24-128336-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

JOHN DAVID BEE,

Defendant / Appellant,

vs.

STATE OF KANSAS,

Plaintiff / Appellee.

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

REPLY BRIEF OF THE APPELLANT

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Reply Argument and Authorities

Rule 6.05 Statement

This reply brief is made necessary by new material in the brief of the appellee (["Aple.Br."]). Specifically, that new material is the appellee's arguments:

(1) That Mr. Bee waived his argument that the district court erred in denying his motion for judgment of acquittal at the close of the State's case-in-chief because he presented a defense case (Aple.Br. 15-16);

(2) That the Court should recognize and apply a new "direct outgrowth" venue rule (Aple.Br. 17-22);

(3) That paragraph 8(b) of the protection order Mr. Bee was accused of violating and the notation on that page about the continuing divorce case controlling do not modify the order's general no-contact provision (Aple.Br. 24);

(4) That the State communicated its specific legal theories clearly before trial (Aple.Br. 23-25);

(5) That the right to a unanimous jury verdict is statutory, not constitutional (Aple.Br. 27);

(6) That the denial of a bill of particulars is not mandatory when a charging document is insufficient (Aple.Br. 38);

(7) Accusing Mr. Bee's appellate counsel of deceiving this Court (Aple.Br. 39); and

(8) That the failure to order a bill of particulars is subject to and is harmless under a statutory harmless error analysis (Aple.Br. 40).

I. Reply as to Issue I: Sufficiency of evidence of venue

This is Mr. Bee's direct appeal from his convictions and sentence after a jury trial of 17 person misdemeanor counts of violating a protection from abuse ("PFA") order based on the subject matter or tone of messages Mr. Bee sent by means of a court-approved text messaging application, TalkingParents, to his ex-wife (R1 at 233). The State initially charged a single count (R1 at 1) but then amended charged 27 counts allegedly occurring over a nearly year-long period (R1 at 56-61). The jury convicted Mr. Bee on 17 counts and acquitted him on ten, and the district court sentenced him to a five-year underlying sentence and ordered him to serve 30 days followed by a 12-month probation (R1 at 189-98 (verdict forms), 233 (journal entry of sentencing)).

In Mr. Bee's first issue on appeal, he explained that the district court erred in denying his original motion for judgment of acquittal ("JOA") at the close of the State's evidence and his renewed one at the close of all evidence because the State failed to prove venue in Riley County, as the messages were never received there and the State never presented evidence of the location from where they were sent (Brief of the Appellant ["Aplt.Br."] 14-24).

A. The waiver rule cannot apply at all because it violates double jeopardy and fundamental decision in fairness.

Relying on the 46-year-old *State v. Blue*, 225 Kan. 576, 92 P.2d 897 (1979), the State initially responds that Mr. Bee waived any error regarding his original JOA motion by presenting evidence in the defense's case-in-chief (Aple.Br. 15-16). Under that waiver rule, this Court only reviews a renewed JOA motion at the closed of all evidence, and therefore also considers

evidence adduced after the initial JOA motion (that is, evidence the defendant introduced in his case-in-chief). *Blue*, 225 Kan. at 578.

Blue's waiver rule has been narrowed over time. *See, e.g.*, *State v. Copes*, 244 Kan. 604, 609-10, 772 P.2d 741 (1989) (no waiver when defendant only attacks co-defendant's evidence). Most recently, the Kansas Supreme Court declined to apply the rule when the State did not raise it in briefing. *State v. Frantz*, 316 Kan. 708, 735, 521 P.3d 1113 (2022). But in *Frantz*, Justice Stegall and two other justices would have instead reconsidered the *Blue* waiver rule and abolished it entirely due to "simple fairness problems with the rule" and double jeopardy concerns raised by application of the rule. *Id.* at 748-51 (Stegall, J., concurring). This Court should decline to apply the waiver rule for the reasons stated in Justice Stegall's concurrence. *See id.*

Even if this Court applies the waiver rule, it does not defeat Mr. Bee's first issue on appeal. The Court simply would review his renewed JOA motion including the evidence he presented in his defense (Aplt.Br. 24). As he explained in his opening brief, that additional information does nothing to prove or support a reasonable inference that Mr. Bee was present in Riley County when he sent any particular message on the TalkingParents application (Aplt.Br. 24).

B. The State's new "direct outgrowth" rule has no basis in law and the Court should refuse to recognize it.

Next, the State seeks to expand a dicta description of a particular fact pattern into a new rule for venue – that any "violation that is 'a direct outgrowth' of a court order constitutes a requisite act of the offense" in the county in which the order was entered (Aple.Br. 17). This cannot stand.

At the outset the State errs by using the wrong word – "violation" rather than "charge" as in the decisions the State cites. *See State v. Boorigie*, 273 Kan. 18, 24, 41 P.3d 764 (2002) ("the subsequent criminal charges were a direct outgrowth"). Regardless, this language is dicta, does not control, and has no real basis to apply in the context of an alleged violation of a protective order. Instead, this Court should apply Kansas's well-established principles of statutory interpretation and reject the State's invitation to create a new, extra-statutory venue rule.

Mr. Bee has consistently explained the lack of evidence of venue was grounded in Kansas's venue statutes (R9 at 174-75 (motion), 222-23 (renewed motion); Aplt.Br. 16-17 (basing argument on statute)). That is, the statutes require that "[e]xcept as otherwise provided by law, the prosecution shall be in the county where the crime was committed." K.S.A. § 22-2602. And the "county where the crime was committed" or may otherwise be prosecuted is defined by several statutes. *See* K.S.A. §§ 22-2603 to 22-2615, 22-2619. These statutes are granular, even addressing where specific crimes and categories of crimes may be prosecuted. *See, e.g.,* K.S.A. §§ 22-2613 (bigamy); 22-2614 (kidnapping); 22-2615 (failure to appear); 22-2619 (crimes committed with an electronic device). And while venue is *also* constitutionally mandated, *see Boorigie*, 273 Kan. at 22 (citing Kan. Const. Bill of Rights § 10), Mr. Bee's argument is not a constitutional matter. So, determining the venue rule here is a question of statutory interpretation, no more and no less.

In interpreting a statute, this Courts must "begin by looking to the plain language of the statute, and if the language of the statute is plain and

unambiguous, [it] do[es] not speculate about legislative intent and [it] will not read something into the statute that is not readily found in its words." *State v. Beck*, ___ Kan. ___, 577 P.3d 119, 122-23 (2025). No statute supports the State's new proffered "direct outgrowth" basis for venue. Therefore, the State is impermissibly trying to read something into the venue statutes that is "not readily found" in their words. *See id.*

The "direct outgrowth" language on which the State relies originated in *Boorigie*, in which the defendant was charged and convicted in Montgomery County for soliciting false testimony in a proceeding pending there. 273 Kan. at 24. The defendant did not raise venue in the trial court and instead raised it for the first time on appeal as a jurisdictional argument, relying in part on Kansas's constitutional venue requirement. *Id.* at 22-23. The Supreme Court held the direct link between the original case in Montgomery County and the attempt to solicit another to commit a crime in that county made that county a logical and proper venue. *Id.* at 24-25.

So, *Boorigie* is inapplicable at the outset because it involved a constitutional and jurisdictional claim, whereas Mr. Bee's arguments here are purely statutory. *Id.* at 22-23.

More importantly, the language the State cites is dicta. The Court did not reach its conclusion based on the "direct outgrowth" language. *Id.* at 25. Instead, it relied on K.S.A. § 22-2607(a), which "allows for the prosecution of someone who, among other things, 'advises, counsels or procures another to commit a crime,' in the county where the principal crime was committed even if the act of advising or procuring another to commit the crime took place

outside the county." *Id.* (quoting § 22-2607(a)). Accordingly, the description of the new charges as a "direct outgrowth" is dicta because it is "entirely unnecessary for the decision of the case." *State v. Fortune*, 236 Kan. 248, 251, 689 P.2d 1196 (1984). This Court is not bound by that language and should not accept the State's invitation to promote that language to a brand new venue rule without any statutory foundation.

The State's reliance (Aple.Br. 19-20) on *State v. Jones*, 9 Kan. App. 2d 107, 673 P.2d 455 (1983) and *State v. Doolin*, 216 Kan. 291, 532 P.2d 1080 (1975), both of which involved escape from custody charges, is also misplaced.

In *Jones*, the State charged the defendant with escape by failing to return to custody in Allen County after he was granted temporary leave to be taken to a hospital in Missouri for medical treatment. 9 Kan. App. 2d at 106. So, there, the defendant committed the crime of escape by his omission to perform a duty, that is failing to return to custody, which he was required to perform in Allen County, making venue proper there. *Id.* at 106-07.

And in *Doolin*, the defendant was convicted of *aggravated* escape because of a previous escape in Shawnee County. 216 Kan. at 291. Because that prior escape was one of multiple acts required to commit the aggravated crime, venue was proper in Shawnee County. *Id.*

Neither of those fact patterns is present here, where the issue is whether Mr. Bee sent messages by the TalkingParents application while he was present in Riley County. *Jones* and *Doolin* are inapplicable.

There was no evidence of venue in Riley County under well-established Kasnas law. This Court should reverse the district court's judgment.

II. <u>Reply as to Issue II:</u> The State misinterprets the PFA order, and its legal theories were not clearly established before trial as it suggests.

In Mr. Bee's second issue, he explained that the State failed to present sufficient evidence to support the convictions because it never introduced any evidence of orders in the divorce case to which the PFA order deferred for exceptions to its general no-contact rule and failed to present sufficient evidence of venue based on the jury instructions (Aplt.Br. 25-28). This is because the PFA order disallowed contact between Mr. Bee and his ex-wife "except as authorized by the court in Paragraph 8(b) of this order," but that section stated "N/A 21DM87 divorce governs" (R11 at 181), but the State presented no evidence of orders in the 21DM87 case (Aplt.Br. 26-27). As a result, the jury had no basis to fully interpret the PFA order (Aplt.Br. 26-28).

A. The State misinterprets the PFA order.

In response, the State argues the Court should disregard the PFA order's explicit internal reference to paragraph 8(b) – and thus to orders in the divorce case –because the form language for that paragraph does not relate to the "type or tenor" of communications (Aple.Br. 24).

The State misinterprets the PFA order. The original reference to paragraph 8(b) identifies it as an exception to the general rule prohibiting any contact, reading "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." (R11 at 179 (emphasis added)). Plainly, that indicates that paragraph 8(b) is an exception and therefore an authorization of *certain* types of communication. And, since the PFA order here refers to the divorce case for the entire category containing paragraph 8(b), it

contemplates that the divorce judgment – or any subsequent orders in that case –modify and adjust the permissible subjects about which the parties may communicate (R11 at 181). Contrary to the State's assertion that the jury had all it needed to determine guilt, without any orders from the divorce case, the jury had no way of knowing – and certainly no way of ruling out the possibility – that a court had expanded the scope of permissible communication between Mr. Bee and his ex-wife.

B. The State's legal theories were never made as clear to Mr. Bee and his counsel below.

The State argues it was not prosecuting Mr. Bee for having contact with his ex-wife, but rather for "the nature of the conversations he was trying to have" (Aple.Br. 23). Later, it describes the alleged violations as concerning the "decision … to discuss matters beyond parenting time, child exchanges, and return of property *and to* use the app to engage in the prohibited behaviors of threatening, abusing, harassing, and interfering with Kimberly's privacy" (Aple.Br. 25). The State claims this was "noted by the prosecutor throughout the case, *before* and during trial," but it does not cite anything but the trial transcript and exhibits (Aple.Br. 25 (emphasis added)).

The State's argument gives the inaccurate impression that it communicated its legal theories to the defense clearly and unequivocally throughout the proceedings below. That is not so. In fact, the State never communicated its legal theories about how or why particular messages from Mr. Bee violated the PFA order despite his attempts to seek just that in a bill of particulars, as Mr. Bee explains in his fourth issue on appeal. Until trial, besides having no way of knowing which particular messages on a given day

the State might rely on, Mr. Bee had no way of knowing which provisions of the PFA order the State would argue those messages violated (Aplt.Br. 38-41). Those omissions hindered him from being able to prepare a defense. For example, he coult not obtain and introduce evidence of any additional orders in the continuing divorce case that had been transferred to Pottawatomie County. The State's argument otherwise is in error.

III. <u>Reply as to Issue III:</u> The lack of a unanimity instruction is reversible error.

In Mr. Bee's third issue in his opening brief, he requested clear error review of the lack of a unanimity jury instruction for eight counts for which the State introduced evidence of multiple messages from the date charged in each count (Aplt.Br. 29-33). This is because a multiple acts count is one where 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). To convict, a jury must unanimously agree on at least *one* of those acts. *Id.* Here, 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, requiring the trial court to instruct the jury that it must unanimously agree on which particular act constituted a violation, which it did not, and this prejudiced Mr. Bee (Aplt.Br. 29-33).

The State concedes this satisfies the first two steps of the clear error analysis, and that the failure to give the instruction was error (Aple.Br. 27, 35). Instead, it argues solely that the error is not reversible because there was no reasonable probability it affected the outcome of the trial (Aple.Br. 35). The State is incorrect.

Relying on *State v. Moyer*, 306 Kan. 342, 359, 410 P.3d 71 (2017), the State asserts that in Kansas, jury unanimity is a statutory rather than constitutional right, so statutory harmless error applies to the third step of the analysis (Aple.Br. 27). While that was true when *Moyer* was decided in 2017, the State omits that since then, the U.S. Supreme Court overruled previous cases and held jury unanimity is constitutionally binding on the states. *Ramos v. Louisiana*, 590 U.S. 83, 93 (2020), *abrogating Apodaca v. Oregon,* 406 U.S. 404 (1972), and *Johnson v. Louisiana*, 406 U.S. 356 (1972). Regardless, the State errs because the clear error reversibility applies to this issue, rather than constitutional or statutory harmless error.

Addressing that error, the State claims there was evidence of a violation of the PFA order in each grouping Mr. Bee laid out in his opening brief (Aplt.Br. 13 (table), 31-33) "because defendant went beyond the authorized scope of the communications and engaged in behavior that was prohibited by the order. Specifically, defendant did more than discuss parenting time, child exchanges, and return of property, and engaged in communication that was abusing, that was harassing, and that interfered with Kimberly's privacy, all of which violated the terms of the PFA order" (Aple.Br. 35). But despite reproducing the messages at issue verbatim, the State applies no further specific analysis to each date.

The reason the State provides no further analysis is that the jury likely would have reached a different verdict had the unanimity instruction been given. As Mr. Bee explained in his opening brief, the jury was called on to make judgment calls for each count as to whether a particular message

violated the prohibition on abusive or harassing language (Aplt.Br. 33). For example, Exhibits 23.1 to 23.3: the first two messages are within scope, discussing the child, and the third message is part of that conversation and within scope as well (R.11 at 168-70).

The State does not identify in its brief what language in those messages is abusive, harassing, or invasive of privacy. It is possible one juror could have found the comment about strange men staying the night in the first message to be abusive or harassing (R11 at 169). But clearly not all jurors agreed since they acquitted Mr. Bee on Count 22, a single act count that included similar and even more severe messages referring to "infidelity" (R11 at 166). Another juror may have disagreed but thought the description of the "nonsense PFA" to be an issue (R11 at 169-70). Again, not all jurors agreed that sort of comment would violate the PFA order, since they acquitted Mr. Bee on Count 6, another single act count where the message described an "unjust protection order" and "corrupt judge" (R11 at 142).

The State's slapdash analysis does nothing to show that the jury would have reached guilty convictions on the eight multiple-acts counts. The erroneous lack of a unanimity instruction prejudiced Mr. Bee. This Court should reverse those eight convictions due to the failure to instruct the jury that its verdict must be unanimous.

IV. <u>Reply as to Issue IV:</u> The district court had to order a bill of particulars because the charging document was insufficient and the State cannot show that the district court's failure was constitutionally harmless.

In his fourth issue, Mr. Bee explained that the district court erred in denying his request for a bill of particulars (Aplt.Br. 34-41). This is because a

bill of particulars *must* be ordered when the charging document alone is insufficient to inform the accused of the charges against which he must defend so that a defendant is able to make out his defense (Aplt.Br. 34-35). Here, the charging instrument failed to specify the conduct or legal theory on which the State relied for the charged offenses, so without a bill of particulars, Mr. Bee could not present a meaningful defense (Aplt.Br. 34-41).

A. A bill of particulars *must* be granted when the charging instrument alone is insufficient to inform the accused of the charge against which he must defend, and the sufficiency of that document is subject to unlimited review.

In response, the State mischaracterizes Mr. Bee's argument as relying solely on a claim of abuse of discretion (Aple.Br. 38). This is untrue.

To the contrary, Mr. Bee explained that there are two standards at play. The first standard applies when "the *charging instrument itself* is insufficient to inform the accused of the charge against which he or she must defend," in which case a district court *must* order a bill of particulars. *State v. Webber*, 260 Kan. 263, 284, 918 P.2d 609 (1996) (emphasis added). Since that simply involves analysis of written evidence in the form of pleadings, this Court's review is unlimited. *See Heiman v. Parrish*, 262 Kan. 926, 927, 942 P.2d 631 (1997). The second standard – abuse of discretion – applies only if this Court concludes that the pleadings *are* sufficient on their own.

As Mr. Bee explained in his opening brief, the charging document here – the complaint – was insufficient because it did not identify the specific messages (among multiple messages on each date charged for many of the counts) *or* the State's legal theory for how and why those messages violated the PFA order (Aplt.Br. 39-40). Mr. Bee supported this argument with a

directly on-point case from just two years ago in which this Court reversed convictions due to a district court's failure to order a bill of particulars. *See State v. Panjada*, No. 125,259, 2023 WL 3143658 (Kan. App. Apr. 28, 2023) (unpublished).

The State fails in any way to engage with, distinguish, or explain why *Panjada* does not control the outcome here. It does not cite or discuss the case anywhere in its brief, even in its response to Mr. Bee's fourth issue (Aple.Br. 36-40). This Court should reverse.

B. The State erroneously accuses Mr. Bee's counsel of deception, not realizing that Mr. Bee's trial and appellate counsel are different.

The State argues that Mr. Bee's trial counsel understood the charges to be limited to messages over the TalkingParents application, describing Mr. Bee's argument on appeal as a "misleading tact" by Mr. Bee's trial counsel (Aple.Br. 38-39 (citing R12 at 12-14)). The State's argument here is itself incorrect and misleading. First, the State fails to understand that Mr. Bee's trial counsel and his appellate counsel are different. Second, Mr. Bee's trial counsel never stated he understood the charges to be limited to TalkingParents messages as the State claims – at best, he referred to "conversations" (R. 12, 12).

In fact, the State's own argument – that the charging document *combined with* the litigation of the motion for a bill of particulars were (supposedly) sufficient (Aple.Br. 39) –itself defeats the State's opposition to this issue on appeal. Because in its view the additional litigation of the bill of particulars issue below was required for Mr. Bee even potentially to

understand the charges against him, the charging document *alone* was not sufficient, and the district court therefore had to order a bill of particulars. *Webber*, 260 Kan. at 284.

C. The constitutional harmless error standard applies, and the failure to order a bill of particulars was not harmless.

Without committing to a particular harmlessness standard, the State argues that any error was harmless (Aple.Br. 40). As Mr. Bee explained in his opening brief, the failure of a charging document to inform the accused of the nature of the charges against him combined with the failure to order a bill of particulars to remedy that insufficiency implicates his constitutional rights under the Kansas and U.S. Constitutions (Aplt.Br. 35). Accordingly, the constitutional harmless error standard applies. *See State v. Brown*, 280 Kan. 65, 76, 118 P.3d 1273 (2005).

"An error of constitutional magnitude is serious and may not be held to be harmless unless the appellate court is willing to declare a belief that it was harmless beyond a reasonable doubt. Thus, before an appellate court may declare the error harmless, it must be able to declare beyond a reasonable doubt that the error had little, if any, likelihood of having changed the result of the trial." *Id.* at 77. As the party benefitting from the error, the State bears the burden to show it was harmless. *Id.* at 76.

The State claims the outcome here would have been the same even with a bill of particulars but offers no analysis to support this (Aple.Br. 40).

The State is wrong. As Mr. Bee showed in his opening brief, he was handicapped in presenting his defense because even after the litigation of the motion for a bill of particulars and "full discovery," he did not know the

specific messages on which the State would rely for each charge and did not know how the State would argue those messages violated the PFA order (Aplt.Br. 40-41). This difficulty was compounded by the ambiguity in the PFA order itself including its reference to additional proceedings that may change its terms and the complex threaded nature of conversations on the TalkingParents application (Aplt.Br. 40-41). Had Mr. Bee known the messages and legal theories on which the State would rely, he would have been able to present a more complete and persuasive explanation of the messages and likely could have persuaded the jury to acquit on more of, if not all of the charges.

The failure to order a bill of particulars prejudiced Mr. Bee. This Court should reverse and order a new trial.

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,

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by /s/Jonathan Sternberg

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Certificate of Service

I certify that on November 7, 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:

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Appendix

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
|
Opinion Filed April 28, 2023.

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

Attorneys and Law Firms

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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

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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 harmlessness 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