with her KCKPD supervisor, Deputy Chief Pam Waldeck, generally discussing the status of the investigation. Turner's analysis further revealed multiple calls and text messages between Panjada and Carver, as well as several messages

and calls between Panjada and Captain Jeffrey Taylor of the Wyandotte County Sheriff's Office.

The State charged Panjada with one count of official misconduct (Count 1) and one count of obstruction of law enforcement (Count 2). At trial, Ramirez, Stokes, Gill, Burk, and Turner testified on behalf of the State. Panjada moved for a directed verdict on both counts following the State's case-in-chief, which the district court denied. Panjada then called Carver and Taylor as defense witnesses. Taylor testified he was the union president and Panjada was simply doing him a favor by advising him one of his officers was the subject of an investigation. Taylor denied Panjada asked him to warn Simmons of the investigation and further testified Panjada never asked him to interfere with the investigation. Carver testified Panjada called him asking for Simmons' address but he did not know the exact address. He gave Panjada directions to the general area, and Panjada sent him some photos of a house but he could not tell if it was Simmons'. Carver never provided Panjada with Simmons' address because he did not have the information. According to Carver, Panjada never suggested she was trying to interfere with Ramirez' investigation.

\*3 The jury found Panjada guilty of both counts. The district court denied Panjada's motion for new trial and sentenced her to 12 months in jail for official misconduct with a concurrent term of 3 months in jail for interference with law enforcement, suspended to 12 months' supervised probation. Additional facts are set forth as necessary.

## ANALYSIS

### *The Evidence Was Insufficient to Convict Panjada of Interference with Law Enforcement*

Panjada argues the evidence was insufficient to support her conviction for Count 2, interference with law enforcement, because (1) there was no evidence she deleted anything from her phone and (2) she did not substantially hinder Burk's investigation based on the 10-minute delay in turning over her phone. Her argument is persuasive.

### *Standard of Review*

“ ‘When the sufficiency of the evidence is challenged in a criminal case, we review the evidence in a light most favorable to the State to determine whether a rational factfinder could have found the defendant guilty beyond

a reasonable doubt. An appellate court does not reweigh evidence, resolve conflicts in the evidence, or pass on the credibility of witnesses.’ ” *State v. Aguirre*, 313 Kan. 189, 209, 485 P.3d 576 (2021).

#### Discussion

To support a conviction for interference with law enforcement, the State was required to show Panjada substantially hindered or increased the burden on Burk when he executed the warrant to seize her phone. See *State v. Parker*, 236 Kan. 353, 366, 690 P.2d 1353 (1984). As a preliminary matter, the State argues our Supreme Court erroneously interpreted *K.S.A. 21-3808* (now *K.S.A. 2022 Supp. 21-5904*) in *Parker* by reading language into the statute—substantially hindering or increasing the burden on the officer—not contained therein. The State’s argument is unpersuasive. Our Supreme Court’s interpretation of Kansas statutes is binding. Absent some indication our Supreme Court is departing from its position, we are duty bound to follow Supreme Court precedent. *State v. Rodriguez*, 305 Kan. 1139, 1144, 390 P.3d 903 (2017). There is no indication our Supreme Court is departing from its position in *Parker*, as it continues to apply the same standard in more recent decisions. See *State v. Brown*, 305 Kan. 674, 690, 387 P.3d 835 (2017).

At trial, the State advanced evidence which could go to two theories of how Panjada interfered with Burk’s execution of the search warrant. First, there was an implication Panjada did something with the phone based on the officers’ testimony they saw the screen light up as she was touching it. Second, Panjada asked the officers some basic questions after they informed her of the warrant and then asked for the officers to give her five minutes to call her husband before turning over the phone. In total, this resulted in a delay of approximately 10 minutes between the time Gill and Burk told Panjada they had a search warrant and Panjada giving Burk her phone.

It is not entirely clear from the State’s arguments at trial whether it was relying on both theories, although it seems to have focused more on the second. On appeal, the State largely confines its argument to the second theory. Nevertheless, both are addressed herein as (1) the first theory has some bearing on various points Panjada raises in Issues 2, 3, 5, and 7 of her brief before us, and (2) the district court’s jury instruction did not limit the jury’s consideration to one theory or another.

\*4 Relevant to the interference with law enforcement charge, in opening remarks, the State argued:

“Once the KBI understood that there was information being transmitted between her and other people in the sheriff’s office and her Kansas City, Kansas, Police Department, they wanted to get her phone to get any information that might be on it. They went to her home, they asked her politely to hand over the phone, you’ll hear the entire recording. She initially refused, she asked for five minutes, she was screaming at her child as the KBI agents were storming her house. You’ll hear the entire conversation and process. Eventually the phone was handed over to the KBI for their analysis.”

The State further asserted: “She obstructed the Kansas Bureau of Investigation [agents who] tried to just do their job in getting information to further the investigation.”

In closing, the State argued:

“He says, it wasn’t—I had to get a search warrant. They went and looked in her phone and found—what did they find? The photograph, you have it. We know he said about 3:30 it either was sent or received, but it was posted during the time. It says right here four hours. Did she have access? We don’t know, we have no evidence of that. Man, they’re concerned about it. This obstructed the officer in doing his job, trying to get the cell phone, same thing, delay, slow this down, give me five minutes, just like this, just like this. Find her guilty.”

In its rebuttal, the State asserted:

“You also heard Burk when he testified, I asked him outright, would you have—why didn’t you arrest her? He goes, because she was pregnant. They didn’t storm her house, they didn’t do anything of that nature. They were respectful. The only person that caused all the trouble all that day was the defendant.”

On appeal the State again essentially confines its argument to the delay in giving Burk the phone. And the overall thrust of the State’s opening and closing arguments was largely tied to the delay. Still, Gill asserted Panjada manipulated the phone prior to giving it to them. Gill testified, “I could see the glow of the phone. I could see her finger or thumb, whichever digit it was, manipulating the screen.” The State asked Gill why that concerned him, and he responded, “It concerned me for deleting evidence, message deleting, anything regarding this case.” Gill testified Burk told Panjada not to delete anything from the phone, and Gill further stated, “[W]e had

issues with her taking things of evidentiary value off the phone and we needed that phone.” Although he admitted he did not know what exactly Panjada did with her phone or whether she deleted anything, Burk similarly testified on cross-examination, “Before she handed the phone over to us, she was manipulating the screen.” However, the evidence presented by the KBI analyst, Turner, reflected nothing had been deleted from the phone and the State knew this before Gill and Burk testified.

The district court's jury instruction on interference with law enforcement did not clarify the State's theory of the interference charge. In relevant part, the jury was instructed:

\*5 “To establish this charge, each of the following claims must be proved:

“1. That Agent Ronnie Burk was discharging an official duty, namely investigating a misdemeanor.

“2. The defendant knowingly obstructed, resisted, or opposed Agent Burk in discharging that official duty.

“3. The act of the defendant substantially hindered or increased the burden of the officer in the performance of the officer's official duty.

“4. At the time the defendant knew or should have known that Agent Burk was a law enforcement officer.”

Due to the ambiguity in the jury instruction, we must examine whether there was sufficient evidence Panjada either (1) deleted evidence from the phone, or (2) substantially hindered or increased the burden on Burk in seizing the phone. As to the first theory, there was no evidence Panjada deleted anything from the phone when Gill and Burk came to her home. In fact, there was no evidence she deleted anything going back to the night of Ramirez' investigation. Turner's testimony was unequivocal on these points. Because there is no evidence Panjada deleted anything from her phone, and in fact the evidence showed her communications on the night of the DUI investigation were still on her phone, the State could not have shown Panjada substantially hindered Burk's investigation through her alleged manipulation of the phone.

As to the second theory, Panjada did not substantially hinder Burk's investigation. Burk's own testimony belies the State's argument. Burk explicitly conceded the 10-minute delay between telling Panjada he had a search warrant for the phone and Panjada giving him the phone did not substantially interfere with his investigation. Moreover, Burk admitted

Panjada could have simply closed the door and refused to talk to him and Gill because they had a warrant to seize her phone but not a warrant to arrest Panjada or search her home. Had Panjada exercised her right to terminate the conversation with Gill and Burk, it could have taken hours longer to get a separate warrant to search her house for the phone.

On appeal, the State fails to demonstrate any affirmative duty Panjada had to retrieve an item law enforcement had a warrant to seize—her phone—from a place they did not have a warrant to search—her home. Accordingly, the State's interference with law enforcement charge appears to be based on little more than the fact the encounter was less convenient than Burk and Gill hoped it would be. The State's position is troubling as a broader proposition because it effectively weaponizes [K.S.A. 2022 Supp. 21-5904\(a\)\(3\)](#) against the particularity requirement for a search warrant under the Fourth Amendment to the United States Constitution. See [State v. Mullen](#), 304 Kan. 347, 353, 371 P.3d 905 (2016) (affidavit in support of search warrant must establish “ ‘a fair probability that contraband or evidence of a crime *will be found in a particular place*’ ” [Emphasis added.]).

If the State is correct, law enforcement officers can simply obtain a warrant to seize incriminating evidence they believe an individual possesses, without establishing probable cause of where the evidence is likely to be found, then demand the individual bring them said evidence regardless of where it is located. But it is well established the State cannot prosecute someone for availing oneself of constitutionally guaranteed protections. See [State v. Ryce](#), 303 Kan. 899, 902-03, 368 P.3d 342 (2016) (threat of criminal punishment for refusing consent to search implicates due process protections under Fourteenth Amendment to United States Constitution); [State v. Mueller](#), 271 Kan. 897, 901, 27 P.3d 884 (2001) (State cannot condition receipt of privilege or benefit on waiver of constitutional right). Here, Panjada had the right to refuse to speak with the officers and further refuse to allow them to search and seize items from her home without a warrant. See [United States v. Mendenhall](#), 446 U.S. 544, 553, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980) (law enforcement may seek voluntary encounters but individuals are free to decline); [Payton v. New York](#), 445 U.S. 573, 585-86, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980) (“ [P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.” ). We find the State's argument fails as both a matter of fact and law.

\*6 In its brief, the State unpersuasively relies on *State v. Beltran*, 48 Kan. App. 2d 857, 877-78, 300 P.2d 92 (2013), asserting: “[A]n individual’s refusal to comply with officers’ commands during the execution of a search warrant is sufficient to support a finding of obstruction.” The State’s argument misinterprets the issue addressed in *Beltran*. There, officers had a warrant to search a home in which Beltran was an occupant. An officer entered the home and saw Beltran going into another room with his left hand in his pocket. The officer ordered Beltran to stop and take his hand out of his pocket, but Beltran refused. The officer then restrained Beltran, pulled Beltran’s left hand out of his pocket, and searched the pocket, revealing cash and cocaine. Beltran argued the evidence should have been suppressed because the officer did not have authority to search his person pursuant to the search warrant for the home.

The *Beltran* panel found the search was justified as a search incident to arrest because the officer had probable cause to arrest *Beltran* for obstruction. 48 Kan. App. 2d at 878. However, the panel explicitly noted:

“An able defense lawyer might argue that given the brevity of Beltran’s evasive actions in refusing to stop and to remove his hand from his pocket, the conduct failed to ‘substantially hinder’ McClay. And we suppose a jury could agree depending on the full range of evidence at trial. But that isn’t the issue here.” 48 Kan. App. 2d at 878.

*Beltran* is of limited value to this issue because the relevant portion of the analysis therein deals with probable cause to arrest, which is a much lower evidentiary burden than is required for a conviction. See *State v. Huff*, 235 Kan. 637, 639, 681 P.2d 656 (1984) (“Probable cause connotes considerably less proof than may be required at trial.”). *Beltran* is further distinguishable because the officers had a warrant to search the home, which in turn, gave the officers authority to detain the individuals present to effectuate the search. See *Michigan v. Summers*, 452 U.S. 692, 703-04, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981).

Here, Burk and Gill had no such authority to enter Panjada’s home or detain her in executing the warrant to seize and search her phone. Panjada’s actions here are highly analogous to what occurred in *Parker*. There, Parker had been arrested for prostitution; a detective, Metz, asked Parker about the location of marked money that had been used in the investigation. Parker responded: “ ‘I don’t know what money you are talking about.’ ” 236 Kan. at 365-66. Ultimately, the

detective obtained a warrant, searched the property, and found the marked bills. Our Supreme Court

“concluded that the evidence was not sufficient to prove the offense of obstruction of official duty under the statute. If the defendants had remained silent they could not have been charged with obstruction of official duty. They had a right to remain silent. The response of each defendant was essentially the equivalent of silence and did not substantially increase the burden placed upon detective Metz in carrying out his official duty. As he had contemplated, the officer obtained a search warrant, searched the premises, and found the marked bills.” 236 Kan. at 366.

Similarly, if Panjada had refused to speak with Gill and Burk—something she was entitled to do—they would have had to get a separate warrant to search her home—something they had no authority to do under the existing warrant—in order to seize her phone. Here, Burk did not have to obtain a second warrant because Panjada continued speaking with him after he informed her he had a warrant to seize the phone and she ultimately gave it to him approximately 10 minutes later. In this sense, Panjada’s actions were less burdensome on Burk than Parker’s were on Metz. Accordingly, the 10-minute delay did not substantially hinder or increase the burden on Burk in executing the warrant. We find, given the specific facts of this case, the evidence was insufficient to support Panjada’s conviction for interference with law enforcement; thus, we reverse her conviction and vacate her sentence.

#### *The District Court Should Have Granted Panjada’s Motion for a Bill of Particulars*

\*7 Panjada argues the district court erred in denying her motion for a bill of particulars. Specifically, she asserts (1) there was no way for her to know whether the official misconduct charge was based on her alleged refusal to give information to Ramirez or her communications with other individuals, and (2) there was no way to know whether the interference with law enforcement charge was based on her initial refusal to give her phone to Burk or her alleged manipulation of her phone prior to giving it to Burk. This second point is moot in light of our conclusion the evidence was insufficient to find Panjada guilty of interference with law enforcement.

The district court’s denial of a motion for bill of particulars is reviewed for an abuse of discretion. *State v. Rojas-Marceleno*, 295 Kan. 525, 533, 285 P.3d 361 (2012). A judicial action

constitutes an abuse of discretion if (1) it is arbitrary, fanciful, or unreasonable; (2) it is based on an error of law; or (3) it is based on an error of fact. *State v. Levy*, 313 Kan. 232, 237, 485 P.3d 605 (2021).

Panjada correctly notes the due process considerations served by a bill of particulars—(1) sufficiently informing the accused of the nature of the charges to enable her to prepare a defense, and (2) preventing further prosecution for the same offense in violation of double jeopardy protections. *Rojas-Marceleno*, 295 Kan. at 534. Her argument is generally persuasive. In relevant part, the State's complaint alleged Panjada committed official misconduct by

“unlawfully and knowingly, at a time when such person was a public officer or employee and while in the employee's public capacity or under color of the officer or employee's office or employment, did destroy, tamper with or conceal evidence of a misdemeanor crime, when not authorized by law to do so.”

Panjada is generally correct these allegations fail to specify the conduct on which the State relied. As it relates to the official misconduct charge, there was evidence Panjada did not give Ramirez a clear answer as to whether she was able to locate Simmons' address. But there was also evidence, given her communications with Waldeck, Taylor, and Carver, she did not have the address for Simmons' house. Some of the records concerning these communications appear to have been turned over to Panjada only shortly before trial, although the record is unclear on the exact timing, and Panjada's counsel admitted he believed he ultimately received everything the State had. From the State's arguments at trial, we cannot discern whether Panjada's communications with the other officers was a separate theory of official misconduct or whether it was alleging a continuous course of conduct. In particular, the State's closing argument made repeated reference to Panjada's communications with Waldeck, Taylor, and Carver. As further discussed herein, the district court's jury instruction on official misconduct also did not clarify the basis or bases for the State's allegation. Given the variety of conduct that could serve to support the charge, Panjada's motion should have been granted.

On appeal, the State argues a bill of particulars is not required where the defendant has received full discovery, relying on *State v. Webber*, 260 Kan. 263, 284, 918 P.2d 609 (1996), and *State v. Young*, 26 Kan. App. 2d 680, 683, 11 P.3d 55 (1999). The State's reliance on these authorities is misplaced as *Webber* dealt with a challenge to the sufficiency of a

bill of particulars. *Webber's* motion for bill of particulars was granted; the issue on appeal was whether a subsequent motion for a more definitive statement should have been granted. *Webber* held the bill of particulars coupled with the complaint, pretrial discovery, and the evidence presented at the preliminary hearing sufficiently informed *Webber* of the charges which she was required to defend. 260 Kan. at 284-85. Here, Panjada was charged with misdemeanors and did not have a preliminary hearing and her motion for bill of particulars was denied. *Webber* is unpersuasive to our analysis.

\*8 *Young* is lacking in its explanation of the factual and procedural background, and the nature of the charges and the arguments for why a bill of particulars should have been granted therein are fairly distinguishable. *Young* was charged with mistreatment of a dependent adult and specifically complained she wanted to know (1) when the crime occurred, (2) the acts or omissions that constituted the crime, and (3) how the victim qualified as a dependent adult. The panel also noted *Young* filed her motion six months after receiving full discovery. 26 Kan. App. 2d at 683. Here, Panjada did not receive full discovery until shortly before trial, and the motion for a bill of particulars was filed long before the discovery had been provided to Panjada. The phone records at issue here were significant in the State's arguments regarding her communications with Carver. We find *Young* distinguishable and, therefore, unpersuasive to our analysis.

The State further unpersuasively argues a bill of particulars was not required because Panjada knew who she called and texted on the night of the incident. Be that as it may, calling and texting various individuals are not criminal acts. The pertinent concern is whether the State was alleging that *specific* calls and texts to *specific* individuals were, in whole or in part, criminal acts. Panjada should not have been left guessing what acts or omissions constituted the crime charged. We find, under the specific facts and the lack of specificity as to what evidence was considered a criminal act, Panjada's motion for bill of particulars should have been granted, but we defer our reversibility determination to the cumulative error analysis. See *State v. Smith-Parker*, 301 Kan. 132, 165, 340 P.3d 485 (2014).

#### *A Unanimity Instruction Should Have Been Given*

Panjada next argues the district court erred in failing to give the jury a unanimity instruction on both counts. Panjada acknowledges she did not request the instruction at trial; therefore, we review the issue for clear error. K.S.A. 2022

[Supp. 22-3414\(3\)](#). This means Panjada bears the burden of firmly convincing us the jury would have reached a different verdict had a unanimity instruction been given. See [State v. Berkstresser](#), 316 Kan. 597, 520 P.3d 718, 725 (2022). However, we must first determine whether the instruction should have been given, i.e., whether it was legally and factually appropriate, using an unlimited standard of review of the entire record. In determining whether an instruction was factually appropriate, we determine whether there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, that would have supported the instruction. [State v. Holley](#), 313 Kan. 249, 254-55, 485 P.3d 614 (2021).

In determining whether a unanimity instruction should have been given, we must first determine whether the case was a multiple acts case, i.e., “ ‘whether [the jury] heard evidence of multiple acts, each of which could have supported [a] conviction on a charged crime.’ ” [State v. Castleberry](#), 301 Kan. 170, 185, 339 P.3d 795 (2014). “ ‘Multiple acts’ are legally and factually separate incidents that independently satisfy the elements of the charged offense.” [State v. De La Torre](#), 300 Kan. 591, 598, 331 P.3d 815 (2014). Factors for courts to consider include:

“ ‘(1) whether the acts occur at or near the same time; (2) whether the acts occur at the same location; (3) whether there is a causal relationship between the acts, in particular whether there was an intervening event; and (4) whether there is a fresh impulse motivating some of the conduct.’ ” [State v. King](#), 299 Kan. 372, 379, 323 P.3d 1277 (2014).

Panjada argues:

“[I]t is entirely unknown whether the jury convicted Ms. Panjada for official misconduct based on some alleged conspiracy with Major Carver in failing to disclose Michael Simmons' address to Trooper Ramirez, or because of any communication between her and ... Jeff Taylor. These two incidents occurred relatively close in time, but are enough removed from one another factually—and served entirely different purposes—to constitute distinct ‘multiple acts.’ These two communications were to different individuals acting in very different capacities.”

\*9 We agree. Here, error was committed because the State did not tell the jury which act it relied upon and the district court did not instruct the jury it had to agree on a specific act for each charge. [Castleberry](#), 301 Kan. at 185. On Count 1—

official misconduct—the district court instructed the jury, in relevant part:

“To establish this charge, each of the following claims must be proved:

“1. The Defendant was a public officer.

“2. The Defendant knowingly concealed evidence of a crime.

“3. This act occurred on or about the 14th day of December 2019 in Wyandotte County, Kansas.”

Under this instruction, the jury could have found Panjada committed official misconduct based on some conspiracy or collusion with Carver and/or Taylor to delay the investigation, i.e., conceal evidence of a crime, but the jury could have just as easily found her refusal to give Ramirez the information about Simmons' approximate address—the overall thrust of the State's allegations underlying the official misconduct charge—was her decision alone. The State's arguments at trial did not clarify the issue given the State's references in closing arguments to text messages and/or phone calls with Carver, Taylor, and Waldeck during and after the time of her interactions with Ramirez.

We find a unanimity instruction was legally and factually appropriate. However, because we review for clear error, we must consider the impact of the failure to give the instruction in light of the record as a whole. [State v. Dobbs](#), 297 Kan. 1225, 1237, 308 P.3d 1258 (2013). Given Panjada's additional claims, we defer our reversibility determination to the cumulative error analysis. See [Smith-Parker](#), 301 Kan. at 165.

*The District Court Did Not Err in Denying Panjada's Request for a Continuance*

Panjada further argues the district court erred in denying her request for a continuance based on the State not providing certain discovery until shortly before trial. The district court has the authority to grant a continuance “for good cause shown.” [K.S.A. 22-3401](#). The denial of a motion for continuance is reviewed for an abuse of discretion. [State v. Cook](#), 281 Kan. 961, 986, 135 P.3d 1147 (2006). “A judicial action constitutes an abuse of discretion if (1) it is arbitrary, fanciful, or unreasonable; (2) it is based on an error of law; or (3) it is based on an error of fact.” [Levy](#), 313 Kan. at 237.

We find Panjada has not established an abuse of discretion. She argues:

“Here, the continuance should have been granted for good cause, and in accordance with Ms. Panjada’s fundamental right to present her theory of defense. The late-admitted evidence presented by the State on the morning of trial, coupled with the court’s denial [of the] continuance, inhibited Ms. Panjada’s right to present a meaningful defense and [denied] her right to confrontation under the Sixth Amendment, inconsistent with substantial justice and necessitating reversal.”

Her argument regarding her right to present a defense and confront the State’s evidence is conclusory. As the party asserting an abuse of discretion, Panjada has the burden to show it. See *State v. Crosby*, 312 Kan. 630, 635, 479 P.3d 167 (2021). We find she has not met her burden. Her argument is also problematic from a preservation standpoint because, on the morning of trial, she initially objected on the grounds she had not been given certain records the State obtained from Verizon. Panjada asserted the evidence should be excluded and she should not be burdened with having to accept a continuance. She later requested a continuance because she thought she had not been given information the State obtained from a search of Carver’s phone.

**\*10** The district court generally indicated it was not inclined to grant a continuance unless there was some evidence the State had not already turned over. After taking a recess, Panjada’s counsel informed the district court, “I’m satisfied the State has given me everything that is in their possession. Honestly, I don’t know at this moment, and I’ll have to question the witnesses about whether or not they handed everything they had over to the State.” Essentially, Panjada acknowledged the basis for her continuance request was no longer a concern, and the district court never conclusively ruled on the continuance request given the parties’ subsequent explanation of the discovery issue. The issue is not properly preserved for appeal.

#### *There Was No Prosecutorial Error*

Panjada next argues the State committed prosecutorial error during its case-in-chief as well as closing arguments. We use a two-step process to evaluate claims of prosecutorial error—error and prejudice:

“To determine whether prosecutorial error has occurred, the appellate court must decide whether the prosecutorial

acts complained of fall outside the wide latitude afforded prosecutors to conduct the State’s case and attempt to obtain a conviction in a manner that does not offend the defendant’s constitutional right to a fair trial. If error is found, the appellate court must next determine whether the error prejudiced the defendant’s due process rights to a fair trial. In evaluating prejudice, we simply adopt the traditional constitutional harmless inquiry demanded by *Chapman [v. California]*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)]. In other words, prosecutorial error is harmless if the State can demonstrate ‘beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, where there is no reasonable possibility that the error contributed to the verdict.’ ” *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016).

A prosecutor commits error by misstating the law. A prosecutor also errs when arguing a fact or factual inference without an evidentiary foundation. *State v. Watson*, 313 Kan. 170, 179, 484 P.3d 877 (2021).

Panjada first claims the State committed prosecutorial error by reading Simmons’ address into the record when it discussed Simmons’ Kansas driver’s license report during its cross-examination of Carver. However, her argument is contrary to the record. The district court did not allow the State to discuss Simmons’ driving record based on Panjada’s objection, finding it irrelevant and beyond the scope of direct examination. The State simply asked to mark it as an exhibit and put it in the record even though it was not admitted, apparently to preserve the issue. But no such evidence was presented to the jury. Panjada’s first claim of prosecutorial error fails.

Panjada next argues the prosecutor erred by advancing an unsupported narrative that she conspired with Carver to hinder Ramirez’ investigation. Her argument on this point is unclear because she claims the State misled the jury by disclosing facts not in evidence. However, the objectionable acts she cites to are all testimony from trial. Essentially, she alleges prosecutorial error because the answers to the State’s questions on direct examination were later rebutted through cross-examination or the testimony of other witnesses. This is not the same as arguing facts not supported by the evidence. Panjada’s second claim of prosecutorial error fails.

Panjada similarly argues the State committed prosecutorial error by eliciting testimony she manipulated her phone

despite uncontroverted evidence she had not deleted anything from her phone. Regarding the testimony of Burk and Gill about the alleged manipulation of her phone, Panjada fails to establish error. Panjada would likely have a valid claim if the State had argued the point in either one of its closing arguments. However, any discussion of Panjada manipulating the phone elicited by the State came about in Gill's answer to one of the State's questions on direct examination. But the State did not ask Gill whether Panjada “manipulated” the phone; the State asked, “[W]hat was she doing with the phone?” Gill responded:

\*11 “[T]he best way to describe [it] is manipulation of the phone, meaning you open it, I can see the glow of the phone. ... I could see her finger or thumb, whichever digit it was, manipulating the screen. I didn't see what was on the screen, just that it was being used.”

In cross-examination, Burk similarly stated, “Before she handed the phone over to us, [Panjada] was manipulating the screen.” Gill and Burk may have overstated their concern, but the record does not reflect the State intentionally elicited testimony that Panjada manipulated her phone in the sense she deleted evidence. And the State never explicitly argued to the jury Panjada deleted anything from her phone.

Panjada further argues the State committed multiple errors in closing argument by arguing facts not in evidence and attempting to shift the burden of proof. She asserts the State erred by shifting the burden of proof when it argued the evidence presented by the defense was “telling” because it only depicted a side view of Simmons' home. But Panjada objected to the State's argument, and the district court told the State to move on, which it did. While the State's comments were arguably improper, Panjada does not meaningfully explain how they were prejudicial in light of the district court's prompt response to her objection.

Panjada next argues the State wrongly asserted Waldeck ordered Panjada to leave the scene but Panjada remained. She is correct the State raised this point in closing argument, but she fails to cite to the record to show how the prosecutor's argument was unsupported by or contrary to the evidence. Accordingly, we presume the point is unsupported. See [Supreme Court Rule 6.02\(a\)\(4\)](#) (2023 Kan. S. Ct. R. at 36).

Panjada additionally makes a passing argument that the prosecutor “offered her personal opinion, not based on evidence, that Ms. Panjada ‘used her personal cell phone to circumvent this whole coverup.’ ” Contrary to Panjada's

assertion, this was a permissible comment on the evidence. Prosecutors have wide latitude in discussing the evidence and reasonable inferences to be drawn therefrom. [State v. Crawford](#), 300 Kan. 740, 749, 334 P.3d 311 (2014). Here, the State was asking the jury to make a reasonable inference Panjada used her personal cell phone, not a department-issued device, because she was engaged in a coverup.

Panjada further asserts the prosecutor used a mocking tone while arguing Panjada's text messages to Taylor showed she was upset that Simmons was eventually arrested by Ramirez. The prosecutor's tone is not evident from the cold record. Panjada objected, and the district court overruled her objection.

Panjada largely fails to explain how the various points she raises about the prosecutor's closing arguments constituted reversible error. At most, she has identified one point of error—the State commenting on the strength of her evidence—but it is questionable whether the State's argument was improper. The State is not allowed to shift the burden of proof to the defendant, but the State is permitted to point out a lack of evidence supporting a theory of defense. [State v. Williams](#), 299 Kan. 911, 939, 329 P.3d 400 (2014). Still, even assuming the State's comments were impermissible, the error was not prejudicial because the State did not belabor the point and moved on as soon as the district court ruled on Panjada's objection. Further, whether Panjada could readily identify Simmons' home was not the crux of the issue. The State's theory of official misconduct was largely premised on the fact Panjada knew from her conversations with Carver the specific intersection where Simmons' house was located—even if she did not know the exact address—but did not provide this information to Ramirez. Even assuming the prosecutor's comments were erroneous, the State has shown the error was harmless.

#### *There Was No Error in Responding to the Jury's Request*

\*12 Panjada argues the district court erred in responding to a question from the jury during deliberations. Specifically, the jury indicated it wanted to hear a recording of the conversation between Carver and Ramirez but returned a verdict before the district court could provide technical assistance in playing the exhibit. Because this issue involves statutory procedures and potentially implicates Panjada's statutory and/or constitutional rights, we exercise de novo review in determining whether the district court properly responded to the jury's request for assistance. [State v. Cooper](#), 303 Kan. 764, 767, 366 P.3d 232 (2016). To the extent this

issue requires we engage in statutory interpretation, it raises a question of law subject to unlimited review. *State v. Stoll*, 312 Kan. 726, 736, 480 P.3d 158 (2021).

Panjada asserts the district court violated her right to be present under *K.S.A. 2022 Supp. 22-3420(d)*, which provides:

“The jury shall be instructed that any question it wishes to ask the court about the instructions or evidence should be signed, dated and submitted in writing to the bailiff. The court shall notify the parties of the contents of the questions and provide them an opportunity to discuss an appropriate response. The defendant must be present during the discussion of such written questions, unless such presence is waived. The court shall respond to all questions from a deliberating jury in open court or in writing. In its discretion, the court may grant a jury's request to rehear testimony. The defendant must be present during any response if given in open court, unless such presence is waived. Written questions from the jury, the court's response and any objections thereto shall be made a part of the record.”

However, as the State points out, Panjada's argument ignores *K.S.A. 2022 Supp. 22-3420(c)*, which provides: “In the court's discretion, upon the jury's retiring for deliberation, the jury may take any admitted exhibits into the jury room, where they may review them without further permission from the court. If necessary, the court may provide equipment to facilitate review.” In light of this statutory language, another panel of this court found no error in the prosecutor's trial assistant providing technical assistance to the jury in playing an admitted exhibit without the defendant present. *State v. Watson*, No. 114,818, 2017 WL 2304439, at \*2 (Kan. App. 2017) (unpublished opinion). The reasoning in *Watson* is sound, and we apply it here.

The record reflects the jury indicated to the district court's administrative assistant it wanted to rehear the recording of Carver's conversation with Ramirez. The district court's administrative assistant did not attempt to help the jury play the recording because she did not know how. Outside the presence of the jury, the State and the district court's administrative assistant tried to find a way to play the recording, but the jury returned its verdict before the issue was resolved. The district court never communicated with the jury during its deliberations. There was no question from the jury regarding the jury instructions or evidence. And the jury did not request to rehear testimony. Rather, the jury was asking to review an admitted exhibit in the jury room. *K.S.A.*

*2022 Supp. 22-3420(c)* controls this issue, not *K.S.A. 2022 Supp. 22-3420(d)*. The district court did not err in failing to inform Panjada because she did not have a right to be present under the applicable statutory provision. See *Watson*, 2017 WL 2304439, at \*2.

#### *Cumulative Error Denied Panjada a Fair Trial*

Finally, Panjada argues even if none of the errors alleged in her brief warrant reversal on their own, their cumulative effect denied her a fair trial. We agree.

\*13 Cumulative trial errors, when considered together, may require reversal of a defendant's conviction when the totality of the circumstances establish the defendant was substantially prejudiced by the errors and denied a fair trial. In assessing the cumulative effect of trial errors, appellate courts examine the errors in context and consider how the trial judge dealt with the errors as they arose; the nature and number of errors and whether they are interrelated; and the overall strength of the evidence. If any of the errors being aggregated are constitutional in nature, the party benefitting from the error “‘must establish beyond a reasonable doubt that the cumulative effect of the errors did not affect the outcome.’ ” *State v. Alfaro-Valleda*, 314 Kan. 526, 551-52, 502 P.3d 66 (2022).

Here, the evidence underlying Count 1—official misconduct—was not strong and, as we have found, the evidence was insufficient for Count 2—interference with law enforcement. The lack of specificity in the State's complaint warranted a bill of particulars as Panjada requested. This error was significantly compounded by the lack of a unanimity instruction. Panjada did not receive adequate notice of the basis or bases for the State's charge in Count 1—which could have been based on one or more of at least three different acts—and the jury was never informed it had to agree on a particular act in order to convict. Simply put, Panjada was prejudiced both in her ability to formulate a defense prior to trial as well as in her ability to argue a cohesive theory of defense to the jury. Accordingly, we find these errors are meaningfully more prejudicial in the aggregate. And when, as here, any of the errors being aggregated are considered constitutional, “the constitutional harmless error test” applies, and we must determine if “the party benefitting from the errors [has] establish[ed] beyond a reasonable doubt that the cumulative effect of the errors did not affect the outcome.” *State v. Thomas*, 311 Kan. 905, 914, 468 P.3d 323 (2020). We find the State cannot meet its burden to show the aggregate effect of these errors is harmless beyond a reasonable doubt.

We pause to note an additional problem due to the fact the evidence was insufficient to support Panjada's conviction for interference with law enforcement. Insufficient evidence cannot be a harmless error; therefore, it does not directly affect the cumulative error analysis as applied to Count 2. See *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (“Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”). Still, while our resolution of Panjada's conviction for interference with law enforcement comes down to the sufficiency of the evidence, Panjada made a motion for judgment of acquittal, which the district court denied. Panjada correctly argues this ruling was erroneous because the evidence was insufficient.

We are persuaded there was some additional prejudice to Panjada as applied to Count 1 because the district court's error in failing to grant a judgment of acquittal on Count 2 allowed the State to make arguments about both. In its closing argument, the State effectively tied together the conduct underlying both counts, asserting:

“The photograph, you have it. We know [Turner] said about 3:30 it either was sent or received, but it was posted during the time. It says right here four hours. Did she have access? We don't know, we have no evidence of that. Man, they're concerned about it. This obstructed the officer in doing his job, *trying to get the cell phone, same thing, delay, slow this down, give me five minutes, just like this, just like this*. Find her guilty.” (Emphasis added.)

\*14 A reasonable jury considering the evidence underlying both charges would recognize a strong interrelationship between the two. Burk and Gill wanted to obtain Panjada's phone because they believed it contained evidence showing she committed official misconduct by obstructing Ramirez' investigation. A reasonable inference could be drawn that Panjada interfered with Burk and Gill's seizure of the phone because it contained evidence she interfered with Ramirez' investigation. Thus, there was additional prejudice to Panjada on Count 1 by allowing Count 2 to be submitted to the jury.

We find the collective effect of the district court's failure to give a unanimity instruction and the denial of Panjada's motion for bill of particulars establishes she was denied a fair trial under the test for cumulative error. We are further persuaded there was additional prejudice due to the denial of Panjada's motion for judgment of acquittal as applied to Count 2; however, we would still reverse her conviction on Count 1 for cumulative error notwithstanding this point. We reverse Panjada's conviction for interference with law enforcement due to insufficient evidence and vacate that portion of her sentence. We further reverse her conviction for official misconduct due to cumulative error and remand for a new trial on that charge.

Reversed and remanded with directions.

#### All Citations

528 P.3d 279 (Table), 2023 WL 3143658

555 P.3d 744 (Table)

Unpublished Disposition

This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.

NOT DESIGNATED FOR PUBLICATION

Court of Appeals of Kansas.

STATE of Kansas, Appellant,

v.

Reynaldo CONTRERAS-AVILA, Appellee.

No. 125,485

|

Oral Argument Held July 9, 2024.

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Opinion Filed August 30, 2024.

Appeal from McPherson District Court; JOHN B. KLEND, judge.

**Attorneys and Law Firms**

[Steven J. Obermeier](#), assistant solicitor general, and [Kris W. Kobach](#), attorney general, for appellant.

Patrick H. Dunn, of Kansas Appellate Defender Office, for appellee.

Before Malone, P.J., Hurst and Coble, JJ.

## MEMORANDUM OPINION

Per Curiam:

\*1 The State of Kansas appeals after the district court granted Reynaldo Contreras-Avila's motion to dismiss due to the State's violation of his constitutional right to a speedy trial. The State dismissed its first case against Contreras-Avila on the eve of trial due to the prosecutor's concerns regarding COVID-19 and later refiled the same charges against him in a second case. Contreras-Avila moved to dismiss the second case for speedy trial reasons and the district court granted his request. Now, on appeal, the State claims the district court erred because the prosecutor's decision to dismiss the first case was necessary, and the court failed to properly apply the four *Barker* factors when it decided the motion. See *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). We agree with the district court that the first dismissal was not necessary. However, we find the district

court failed to apply the proper legal standard to Contreras-Avila's motion, and on our review, determine the *Barker* factors, when taken together with the unique circumstances of the COVID-19 pandemic, weigh in the favor of the State. We reverse the district court's order of dismissal and remand for further proceedings.

## FACTUAL AND PROCEDURAL BACKGROUND

On January 27, 2020, the State charged Contreras-Avila with one count of aggravated assault in violation of [K.S.A. 21-5412\(b\)\(1\)](#), a level 7 person felony. The charges stemmed from an incident at a local business on January 10, 2020, when Contreras-Avila allegedly stopped and pointed a gun at the two business owners—an incident that was recorded on the business' security system. Although the record does not explicitly provide the date of Contreras-Avila's arrest, we presume he was arrested on January 10, 2020—given that date is both the date the crime was allegedly committed, and the date Contreras-Avila was released on bond.

While on bond, Contreras-Avila was subject to bond conditions, including reporting to court services, being prohibited from consuming alcohol and/or non-prescription drugs, subjected to tests for alcohol and drugs, prohibited from traveling outside Kansas without the district court's approval, and prohibited from having any contact with the two victims of his alleged crime.

Two months after his arrest, the district court appointed a new attorney, Donald Snapp, to represent Contreras-Avila due to his prior attorney's conflict. Soon after, Contreras-Avila requested his only continuance of that case, which resulted in a two-week continuance to April 3, 2020.

Then, as the COVID-19 pandemic ramped up, the Kansas Supreme Court entered Kansas Supreme Court Administrative Order 2020-PR-016, effective March 18, 2020. This order continued all jury trials in Kansas that had not yet begun and suspended all statutory deadlines and time limitations for bringing a defendant to trial until further notice. As a result, Contreras-Avila was not arraigned until July 17, 2020. He pleaded not guilty and requested a jury trial.

\*2 About two months later the Kansas Supreme Court issued Kansas Supreme Court Administrative Order 2020-PR-099, effective September 4, 2020. This order made it theoretically possible to resume jury trials, as it permitted

trials to commence in counties not subject to stay-at-home orders and in cases where there was a constitutional speedy trial issue.

On January 15, 2021, a third attorney entered his appearance on behalf of Contreras-Avila, after Snapp fell seriously ill with COVID. Snapp tragically succumbed to the virus, passing away that same month.

In early March 2021, with the end of the pandemic hopefully on the horizon, the district court set Contreras-Avila's case for trial. A final pretrial conference was scheduled for August 19, 2021, and the trial was set to commence on August 25, 2021.

In April 2021, Contreras-Avila was charged in a new, unrelated criminal case. As a result, the State moved to revoke his bond and the district court issued an arrest warrant. But Contreras-Avila ultimately posted an own recognizance bond for the new charges a few days later and remained out of jail pretrial. Less than a week later, the district court granted him permission to travel outside Kansas to attend his brother's graduation ceremony.

Five days before the trial was scheduled to begin, the State moved to impose COVID-19 safety precautions or, in the alternative, to continue the trial. Due to emergence of the COVID Delta variant, and the prosecutor's preexisting lung condition, the State asked that all participants in the jury trial wear face masks at all times, regardless of [vaccination](#) status. In this motion, the State acknowledged that Contreras-Avila previously indicated he would object to requiring face masks at trial as it would interfere with his constitutional right to a fair trial. Accordingly, the State alternatively requested a continuance of the trial until the public health situation permitted individuals to gather safely indoors without face masks.

Contreras-Avila objected to the State's requests. First, he argued that requiring face masks would interfere with his rights to a fair trial, due process, an impartial jury, confrontation of witnesses, and effective assistance of counsel. Second, he argued that a continuance would interfere with his rights to due process, a speedy trial, and justice administered without delay.

On August 24, 2021, the day before the jury trial was scheduled to commence, the district court held an emergency hearing on the State's motion. The district court explained the courtroom was socially distanced so all participants in the jury

trial would remain more than 6 feet apart. Additionally, the courtroom had plexiglass barriers installed on all podiums and at the witness stand. The district court added that the Chief Judge of the McPherson County District Court, under the authority granted by Kansas Supreme Court Administrative Order 2021-PR-048, effective May 24, 2021, gave district court judges wide discretion over trial protocol. Using this discretion, the district court ordered all participants in the jury trial to wear face shields, regardless of [vaccination](#) status, and permitted the prosecutor to wear a face mask, except when questioning jurors or witnesses. The district court reasoned that face shields would protect the participants while preserving Contreras-Avila's rights to a fair trial and to confront witnesses. The State conceded that the use of face shields would legally comply with the Kansas Supreme Court's recommendations for jury trials.

**\*3** Feeling satisfied with the imposed COVID precautions, the district court refused to consider a continuance on the eve of trial. But the district judge also told the State, “[I]f you don't want to proceed with the trial, the State can always dismiss without prejudice and refile at a later date, but, you know, that's the State's decision. I don't have any control over that.”

Later that day, the State filed a notice of dismissal. The district court granted the dismissal as a matter of right, dismissing the case against Contreras-Avila without prejudice.

Two months later, on October 25, 2021, the State filed a new complaint against Contreras-Avila. The only difference between the complaints in the first and second prosecutions was that the complaint in the second prosecution charged Contreras-Avila with two counts of aggravated assault, one for each of the alleged victims. On October 25, 2021, December 30, 2021, and January 5, 2022, the State asked the district court to schedule a summons date for Contreras-Avila. However, for unknown reasons, the district court did not issue a summons until January 5, 2022. This summons was not executed until January 10, 2022, and a first appearance was not held until February 15, 2022.

At a nonevidentiary preliminary hearing on April 15, 2022, Contreras-Avila indicated his intent to file a speedy trial motion. Six weeks later, Contreras-Avila moved to dismiss the case against him with prejudice due to the State's violation of his constitutional right to a speedy trial. The State responded to Contreras-Avila's motion, arguing the first case was dismissed due to necessity and Contreras-Avila neither

adequately asserted his right to a speedy trial nor suffered prejudice from the delays in his case.

Two months after Contreras-Avila filed his motion, the district court held a hearing. The district court found that the case against Contreras-Avila was straightforward and should have been easy for the State to prosecute. But the State instead dismissed the case on the eve of trial when it could have done so at any time after the trial date was set in March 2021. According to the district court, this dismissal was not necessary because the court had “made the proper [COVID] accommodations to protect all the parties to proceed” with the trial. The district court then noted that it would take another four to five months to hold a new trial in the second prosecution. For these reasons, the district court granted Contreras-Avila's motion and dismissed the case with prejudice.

The State timely filed its notice of appeal. However, the State missed two deadlines to file its brief and we dismissed the appeal on January 4, 2023. For reasons the State could not fully explain, the Office of the Kansas Attorney General was not properly monitoring this case. We ultimately granted the State's motion to reinstate its appeal.

#### THE DISTRICT COURT ERRED BY GRANTING CONTRERAS-AVILA'S MOTION TO DISMISS

The State primarily argues the first case against Contreras-Avila was dismissed due to necessity, contrary to the district court's finding. It also contends the district court failed to properly weigh the four *Barker* factors to determine whether the right to a speedy trial had been violated. See *Barker*, 407 U.S. at 530.

Multiple legal principles apply to this appeal. First, the State preserved this issue for appeal by objecting to Contreras-Avila's motion to dismiss. And, we have jurisdiction to hear this appeal under K.S.A. 22-3601. Then, whether the State has violated a defendant's right to a speedy trial is a question of law. We conduct an unlimited review over such questions and owe no deference to the district court's decision. *State v. Ford*, 316 Kan. 558, 560, 519 P.3d 456 (2022).

#### *The Issue is Properly Before This Court*

\*4 As a threshold issue, Contreras-Avila argues that this court erred by reinstating the State's appeal after initially

dismissing it, because by dismissing the case, he suggests we now lack jurisdiction over the appeal. The existence of appellate jurisdiction is a question of law over which this court has unlimited review. *State v. Hillard*, 315 Kan. 732, 775, 511 P.3d 883 (2022).

The parties do not dispute the untimeliness of the State's appellate briefing following the docketing of its appeal, so an in-depth review of that timeline is unnecessary. Basically, the State missed both its initial brief filing deadlines and an extension ordered by this court's motions panel. Then, the State did not seek to reinstate its appeal until three months after another motions panel dismissed the appeal due to the State's failure to file a brief. Broadly, the State's reasons for its dilatory conduct were a combination of high turnover in the attorney general's office—contracted with handling the appeal for McPherson County—and erroneous tracking of this particular appeal as the appellee party, instead of the appellant. This court granted the motion to reinstate.

Contreras-Avila's position on this jurisdictional issue is unpersuasive. Simply put, he should have taken his argument to the Kansas Supreme Court if he disagreed with our reinstatement of the State's appeal. See *State v. Pewenofkit*, 307 Kan. 730, 731, 415 P.3d 398 (2018) (“[A] party must challenge on petition for review a dispositive procedural holding of the Court of Appeals.”). Because Contreras-Avila did not seek review of the decision, he cannot now challenge it by claiming this court lacks jurisdiction.

#### *The Constitutional Right to a Speedy Trial and Related Principles*

Finding this case is appropriately before us for decision, we now pause to emphasize that Contreras-Avila relies solely on his constitutional right to a speedy trial in this matter. Kansas law generally provides criminal defendants with an additional statutory speedy trial right but, due to the global COVID-19 pandemic, the Legislature suspended this statutory right for nearly four years. K.S.A. 22-3402(m). In fact, his claim would be meritless if he relied upon a statutory right to speedy trial, because this subsection outlines that “[n]o time between March 19, 2020, and March 1, 2024, shall be assessed against the state for any reason.” K.S.A. 22-3402(m). This would encompass nearly all the time the relevant charges were pending against Contreras-Avila. Still, criminal defendants in Kansas retain a speedy trial right under both our federal and state Constitutions.

The right to a speedy trial predates the founding of the United States. It is a part of the common law and is codified in both the Sixth Amendment to the United States Constitution and section 10 of the Kansas Constitution's Bill of Rights. *State v. Queen*, 313 Kan. 12, 15-16, 482 P.3d 1117 (2021). The right “ ‘is intended to prevent the oppression of the citizen by holding criminal prosecutions suspended over him for an indefinite time; and to prevent delays in the administration of justice, by imposing on the judicial tribunals an obligation to proceed with reasonable dispatch in the trial of criminal accusations.’ ” *In re Trull*, 133 Kan. 165, 169, 298 P. 775 (1931).

Unlike the Kansas statute, “the constitutional speedy trial provision does not create a strict timeframe within which the State must bring a defendant to trial. Rather, what is ‘speedy’ is relative to each defendant and the circumstances surrounding the case against them.” *Ford*, 316 Kan. at 560 (citing *Barker*, 407 U.S. at 521-22). Instead of a specific time requirement, to determine whether a delay violates the right to a speedy trial, courts consider four nonexclusive factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) the prejudice to the defendant. *State v. Owens*, 310 Kan. 865, 869, 451 P.3d 467 (2019) (citing *Barker*, 407 U.S. at 530). None of these four factors, standing alone, is sufficient to find a violation. Instead, the court must consider the factors together along with any other relevant circumstances. *State v. Rivera*, 277 Kan. 109, 113, 83 P.3d 169 (2004).

\*5 As noted above, “ ‘[a]s a matter of law, appellate courts have unlimited review when deciding if the State has violated a defendant's constitutional right to a speedy trial.’ ” *Ford*, 316 Kan. at 560. We review the district court's factual findings underlying its decision for substantial competent evidence but review de novo the legal conclusion drawn from those facts. *Owens*, 310 Kan. at 868. “Whether a lower court properly applied the *Barker* factors is a question of law subject to unlimited review.” *In re Care & Treatment of Ellison*, 305 Kan. 519, 533, 385 P.3d 15 (2016).

#### *Adequacy of the District Court's Findings*

First, the State argues that the district court erred in failing to fully discuss the four *Barker* factors when it dismissed the case. The State points to *State v. Moncla*, 269 Kan. 61, 65, 4 P.3d 618 (2000), where the Kansas Supreme Court found the district court's approach impeded appellate review because it did not state its findings or conclusions of law. The Supreme Court stated that “the district court must tell us what its findings are and why it concluded the motion to be without

merit if we are to conduct any sort of meaningful appellate review.” 269 Kan. at 65.

But here we find the analogy to *Moncla* unpersuasive. In *Moncla*, the Kansas Supreme Court was reviewing the district court's denial of a postconviction motion for a new trial based on newly discovered evidence. The appellate standard of review for such a case is abuse of discretion. 269 Kan. at 63. Under this standard of review, it is impossible to examine whether a district court abused its discretion when there are no findings in the record. 269 Kan. at 65.

Conversely, the standard of review here is unlimited and we owe no deference to the district court's decision. And in this case, the district court record contains all the facts necessary to decide this appeal. Accordingly, any deficiencies in the district court's findings are not a barrier to our review.

At the outset, we must note that the district court entirely failed to address the *Barker* factors in either its oral ruling or its journal entry of dismissal. But rather than find error alone on this omission, given our duty to examine Contreras-Avila's claim anew, we continue to review the remainder of the district court's decision.

In examining the district court's finding that Contreras-Avila's constitutional speedy trial right was violated, we look at the totality of the circumstances, with an emphasis on the four stated *Barker* factors: (1) length of the delay, (2) reason for the delay, (3) defendant's assertion of the right, and (4) prejudice to the defendant. *Owens*, 310 Kan. at 869; *State v. McDonald*, 62 Kan. App. 2d 59, 64, 506 P.3d 930 (2022). We analyze each in turn.

#### 1. *Length of the Delay*

The first factor we must consider is the length of the delay. “ ‘The length of the delay 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.’ ” [Citations omitted.]” *State v. Rivera*, 277 Kan. 109, 113, 83 P.3d 169 (2004).

The Kansas Supreme Court has declined to set rigid rules for determining when a delay is long enough to be presumptively prejudicial. Rather, Kansas courts analyze the delay in each case according to its particular circumstances. “Accordingly, the ‘tolerable delay for an ordinary crime is less than for a complex one.’ ” *State v. Gill*, 48 Kan. App. 2d 102, 108-09, 283 P.3d 236 (2012) (quoting *State*

*v. Weaver*, 276 Kan. 504, 511, 78 P.3d 397 [2003]). Kansas courts have previously found delays ranging from 450 to 578 days to be presumptively prejudicial in uncomplicated cases. See *Owens*, 310 Kan. at 875 (19-month delay in simple and straightforward aggravated robbery case was presumptively prejudicial); *Weaver*, 276 Kan. at 510-11 (15-month delay in simple and straightforward case of possession of cocaine was presumptively prejudicial); *State v. Henderson*, No. 120,213, 2020 WL 1658859, at \*10 (Kan. App. 2020) (unpublished opinion) (17-month delay in ordinary prosecution for electronic solicitation of a child was presumptively prejudicial).

\*6 “The constitutional protection of a speedy trial attaches when one becomes accused and the criminal prosecution begins, usually by either an indictment, an information, or an arrest, whichever first occurs.” *Rivera*, 277 Kan. at 112 (quoting *State v. Taylor*, 3 Kan. App. 2d 316, 321, 594 P.2d 262 [1979]). Although the parties' briefs disagree on the date of Contreras-Avila's arrest, as discussed above, the record indicates Contreras-Avila was arrested on January 10, 2020, and the first case against him was dismissed on August 24, 2021. So, the total duration between Contreras-Avila's arrest and the first dismissal was 592 days.

The State filed a new complaint against Contreras-Avila on October 25, 2021—62 days after dismissing the case against him. The only difference between the complaints in the first and second prosecutions is that the complaint in the second prosecution alleged two counts of aggravated assault, one for each alleged victim. The second prosecution was eventually dismissed by the district court on August 2, 2022. In sum, the second prosecution lasted 281 days.

But simply calculating the number of elapsed days is not enough to examine this factor. The parties disagree over whether we are to consider the full 935 days between Contreras-Avila's initial arrest and the dismissal of the second case. Under Kansas law, the speedy trial clock starts anew on a second prosecution when the State dismisses a first case due to necessity or when the charge in the second case is not identical to the charge in the first case. *Gill*, 48 Kan. App. 2d at 113-14. But if the charge in the first case was not dismissed because of necessity and the charge in the second case is identical, then the dismissal of the first case merely tolls the speedy trial clock. So, the period before dismissal and the period after the charge was reinstated will together constitute the applicable length of delay. 48 Kan. App. 2d at 113-14

(citing *United States v. MacDonald*, 456 U.S. 1, 8, 102 S. Ct. 1497, 71 L. Ed. 2d 696 [1982]).

Neither party contests that the charges in the second case were, for purposes of speedy trial analysis, essentially identical to the first. But the parties dispute whether the district court erred by finding the first case was not dismissed out of necessity, so we must examine necessity.

The district court concluded the first dismissal was unnecessary because the State opted to dismiss the case despite the court having largely accommodated the prosecutor's concerns about COVID. The State disagrees, arguing the prevalence of COVID at the time made dismissal of the first case necessary. However, the State does not contest that the prosecutor conceded at the continuance hearing that the district court's COVID precautions legally complied with state and local court recommendations, although the prosecutor continued to voice his personal concerns. Nor did the State address, either at the time of the hearing or on appeal, the McPherson County Attorney Office's failure to provide a substitute prosecutor who would have been willing to bring the case to trial as originally scheduled.

In this constitutional speedy trial claim, we apply the same necessity test to calculate the length of the delay as in a statutory speedy trial claim. See *Gill*, 48 Kan. App. 2d at 113. One example of a necessary dismissal in Kansas under the statutory right to a speedy trial includes dismissing a case where a Court of Appeals decision released while the case was pending made it clear that the complaint filed against the defendant was defective and did not grant the district court jurisdiction. *State v. Jamison*, 248 Kan. 302, 305-06, 806 P.2d 972 (1991). And, when the absence of a witness would impede the prosecution, dismissal by the State has been found necessary. See *State v. Ransom*, 234 Kan. 322, 327, 673 P.2d 1101 (1983); *State v. Couch*, No. 123,196, 2021 WL 4032887, at \*4-5 (Kan. App. 2021) (unpublished opinion). In contrast, an example of an unnecessary dismissal is when a witness, who the State did not demonstrate to be necessary, is unavailable. *State v. Anunda*, No. 110,629, 2015 WL 967548, at \*8 (Kan. App. 2015) (unpublished opinion).

\*7 Ultimately, the district court did not err in finding the first case against Contreras-Avila was not dismissed due to necessity. Unlike *Jamison*, *Ransom*, or *Couch*, nothing suggests the State's case was subject to undecided law or lacked crucial evidence. Additionally, these legal and witness issues lie outside of a prosecutor's control, whereas the

dismissal in this case was within the prosecutor's control. Despite the district court's finding that a trial could be safely held under the ordered precautions, the prosecutor dismissed the case due to his personal health concerns. We do not discount the unprecedented circumstances surrounding the COVID-19 pandemic, and while this decision is understandable, it does not rise to the level of legal necessity. Further, the county attorney's office has a responsibility to have prosecutors ready for trial, and another prosecutor should be available to substitute in the event of health or other emergency issues. The adequate staffing of the prosecutor's office is entirely within the State's control and is not analogous to uncontrollable issues such as missing witnesses or changing caselaw.

As noted, the time between the dismissal of the first case and the filing of the second case is generally not considered as part of the delay—that is, unless the State dismisses a case and then refiles it in a bad faith attempt to evade enforcement of the defendant's constitutional right to a speedy trial. *Gill*, 48 Kan. App. 2d at 110-11.

Here, we do not find the State's actions were motivated by bad faith. There is no reason to doubt the prosecutor had legitimate concerns regarding his health, especially given his preexisting lung condition. Furthermore, nothing in the record suggests a purposeful attempt to evade enforcement of the Speedy Trial Clause by the State.

In sum, the State's dismissal of the first case was not legally necessary but was also not in bad faith. For these reasons, the length of the delay in both the first and second cases are added together, but the time between the dismissal of the first case and filing of the second case is not considered. As a result, the relevant length of the delay in this case was 873 days—nearly 29 months or 2.4 years. Because this is a straightforward case involving a single event of aggravated assault, witnessed by two victims and caught on video, this length of delay is presumptively prejudicial and weighs heavily in Contreras-Avila's favor. Finding the length of delay prejudicial, we continue our analysis.

## 2. Reason for the Delay

Our next consideration is the reason for the delay. In *Barker*, 407 U.S. at 531, the Supreme Court specified that “different weights should be assigned to different reasons” for the delay in bringing a defendant to trial:

“A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.”

The State's case against Contreras-Avila was delayed for several reasons, which we examine individually. Some of the delay is attributable to a valid reason—the response of State and local governments to COVID-19—which justifies some delay.

Due to the pandemic, our Supreme Court issued Order 2020-PR-016, which continued all jury trials scheduled to begin on or after March 18, 2020. According to the State, that order remained in effect until April 15, 2021, when deadlines and time limitations for the statutory right to a speedy trial resumed through Kansas Supreme Court Administrative Order 2021-PR-020, effective March 30, 2021. But as Contreras-Avila correctly points out, on September 4, 2020, our Supreme Court issued Order 2020-PR-099, which first allowed jury trials to be conducted in counties without stay-at-home orders or in cases where the constitutional right to a speedy trial required a jury trial. From March 18, 2020, until September 4, 2020—a total of 170 days—it was impossible to hold a jury trial in Contreras-Avila's case.

\*8 This 170-day period cannot weigh against the State, because it arose purely from state and local governments' response to the COVID-19 pandemic, which was completely outside the State's control. See *State v. Paige*, 977 N.W.2d 829, 840 (Minn. 2022) (trial delays caused by statewide orders in response to COVID-19 pandemic do not weigh against the State); *United States v. Olsen*, 21 F.4th 1036, 1047 (9th Cir. 2022) (holding that the COVID-19 pandemic “falls within such unique circumstances to permit a court to temporarily suspend jury trials in the interest of public health” without violating a defendant's right to a speedy trial), *cert. denied* 142 S. Ct. 2716 (2022).

However, this still leaves 703 days of delay, and not all the delays in this case were valid. The entirety of the second prosecution—a 281-day period between October 25, 2021, and August 2, 2022—was attributable to the prosecutor's decision to dismiss the first case on the eve of trial. As

discussed above, there is no evidence in the record of this being a bad faith attempt to delay the case, but the ultimate responsibility still rests with the State.

But the remaining 422 days are not attributable to the State. This includes the 68 days between Contreras-Avila's arrest and the statewide orders prohibiting jury trials and the 354 days between resumption of jury trials and the State's dismissal of the first case against Contreras-Avila. These delays were agreed to by the parties and the district court. Even if the total time to the first trial setting may have been longer than normal, a review of the record shows no dilatoriness on the part of any party but appears to merely reflect the inefficiencies caused by the sudden shift to remote work caused by the COVID-19 pandemic.

Ultimately, less than one-third of the delay (281 out of 873 days) is attributable to the State. Although the 281-day delay is attributable to the prosecutor's health concerns, we still consider this a choice made by the State, albeit weighed less heavily against it. But because the rest of the delay in this case is not attributable to the State, this factor is neutral to our analysis.

### 3. *Contreras-Avila's Assertion of His Right*

Our third consideration is Contreras-Avila's assertion of his right to a speedy trial. Contreras-Avila first argued his constitutional right to a speedy trial in his response to the State's motion to continue his first trial in August 2021. He then moved to dismiss the second case on June 2, 2022—within 10 days of the preliminary hearing being rescheduled. In *Gill*, this court found that the defendant moving to dismiss and alleging a speedy trial violation caused this factor to favor the defendant. 48 Kan. App. 2d at 115. But, in *Rivera*, the Kansas Supreme Court considered the timing of the defendant's motion when weighing this factor. Stated simply, a late motion to dismiss asserting the right caused this factor to not weigh as heavily in the defendant's favor. 277 Kan. at 117-18; see also *Couch*, 2021 WL 4032887, at \*10 (defendant moving to dismiss 12 days before trial was a late assertion of his right to a speedy trial and did not weigh significantly in his favor).

Here, Contreras-Avila did not file a late motion. He had no reason to assert his right until it appeared his impending trial setting may be continued within days before the trial, and immediately asserted the right at that time. He then formally re-asserted his right in his motion to dismiss the second case.

Unlike the situation in *Rivera*, this is not a late motion to dismiss. This factor weighs in Contreras-Avila's favor.

### 4. *Prejudice to Contreras-Avila*

\*9 The fourth *Barker* factor is to consider the prejudice Contreras-Avila faced from the delay in his prosecution. When determining the prejudice to the defendant, it should be assessed in light of the interests that the speedy trial right was designed to protect: (1) preventing oppressive pretrial incarceration, (2) minimizing the anxiety and concern of the accused, and (3) limiting the possibility that the defense will be impaired. 407 U.S. at 532.

“Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past.” 407 U.S. at 532.

Based on the record, we do not find that Contreras-Avila suffered any significant pretrial incarceration. Instead, he was released on bond for the entire pretrial period. Contreras-Avila argues the State sought, and the district court granted, more onerous bond conditions than usual, including a no-contact order with the alleged victims and bond supervision with court services. The conditions of Contreras-Avila's bond also required him to receive permission to travel to his brother's out-of-state graduation, although the district court granted him permission to do so. But when viewing his conditions considering the applicable statutes and compared to conditions in other areas of the state, these seem to be fairly standard bond conditions, rather than overly oppressive ones.

For example, K.S.A. 22-2816(c) requires a defendant to be “closely supervised by a court services officer” until final disposition of the charges against him, and multiple district courts have rules regarding standard bond conditions that include no-contact orders and travel restrictions. See, e.g., Rule 21, Standard Conditions of Appearance Bonds (Kan. 22nd Jud. Dist. Ct. R. at 10) (requiring, in part, as the “minimum conditions of all bonds,” that a defendant abide by the law, have no contact with victims or witnesses, and not leave the state without permission of the court services office); Rule 219(e), Pretrial Release in Criminal Cases Prior to Court Appearance (Kan. 23rd Jud. Dist. Ct. R. at 27) (requiring, in pertinent part, that a defendant be law-abiding, have no contact with any victim or codefendant, and that he or she cannot leave the state for more than three days

without notifying the county attorney's office). Contreras-Avila's pretrial experience was not "oppressive" in the way that the *Barker* court was concerned about. See *Barker*, 407 U.S. at 532-34 (concerned with the detrimental impacts of job loss, disruption of family life, and lack of recreational or rehabilitation programs on the individual incarcerated while awaiting trial, in addition to some concerns of restraints on liberty, and finding Barker's 10-month pretrial incarceration and time spent on bond—despite being "under a cloud of suspicion and anxiety" for over 4 years—equated to minimal prejudice).

Although Contreras-Avila claims he suffered "great anxiety" after his arrest, he offers no evidence to support his conclusory claim, such as a doctor's or therapist's note or anything similar. In fact, his motion to dismiss before the district court did not reference any anxiety on his part, but only argued possible prejudice as to the availability of witnesses. There is no reason to believe that the anxiety suffered by Contreras-Avila was in any way extraordinary for a defendant awaiting trial, and particularly for a defendant awaiting trial on more than one criminal case simultaneously.

\*10 Finally, Contreras-Avila raised general concerns about the fading memory of witnesses and specific concerns about one witness whose location may now be unascertainable. However, as the State points out, Contreras-Avila did not subpoena any witnesses before his scheduled trial, which implies this potentially missing witness is not critical to his defense. He provides no concrete information about the identity of this potentially missing witness, nor of the critical nature of his or her testimony. And the law is on Contreras-Avila's side in terms of procuring the witness' participation. See *K.S.A. 22-4201 et seq.*; *K.S.A. 22-3214*. He simply does not show how the potential for one missing witness affects his defense.

Ultimately, though, to meet his burden to show prejudice, Contreras-Avila cannot rely on generalities or the passage of time but is required to do more—he must specifically

show how the delay thwarts his ability to defend himself. See *McDonald*, 62 Kan. App. 2d at 72. Contreras-Avila has not met this burden to show prejudice, so this factor weighs in the State's favor.

#### 5. Other Relevant Circumstances

In sum, we find the length of delay presumptively prejudicial to Contreras-Avila, but the reasons for delay were essentially neutral. His timely assertion of his right to a speedy trial was also in his favor, but his failure to show prejudice weighs heavily in the State's favor. Consideration of the *Barker* factors alone results in what amounts to a tie.

But we are not required to end our analysis here. Our Supreme Court in *Ford* directed us to not only consider the conduct of both the prosecution and the accused and the *Barker* factors, but to assess them "together along with 'any other relevant circumstances.'" *Ford*, 316 Kan. at 561 (quoting *Owens*, 310 Kan. at 869). We could not, in good conscience, ignore the unprecedented circumstances surrounding these proceedings—that is, the COVID-19 pandemic. Not only did the prosecutor suffer from an underlying lung condition, putting him at higher risk for serious illness if he contracted the virus, but Contreras-Avila's own defense attorney not only fell ill, but succumbed to the virus during the pendency of the first case. These are catastrophic conditions unlikely to be repeated during our lifetimes.

#### Conclusion

Ultimately, we find the district court erred by dismissing this case with prejudice. The COVID-19 pandemic and its concomitant difficulties tips the scale in this close case.

Reversed and remanded.

#### All Citations

555 P.3d 744 (Table), 2024 WL 4002824