IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 121,865

STATE OF KANSAS,
Appellee,

v.

SHAMEKE CAESAR STRONG,
Appellant.

SYLLABUS BY THE COURT

1.

To be legally appropriate, a jury instruction must fairly and accurately reflect the applicable law.

2.

K.S.A. 2022 Supp. 21-5705(e) provides a mandatory, albeit rebuttable, presumption of a defendant's intent to distribute when that defendant is found to have possessed specific quantities of a controlled substance.

3.

While courts generally have authority to determine whether a statute is unconstitutional, this power of judicial review is not unlimited. The separation of powers doctrine embodied in the Kansas constitutional framework requires the court exercise judicial review only when the constitutional challenge is presented in an actual case or controversy between the parties. Under this case-or-controversy requirement, parties must show (among other factors) that they have standing. Standing is the right to make a legal claim. To have such a right, a party generally must show an injury in fact; absent

that injury, courts lack authority to entertain the party's claim. In this respect, standing is both a requirement for a case or controversy, i.e., justiciability, and a component of this court's subject matter jurisdiction.

4.

To establish an injury in fact sufficient to raise a constitutional challenge to a statute, a party must show that the statute affected the party's rights. Generally, if there is no constitutional defect in the application of the statute to a litigant, the litigant does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations.

Review of the judgment of the Court of Appeals in 61 Kan. App. 2d 31, 499 P.3d 481 (2021). Appeal from Riley District Court; JOHN F. BOSCH, judge. Opinion filed April 14, 2023. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Hope E. Faflick Reynolds, of Kansas Appellate Defender Office, argued the cause, and *Jennifer C. Roth*, of the same office, was with her on the briefs for appellant.

David Lowden, deputy county attorney, argued the cause, and *Barry R. Wilkerson*, county attorney, and *Derek Schmidt*, attorney general, were with him on the briefs for appellee.

The opinion of the court was delivered by

WALL, J.: Shameke Caesar Strong challenges his conviction for possession with intent to distribute a controlled substance within 1,000 feet of a school under K.S.A. 2022 Supp. 21-5705. A subsection of that same statute provides for a rebuttable presumption of intent to distribute if a defendant possesses 3.5 grams or more of methamphetamine. K.S.A. 2022 Supp. 21-5705(e)(2). In other words, under subsection (e)(2), a jury *must* presume that a defendant who possessed at least 3.5 grams of methamphetamine did so

with the intent to distribute it, unless the defendant can rebut the presumption with affirmative evidence to the contrary. See *State v. Holder*, 314 Kan. 799, 805, 502 P.3d 1039 (2022).

At Strong's trial, the State presented evidence that Strong possessed more than 11 grams of methamphetamine. But rather than instructing the jury on the mandatory presumption in K.S.A. 2022 Supp. 21-5705(e)(2), the district court provided a slightly modified version of a pattern jury instruction, PIK Crim. 4th 57.022 (2013 Supp.). The district court's instruction informed the jury that if the evidence showed Strong possessed 3.5 grams or more of methamphetamine, then the jury *could*, but was not required to, presume Strong intended to distribute the controlled substance.

Like two other cases decided this day, Strong's appeal raises a claim of instructional error and a constitutional challenge to K.S.A. 2022 Supp. 21-5705(e)(2). See *State v. Slusser*, 317 Kan. ___ (No. 121,460, this day decided); *State v. Martinez*, 317 Kan. ___ (No. 121,204, this day decided). Like the defendants in *Martinez* and *Slusser*, Strong argues the district court's instruction was legally inappropriate because it was inconsistent with the mandatory presumption in K.S.A. 2022 Supp. 21-5705(e). Also like the defendants in *Martinez* and *Slusser*, Strong argues the mandatory presumption in K.S.A. 2022 Supp. 21-5705(e) unconstitutionally shifts the burden of proof to the defendants.

We agree with Strong that the district court's instruction was erroneous because it did not accurately describe K.S.A. 2022 Supp. 21-5705(e)'s mandatory presumption. But we hold that the instructional error does not require reversal of Strong's conviction because he fails to convince us the verdict would have been different but for the error.

As to Strong's constitutional challenge to K.S.A. 2022 Supp. 21-5705(e)'s mandatory presumption, our court lacks jurisdiction over the issue. Granted, courts

generally have authority to determine whether a statute is unconstitutional. But the power of judicial review is not unlimited. The separation of powers doctrine embodied in the Kansas constitutional framework requires that the court exercise review only when the issues are presented in an actual case or controversy between the parties. Under this case-or-controversy requirement, parties must show (among other factors) that they have standing. A party has standing to challenge the constitutionality of a statute only when it adversely impacts the party's rights. We hold that Strong lacks standing to challenge the constitutionality of K.S.A. 2022 Supp. 21-5705(e)(2)'s mandatory presumption because it was not applied to him. Thus, it could not have adversely impacted his rights.

Finally, Strong argues his sentence is unconstitutional under both the state and federal Constitutions because the district court judge, rather than a jury, determined his criminal history. But we hold that Strong's challenges to the constitutionality of his sentence are foreclosed by our precedent, and Strong provides no compelling reason for us to depart from that precedent. Thus, we affirm Strong's convictions.

FACTS AND PROCEDURAL BACKGROUND

In October 2018, police executed a search warrant for a residence located within 1,000 feet of a school in Manhattan. During the search, Strong exited a bedroom inside the house. When the police searched that bedroom, they found mail addressed to Strong (but with a delivery address different than the residence being searched), a digital scale, and a zippered sunglasses case. Inside the sunglasses case, officers found a plastic baggie containing 10.24 grams of methamphetamine; another plastic baggie containing 1.4 grams of methamphetamine; and 15 to 20 clean, empty plastic baggies.

At Strong's trial, Detective Michael Parr, who participated in the search of the residence, testified. Based on his experience, Detective Parr explained that methamphetamine users generally have only a small amount of methamphetamine with them at a time,

usually around 1 gram. Methamphetamine dealers, on the other hand, will usually have a larger amount, which they will break down into smaller amounts to sell individually.

Strong testified in his defense. He said he did not live at the residence law enforcement searched, and he went there only to use the shower because of problems with the water main at his house. He brought his mail and a bag containing some clothes and hygiene products with him. But he denied knowing about the sunglasses case containing methamphetamine found in the bedroom.

The jury found Strong guilty of possession with intent to distribute within 1,000 feet of a school and possession of drug paraphernalia. The district court sentenced Strong to a controlling sentence of 186 months' imprisonment. Strong appealed, and the Court of Appeals panel affirmed his convictions and sentence. *State v. Strong*, 61 Kan. App. 2d 31, 499 P.3d 481 (2021).

We granted Strong's petition for review and ordered the parties to provide supplemental briefing on whether Strong has standing to challenge the constitutionality of K.S.A. 2022 Supp. 21-5705(e)(2). And we heard oral argument from the parties on December 12, 2022.

ANALYSIS

I. *The District Court Committed Instructional Error, but this Error Does Not Warrant Reversal of Strong's Conviction for Possession with Intent to Distribute a Controlled Substance Within 1,000 Feet of a School*

Strong first raises a claim of instructional error. His claim focuses on Instruction No. 6, which told the jury it could, but did not have to, presume Strong intended to distribute methamphetamine, if he possessed at least 3.5 grams:

> "You may presume that a person had the intent to distribute methamphetamine when the person possessed 3.5 grams or more. You may consider this presumption along with all other evidence in the case. You may accept or reject it in determining whether the State has met the burden to prove the required criminal intent of the Defendant. This burden never shifts to the Defendant."

Instruction No. 6 generally reflects the language of the pattern jury instruction PIK Crim. 4th 57.022. The pattern instruction cites K.S.A. 21-5705(e) as its legal authority, and it provides a fill-in-the-blank inference that the jury "may accept or reject":

> "If you find the defendant possessed (450 grams or more of marijuana) (3.5 grams or more of heroin) (3.5 grams or more of methamphetamine) (100 dosage units or more containing *insert name of controlled substance*) (100 grams or more of *insert name of any other controlled substance*), you may infer that the defendant possessed with intent to distribute. You may consider the inference along with all the other evidence in the case. You may accept or reject it in determining whether the State has met the burden of proving the intent of the defendant. This burden never shifts to the defendant." PIK Crim. 4th 57.022.

The key difference between Instruction No. 6 and the pattern instruction is the use of the word "presume." Instruction No. 6 told the jury it "may presume" an intent to distribute and it "may consider this presumption along with all the other evidence in the case." In contrast, the pattern instruction states that the jury "may infer" an intent to distribute and it "may consider the inference along with all the other evidence." PIK Crim. 4th 57.022.

But Strong's argument is not based on the discrepancy between Instruction No. 6 and PIK Crim. 4th 57.022. Rather, Strong argues Instruction No. 6 was legally inappropriate because it did not accurately reflect K.S.A. 2022 Supp. 21-5705(e). He argues that the statute creates a *mandatory* presumption while Instruction No. 6 described the presumption in *permissive* terms.

A. *Relevant Legal Framework and Standard of Review*

Appellate courts follow a multi-step process when reviewing instructional error issues. First, the court decides whether the issue was properly preserved below. Second, the court considers whether the instruction was legally and factually appropriate. Third, upon a finding of error, the court determines whether that error is reversible. *State v. Douglas*, 313 Kan. 704, 709, 490 P.3d 34 (2021). Whether the instructional error was preserved will affect the reversibility inquiry in the third step of this analysis. *State v. McLinn*, 307 Kan. 307, 317, 409 P.3d 1 (2018).

Strong did not object to the instruction he now challenges, so any error will be reviewed for clear error. *Douglas*, 313 Kan. at 710. And Strong does not challenge the factual appropriateness of the instruction. Instead, he argues only that the instruction was legally inappropriate. Our appellate review is unlimited when deciding whether the jury instruction fairly and accurately reflects the applicable law. *State v. Plummer*, 295 Kan. 156, 161, 283 P.3d 202 (2012). Even if the instruction is legally inappropriate, that error will require reversal under the clear-error standard only if Strong firmly convinces us the jury would have reached a different verdict if the error had not occurred. *Douglas*, 313 Kan. at 710.

B. *The Court of Appeals Panel Erred in Holding Instruction No. 6 Was Legally Appropriate*

In addressing Strong's instructional challenge, the Court of Appeals panel held that Instruction No. 6 was legally appropriate. *Strong*, 61 Kan. App. 2d at 40-41. The panel interpreted K.S.A. 2022 Supp. 21-5705(e) as providing for a permissive inference or presumption, rather than a mandatory one. Thus, the panel held that Instruction No. 6 accurately describes the statutory presumption of intent. 61 Kan. App. 2d at 38, 41. The

panel also reasoned that Instruction No. 6 is based on PIK Crim. 4th 57.022, and this court has strongly recommended the use of pattern instructions. 61 Kan. App. 2d at 40-41 (citing *State v. Butler*, 307 Kan. 831, 847, 416 P.3d 116 [2018] [Kansas Supreme Court strongly recommends use of PIK instructions]).

Strong argues the Court of Appeals panel erred in concluding that Instruction No. 6 is legally appropriate, and we agree. As noted, the panel held that Instruction No. 6 accurately reflects the law because K.S.A. 2022 Supp. 21-5705(e) "creates a permissive presumption, not a mandatory one as Strong argues." *Strong*, 61 Kan. App. 2d at 41. But after the panel issued its decision in Strong's case, we subsequently held that K.S.A. 2022 Supp. 21-5705(e) calls for a mandatory, albeit rebuttable, presumption. *Holder*, 314 Kan. at 805; *State v. Valdez*, 316 Kan. 1, 8-9, 512 P.3d 1125 (2022). And we held that the permissive instructions given in those cases, though based on PIK Crim. 4th 57.022, were not legally appropriate because they did not fairly and accurately reflect the mandatory presumption set forth in K.S.A. 2022 Supp. 21-5705(e). *Holder*, 314 Kan. 799, Syl. ¶ 4; *Valdez*, 316 Kan. at 8-9.

A plain language interpretation of K.S.A. 2022 Supp. 21-5705(e) supports our holding in *Holder* and *Valdez*. The guiding principle in statutory interpretation is that legislative intent governs if that intent can be ascertained. *Bruce v. Kelly*, 316 Kan. 218, 224, 514 P.3d 1007 (2022). In ascertaining legislative intent, courts begin with the statute's plain language, giving common words their ordinary meaning. If, however, the statute's language is ambiguous, courts may consult canons of construction to resolve the ambiguity. 316 Kan. at 224. "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997); see also *O'Donoghue v. Farm Bureau Mut. Ins. Co.*, 275 Kan. 430, 433, 66 P.3d 822 (2003) (in construing statutes, courts should construe words and phrases according to context and approved use of

language). Furthermore, even when a statute is plain and unambiguous, the doctrine of *in pari materia* applies, meaning courts should consider not only the words themselves but also their context to bring various provisions of an act into workable harmony, if possible. *Bruce*, 316 Kan. at 224.

We begin our plain language interpretation with the statute's use of the term "rebuttable presumption." As we explained in *Holder*, evidentiary devices such as presumptions and inferences exist along a continuum. 314 Kan. at 804. On one end, there is the permissive inference, which allows, but does not require, the jury to infer the elemental fact once the State has proved the predicate fact, and which places no burden of any kind on the defendant. *Francis v. Franklin*, 471 U.S. 307, 314, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985); *Holder*, 314 Kan. at 804 (citing *Ulster County Court v. Allen*, 442 U.S. 140, 156-57, 99 S. Ct. 2213, 60 L. Ed. 2d 777 [1979]). On the other end, there is the mandatory presumption, which "'instructs the jury that it must infer the presumed fact if the State proves certain predicate facts.'" *Holder*, 314 Kan. at 804 (quoting *Francis*, 471 U.S. at 314).

Mandatory presumptions can be further divided into two camps—conclusive and rebuttable—with different legal effects. *Holder*, 314 Kan. at 804-05.

> "'A conclusive presumption removes the presumed element from the case once the State has proved the predicate facts giving rise to the presumption. A rebuttable presumption does not remove the presumed element from the case but nevertheless requires the jury to find the presumed element *unless the defendant persuades the jury that such a finding is unwarranted*.'" 314 Kan. at 804-05 (quoting *Francis*, 471 U.S. at 314 n.2).

In *State v. Harkness*, 252 Kan. 510, Syl. ¶ 12, 847 P.2d 1191 (1993), we limited the use of the term "mandatory presumption" to what the *Francis* Court dubbed a "conclusive presumption." See *Holder*, 314 Kan. at 805. But we still defined a rebuttable

presumption as an evidentiary device that *requires* the jury to find the presumed element (in this case, the intent to distribute) once the State proves the predicate fact (in this case, possession of at least 3.5 grams of methamphetamine) unless the defendant rebuts the presumption with affirmative evidence to the contrary. *Harkness*, 252 Kan. 510, Syl. ¶ 13. Thus, despite the shift in terminology, rebuttable presumptions are still, by definition, mandatory. And we presume the Legislature was aware of this definition when it first enacted K.S.A. 21-5705(e) in 2012. See *Ed DeWitte Ins. Agency v. Financial Assocs. Midwest*, 308 Kan. 1065, 1071, 427 P.3d 25 (2018) (courts presume Legislature acts with full knowledge about statutory subject matter, prior and existing law, and judicial decisions interpreting prior and existing law and legislation); L. 2012, ch. 150, § 9.

K.S.A. 2022 Supp. 21-5705(e) also provides that "there shall be" a rebuttable presumption of intent to distribute. Viewed in isolation, the term "shall" can be ambiguous because it is susceptible to multiple meanings, including "must," "should," or even "may," depending on the context. See *State v. Raschke*, 289 Kan. 911, 920-22, 219 P.3d 481 (2009) (recognizing "shall" can be either mandatory or directory depending on context); see also Black's Law Dictionary 1653 (11th ed. 2019) ("shall" may mean "[h]as a duty to; more broadly, is required to," "[s]hould," "[m]ay," [w]ill," or "[i]s entitled to"). But reading the statutory language together, as a whole, there is nothing to suggest the Legislature intended the statutory presumption to be permissive. Instead, reading "there shall be" in conjunction with "rebuttable presumption" (which, again, refers to a type of mandatory presumption) indicates the statutory presumption is mandatory. See 289 Kan. at 921 (in interpreting the word "shall," "'[e]ach case must stand largely on its own facts, to be determined on an interpretation of the particular language used'"); see also *Bruce*, 316 Kan. at 224 (quoting *Othi v. Holder*, 734 F.3d 259, 265 [4th Cir. 2013] ["'"To determine a statute's plain meaning, we not only look to the language itself, but also the specific context in which that language is used, and the broader context of the statute as a whole."'"]).

Thus, K.S.A. 2022 Supp. 21-5705(e)'s plain language provides for a mandatory, albeit rebuttable, presumption. Such a presumption requires or compels the jury to draw a certain conclusion (an intent to distribute) based on a proven fact or set of facts (possession of at least 3.5 grams of methamphetamine), unless the defendant provides evidence contrary to that conclusion. See *Holder*, 314 Kan. at 805; see also *State v. Slusser*, 317 Kan. at ___, slip op. at 18 ("A presumption . . . is a rule of law that requires the fact-finder to draw a certain conclusion from a proven fact or set of facts in the absence of contrary evidence."). K.S.A. 2022 Supp. 21-5705(e)'s presumption is not only mandatory but also implies a shifting of the burden of proof from the State to the defendant. See *Holder*, 314 Kan. at 805 (K.S.A. 2022 Supp. 21-5705[e]'s statutory presumption implies "some burden shifting, although the operative impact in a given case would depend on the jury instructions as a whole.").

Instruction No. 6 deviates from K.S.A. 2022 Supp. 21-5705(e) because the instruction does not accurately describe the operation and legal effect of the mandatory rebuttable presumption in the statute. Rather than telling the jury "there shall be" a presumption of intent to distribute if the defendant possessed at least 3.5 grams of methamphetamine, Instruction No. 6 told the jury it "may" presume an intent to distribute based on that evidence. The instruction also told the jury it "may accept or reject" the presumption in deciding whether the State had met its burden. Finally, it told the jury that the burden of proof never shifts to the defendant. This last phrase in particular is inconsistent with a mandatory rebuttable presumption, which shifts the burden of proof to defendant once the State establishes the predicate fact—that defendant possessed at least 3.5 grams of methamphetamine. In short, Instruction No. 6 is legally improper because it describes a permissive presumption or inference, rather than the mandatory rebuttable presumption in the plain language of the statute.

Of course, when deciding whether a defendant intended to distribute a controlled substance, jurors may still draw reasonable inferences from the trial evidence. More specifically, the jury may reasonably infer an intent to distribute based on a defendant's possession of a large quantity of narcotics. See, e.g., *Holder*, 314 Kan. at 806 ("[A] defendant's possession of a large quantity of narcotics certainly may support an inference that the defendant intended to distribute the narcotic."). And if such an inference is reasonably grounded in evidence, the prosecutor may also encourage the jury to make this inference. Nothing in this opinion, or in *Holder*, *Valdez*, *Martinez*, or *Slusser*, should be taken to suggest otherwise.

When viewed in isolation, one might argue that Instruction No. 6 is legally appropriate because it simply recites this basic evidentiary principle—that jurors may draw reasonable inferences from the evidence. But jury instructions "must always fairly and accurately state the *applicable law*." (Emphasis added.) *Plummer*, 295 Kan. at 161. And while jurors remain free to make reasonable inferences from the evidence, Instruction No. 6 fails to incorporate the mandatory presumption in K.S.A. 2022 Supp. 21-5705(e)(2). Thus, the instruction is incomplete and legally inappropriate because it does not "fairly and accurately state the *applicable law*." (Emphasis added.) 295 Kan. at 161.

The State believes Instruction No. 6 accurately reflects the statutory presumption in K.S.A. 2022 Supp. 21-5705(e) when read in conjunction with the evidentiary rules set forth in K.S.A. 60-415 and K.S.A. 60-416. The former statute provides: "If two presumptions arise which are conflicting with each other the judge shall apply the presumption which is founded on the weightier consideration of policy and logic. If there is no such preponderance both presumptions shall be disregarded." K.S.A. 60-415. The latter statute provides: "A presumption, which by a rule of law may be overcome only by

proof beyond a reasonable doubt . . . shall not be affected by K.S.A. 60-414 or 60-415 and the burden of proof to overcome it continues on the party against whom the presumption operates." K.S.A. 60-416.

According to the State, K.S.A. 2022 Supp. 21-5705(e)'s statutory presumption conflicts with the presumption of innocence. See K.S.A. 2022 Supp. 21-5108(b) ("A defendant is presumed to be innocent until proven guilty."); *State v. Ross*, 310 Kan. 216, 221, 445 P.3d 726 (2019) ("Every criminal defendant has a constitutional right to the presumption of innocence."). And the State correctly points out the presumption of innocence may be overcome only by proof beyond a reasonable doubt. See K.S.A. 2022 Supp. 21-5108(a) (State has burden to prove defendant's guilt beyond a reasonable doubt); *State v. Colbert*, 26 Kan. App. 2d 177, 180, 987 P.2d 1110 (1999) (State required to overcome presumption of innocence through proof beyond a reasonable doubt). Thus, the State reasons that Instruction No. 6 was drafted to acknowledge that the presumption of innocence is founded on weightier considerations of policy and logic under K.S.A. 60-415, and the burden to overcome that presumption cannot be lowered or shifted under K.S.A. 60-416.

But assuming, without deciding, that the statutory presumption in K.S.A. 2022 Supp. 21-5705(e) conflicts with the presumption of innocence, neither K.S.A. 60-415 nor K.S.A. 60-416 establish that a permissive instruction (like Instruction No. 6) is legally appropriate. K.S.A. 60-415 simply provides that a district court shall determine which of two conflicting presumptions should be applied in a particular case. And K.S.A. 60-416 simply provides that K.S.A. 60-415 is inapplicable to the presumption of innocence. Nothing in either statute makes it legally appropriate to draft a jury instruction that describes a statutory presumption in a way that deviates from the applicable statute.

In sum, the plain language of K.S.A. 2022 Supp. 21-5705(e)(2) provides for a mandatory (albeit rebuttable) presumption of intent to distribute when a defendant is

found to have possessed at least 3.5 grams of methamphetamine. Once the State proves defendant possessed at least 3.5 grams of methamphetamine, the statute requires the jury to presume defendant intended to distribute the controlled substance unless the defendant proves otherwise. See *Holder*, 314 Kan. at 805. But Instruction No. 6 described the statutory presumption in permissive, rather than mandatory, terms and informed the jury that the burden of proof never shifts to the defendant. The instruction does not accurately describe the operation and legal effect of a mandatory rebuttable presumption. Thus, Instruction No. 6 is not legally appropriate because it does not fairly and accurately state the applicable law in K.S.A. 2022 Supp. 21-5705(e). The panel erred in concluding otherwise, likely because it did not have the benefit of our subsequent decisions in *Holder* and *Valdez*.

C. *The Instructional Error Does Not Require Reversal*

Having concluded that the instruction was not legally appropriate, we next consider whether this error warrants reversal of Strong's conviction for possession with intent to distribute a controlled substance within 1,000 feet of a school. For reasons discussed below, we hold it does not.

Because Strong did not object to the instruction, the clear-error standard governs our reversibility analysis. Under that standard, we must reverse Strong's conviction if we are firmly convinced the jury would have reached a different verdict if the instructional error had not occurred. *State v. Timley*, 311 Kan. 944, 955, 469 P.3d 54 (2020). Strong has the burden to establish clear error. 311 Kan. at 955.

Upon review of the entire record, Strong has not firmly convinced us that the verdict would have changed but for the instructional error. If the district court had given a legally appropriate instruction that mirrored K.S.A. 2022 Supp. 21-5705(e)(2)'s mandatory presumption, such an instruction would have *required* the jury to find that

Strong intended to distribute the methamphetamine found in the bedroom. Such an instruction would have been more prejudicial to Strong than the permissive instruction given to the jury.

If, on the other hand, the district court offered no instruction on the intent to distribute, the State still presented compelling evidence to support the jury's finding that Strong intended to distribute the methamphetamine in his possession. The evidence showed Strong possessed a total of 11.64 grams of methamphetamine. Detective Parr testified that methamphetamine users typically carry small quantities, usually around 1 gram. In contrast, methamphetamine dealers usually have a larger quantity.

The methamphetamine was also divided into two plastic baggies: one containing a larger amount and one containing about 1 gram. Detective Parr testified that based on his training and experience the smaller bag had originally come from the larger bag, which is how dealers usually break down their supply for individual sales. Detective Parr also found it significant that there was a digital scale and multiple new, clean plastic baggies near the controlled substances found in the bedroom. He testified that digital scales are commonly used in drug trafficking. And, according to Detective Parr, if a personal user of methamphetamine has empty baggies on them, then those baggies will usually be coated in residue from the methamphetamine.

Also, Strong's defense did not focus on the intent-to-distribute element of the crime. Thus, he did not show or argue that the methamphetamine was intended for personal use. Instead, his defense focused on whether he possessed the methamphetamine—another element of the offense. And Strong testified the methamphetamine was not his at all. Thus, the State's evidence establishing Strong's intent to distribute was essentially uncontroverted.

In *Valdez*, we found an instructional error was harmless for similar reasons. There, the district court gave an instruction patterned after PIK Crim. 4th 57.022, and we held the instruction was not legally appropriate because it did not fairly and accurately reflect the statutory presumption in K.S.A. 2022 Supp. 21-5705(e)(2). *Valdez*, 316 Kan. at 8-9. But we held that the district court did not commit clear error by giving the instruction. For one, the district court's permissive instruction was more favorable than an instruction patterned after the statutory presumption. 316 Kan. at 9-10. And the State had presented ample evidence that the defendant intended to distribute, including evidence showing that Valdez had possessed over 15 grams of methamphetamine, along with a digital scale with white residue, empty plastic baggies, and a text message discussing a potential narcotics transaction. 316 Kan. at 3, 10.

Strong tries to distinguish his case from *Valdez.* He points out that Riley County police recovered less than the 15 grams of methamphetamine recovered in *Valdez*. And the State did not introduce any text messages from Strong implicating him in a drug transaction. Finally, Strong notes that unlike *Valdez*, there is no evidence the digital scale recovered from the bedroom had any white residue on it.

At best, Strong's argument indicates that the State's evidence supporting defendant's intent to distribute in *Valdez* was not identical in all respects to the evidence presented at Strong's trial. But in both matters, the State presented ample evidence of defendant's intent to distribute, including evidence other than the weight of the methamphetamine in defendants' possession. And again, Strong did not attempt to controvert this evidence as part of his defense. Thus, we conclude that Strong has not met his burden to show the district court committed clear error by giving Instruction No. 6.

II. *Strong Does Not Have Standing to Challenge the Constitutionality of K.S.A. 2022 Supp. 21-5705(e)*

Strong next argues K.S.A. 2022 Supp. 21-5705(e) is facially unconstitutional because it violates a defendant's federal due process right to have the State prove every element of a crime beyond a reasonable doubt. Strong claims the statute imposes a mandatory rebuttable presumption which impermissibly shifts the burden of persuasion on the element of intent to the defendant. See *Francis*, 471 U.S. at 314 (mandatory presumption is unconstitutional if it relieves the State of its burden of persuasion on an element of an offense).

The Court of Appeals panel rejected Strong's argument and concluded that the statute was constitutional. The panel held that K.S.A. 2022 Supp. 21-5705(e)'s statutory presumption "creates a permissive inference telling the jury it may infer intent to distribute if the State proves the defendant possessed the requisite weight of the drug." *Strong*, 61 Kan. App. 2d at 38. It further held that the provision did not violate due process because the inference was justified by reason and common sense. 61 Kan. App. 2d at 38; see also *Francis*, 471 U.S. at 314-15 ("A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury.").

On review, Strong argues the Court of Appeals panel erroneously held that K.S.A. 2022 Supp. 21-5705(e) was constitutional. And he specifically challenges the panel's conclusion that the statute creates a permissive presumption or inference rather than a mandatory rebuttable presumption. But before we can consider the merits of Strong's constitutional challenge to K.S.A. 2022 Supp. 21-5705(e), we must first address the threshold question of whether Strong has standing to challenge the statute.

A. *Standard of Review and Relevant Legal Framework*

While courts generally have authority to determine whether a statute is unconstitutional, this power of judicial review is not unlimited. The separation of powers doctrine embodied in the Kansas constitutional framework requires the court exercise judicial review only when the constitutional challenge is presented in an actual case or controversy between the parties. *Gannon v. State*, 298 Kan. 1107, 1119, 319 P.3d 1196 (2014). Under this case-or-controversy requirement, parties must show (among other factors) that they have standing. Standing is the "right to make a legal claim." 298 Kan. at 1121. To have such a right, a party generally must show an "injury in fact"; absent that injury, courts lack authority to entertain the party's claim. See 298 Kan. 1122-23 (Standing "is a component of subject matter jurisdiction."); see also *In re A.A.-F.*, 310 Kan. 125, 135, 444 P.3d 938 (2019) ("Kansas courts have authority—in other words, the judicial power—to hear only those matters over which they have jurisdiction."). In this respect, standing is both a requirement for a case or controversy, i.e., justiciability, and a component of this court's subject matter jurisdiction. *Gannon*, 298 Kan. at 1122-23.

To establish an injury in fact sufficient to raise a constitutional challenge to a statute, a party must show that the statute affected the party's rights. *State v. Coman*, 294 Kan. 84, Syl. ¶ 3, 273 P.3d 701 (2012); see *Ulster*, 442 U.S. at 154-55 ("A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights."). "As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations." 442 U.S. at 155; see *Coman*, 294 Kan. at 90.

In cases such as Strong's, in which the party is challenging the constitutionality of an evidentiary device such as an inference or presumption, the jury instructions will

generally determine what type of device was applied in a case, although courts may need to look to the relevant statute and related caselaw in interpreting those instructions. *Ulster*, 442 U.S. at 157 n.16.

Whether a party has standing is a question of law over which this court has unlimited review. *State v. Bodine*, 313 Kan. 378, 385, 486 P.3d 551 (2021).

B. *Strong Lacks Standing to Challenge the Constitutionality of K.S.A. 2022 Supp. 21-5705(e)'s Mandatory Rebuttable Presumption*

While not explicitly using the word "standing," the Court of Appeals panel effectively determined that Strong had standing to challenge the constitutionality of the statute because "[t]he jury instruction's discussion of the presumption of intent to distribute placed the statutory provision's presumption in front of the jury." *Strong*, 61 Kan. App. 2d at 37. But the panel's holding is founded on its conclusion that the statute calls for a permissive presumption or inference. See 61 Kan. App. 2d at 38. If that were true, the jury instruction in Strong's case would have likely put the statutory presumption before the jury. But as discussed in Issue I, K.S.A. 2022 Supp. 21-5705(e) provides for a mandatory (albeit rebuttable) presumption, not a permissive presumption or inference. See *Holder*, 314 Kan. at 805; *Valdez*, 316 Kan. at 8.

In *Martinez*, 317 Kan. at ___, slip op. at 14, we held that defendant lacked standing to bring a facial challenge to K.S.A. 2022 Supp. 21-5705(e) because the district court's instruction based on PIK Crim. 4th 57.022 described a permissive inference. In other words, the mandatory rebuttable presumption in K.S.A. 2022 Supp. 21-5705(e) was never applied to Martinez. Thus, it could not have adversely impacted his rights, depriving Martinez of standing to raise his constitutional challenge. But the instruction in Strong's case is not identical to the instruction in *Martinez*. Here, instead of telling the

jury it "may infer" an intent to distribute and it may consider "this inference" along with all other evidence, Instruction No. 6 told the jury it "may presume" Strong's intent to distribute and it may consider "this presumption" along with all other evidence.

But this difference in verbiage does not lead to a different outcome in Strong's case. Strong claims K.S.A. 2022 Supp. 21-5705(e) is constitutionally defective because it provides for a mandatory presumption. He argues all mandatory presumptions (rebuttable or otherwise) are unconstitutional because they relieve the State of its burden to prove each element of a crime beyond a reasonable doubt. But here, Instruction No. 6 did not describe a mandatory presumption. While it used the words "presume" and "presumption," it couched those words in permissive terms and clarified that the burden of proof never shifted to Strong. Because the constitutional defect Strong complains of was not applied to him through the jury instruction, he lacks standing to challenge the statute on those grounds. See *Coman*, 294 Kan. 84, Syl. ¶ 3 ("To challenge the constitutionality of a statute, the appellant must have been directly affected by the alleged defect.").

Strong also argues he has standing to challenge K.S.A. 2022 Supp. 21-5705(e)'s constitutionality not because the jury instruction put the statute's mandatory presumption before the jury, but rather because the prosecutor's closing argument did. During that argument, the prosecutor told the jury that Instruction No. 6 "says if [a person] has 3.5 grams or more [of methamphetamine], you can presume that they had the intent to distribute." The prosecutor also argued that Strong "had over three times the amount that you're allowed to make a presumption on." And later he discussed the presumption of intent along with the presumption of innocence, explaining:

> "Presumption or presumed is mentioned twice in the instructions. One instruction says you must presume the defendant to be not guilty. The other one is the instruction relating to the presumption that you can make with the amount of the methamphetamine when it tells you that you may presume that the person held it with intent to distribute."

Based on these comments, Strong claims the prosecutor's argument described Instruction No. 6 to the jury in a manner consistent with the mandatory rebuttable presumption in K.S.A. 2022 Supp. 21-5705(e)(2).

We are not persuaded by Strong's argument. Strong's constitutional challenge rests on K.S.A. 2022 Supp. 21-5705(e)'s provision for a *mandatory*, albeit rebuttable, presumption. But the prosecutor consistently used permissive language to describe the presumption of intent. He told the jury it "can" presume or it was "allowed" to presume Strong's intent to distribute if the evidence showed he possessed at least 3.5 grams of methamphetamine. This permissive language contrasts with the compulsory language the prosecutor used to describe the presumption of innocence. In discussing this presumption, he told the jury it "must" presume Strong is not guilty.

Granted, on one occasion, the prosecutor stated that Strong possessed "over three times the amount [of methamphetamine] that a person *is presumed* to have [intended to] distribute[]." (Emphasis added.) This language could suggest the presumption is mandatory. See *Francis*, 471 U.S. at 316 (jury instruction using words "is presumed" was "cast in the language of command"). But placing that comment in context, the prosecutor did not give the overall impression that the presumption described in Instruction No. 6 was mandatory. Rather, he repeatedly used permissive terminology to describe the evidentiary device, consistent with the express language in Instruction No. 6. See *Bland v. Sirmons*, 459 F.3d 999, 1015 (10th Cir. 2006) (presuming jury followed its written instructions even when the prosecutor misstated those instructions in closing argument).

It is also worth mentioning that Strong's arguments regarding the prosecutor's closing are readily distinguishable from the prosecutorial error claim raised in *Slusser*. There, the district court gave an instruction more closely patterned after PIK Crim. 4th 57.022 , and this instruction permitted the jury to "infer" an intent to distribute if defendant possessed at least 3.5 grams of methamphetamine. But in closing argument, the prosecutor repeatedly described the evidentiary device as a "presumption" rather than a reasonable "inference," and we held that this argument constituted prosecutorial error when measured against the plain language of the jury instruction. Here, the instruction does not use the terms "inference/infer." And Strong does not take issue with the prosecutor's use of "presumption/presume" to describe the evidentiary device in the jury instruction. Thus, Strong's framing of the issue distinguishes this case from *Slusser*.

Because Strong has failed to show K.S.A. 2022 Supp. 21-5705(e)'s mandatory presumption was applied to him, he lacks standing to challenge the constitutionality of that statutory presumption. And because he lacks standing, we lack jurisdiction to hear his constitutional challenge.

III. *The Use of Strong's Prior Convictions to Enhance His Sentence Does Not Violate the State or Federal Constitutions*

Finally, Strong challenges the constitutionality of his sentence. The district court sentenced Strong pursuant to the Kansas Sentencing Guidelines Act, a graduated sentencing scheme which provides increasingly severe presumptive sentences for most convicted felons based on the severity level of the crime of conviction and the defendant's criminal history. A crime's severity level is determined by statute, and a defendant's criminal history score is calculated by considering and scoring the defendant's eligible prior convictions. See K.S.A. 2022 Supp. 21-6810.

Strong's constitutional challenges to his sentence arise from K.S.A. 2022 Supp. 21-6814(a). That statute authorizes the sentencing judge, rather than a jury, to determine the offender's criminal history by a preponderance of the evidence at the sentencing hearing. Strong argues the statute violates his jury-trial rights under section 5 of the Kansas Constitution Bill of Rights. According to Strong, at the time our state Constitution was adopted, American common law required the State to prove the existence of prior convictions to a jury beyond a reasonable doubt, and thus this requirement became enshrined in section 5.

We rejected an identical argument in *State v. Albano*, 313 Kan. 638, 487 P.3d 750 (2021). There, we held section 5 does not guarantee defendants the right to have a jury determine the existence of sentence-enhancing prior convictions because no authority substantiates the claim that defendants had such a jury trial right at common law when the Kansas Constitution was adopted. 313 Kan. 638, Syl. ¶ 4. And the Court of Appeals panel correctly held that Strong's section 5 challenge failed under *Albano*. *Strong*, 61 Kan. App. 2d at 41-42.

On review, Strong invites us to reconsider *Albano* but provides no new arguments as to why the decision reached an incorrect result or why more good than harm will come by departing from this precedent. See *McCullough v. Wilson*, 308 Kan. 1025, Syl. ¶ 5, 426 P.3d 494 (2018) ("An appellate court may decline to apply the doctrine of stare decisis if it is clearly convinced that the rule of law in issue was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent."). We thus decline Strong's invitation.

Strong also argues that K.S.A. 2022 Supp. 21-6814(a) violates his rights under the Sixth and Fourteenth Amendments to the United States Constitution, as recognized in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). *Apprendi* held that "any fact that increases the penalty for a crime beyond the prescribed

statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. But *Apprendi* recognized that prior convictions were an exception to this general rule. 530 U.S. at 490. Based on this exception, we have held that *Apprendi* does not apply where the sentence imposed was based in part on a defendant's criminal history score under the Kansas Sentencing Guidelines Act. *State v. Ivory*, 273 Kan. 44, Syl., 41 P.3d 781 (2002). Applying *Ivory*, the Court of Appeals panel rejected Strong's federal constitutional challenge to his sentence. On review, Strong concedes his argument is foreclosed by *Ivory*, and he raises the issue only to preserve it for federal review.

CONCLUSION

We hold that Instruction No. 6 was legally inappropriate because it did not fairly and accurately reflect the mandatory rebuttable presumption set forth in K.S.A. 2022 Supp. 21-5705(e), and the Court of Appeals panel erred by holding otherwise. Nevertheless, Strong failed to meet his burden to show this error requires reversal under the clear-error standard.

We also hold that Strong lacks standing to challenge the constitutionality of K.S.A. 2022 Supp. 21-5705(e), depriving the appellate courts of jurisdiction over the challenge. We thus vacate the panel's holding that the statute is constitutional and do not reach the merits of Strong's challenge.

While we disagree with the panel's rationale on these two issues, we nevertheless affirm the Court of Appeals' judgment affirming Strong's convictions. See *State v. Brown*, 314 Kan. 292, 306-08, 498 P.3d 167 (2021) (affirming Court of Appeals' judgment as right for the wrong reason).

Finally, Strong's constitutional challenges to his sentence are foreclosed by *Albano* and *Ivory*. We thus affirm the Court of Appeals' decision upholding Strong's sentence.

Judgment of the Court of Appeals is affirmed. Judgment of the district court is affirmed.

* * *

STEGALL, J., concurring: Here is what is going on. In 1985, the United States Supreme Court held that a "mandatory rebuttable presumption is . . . unconstitutional" because it "relieves the State of the affirmative burden of persuasion on the presumed element by instructing the jury that it must find the presumed element unless the defendant persuades the jury not to make such a finding"—thereby amounting to "unconstitutional burden-shifting." *Francis v. Franklin*, 471 U.S. 307, 317-18, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985).

Then, in 2012 the Kansas Legislature passed an amendment to K.S.A. 21-5705 which contains the mandatory rebuttable presumptions at issue in this and related cases. The following year, the Pattern Instructions in Kansas committee had to draft an instruction to implement K.S.A. 21-5705. Confronted with an obvious constitutional dilemma, the committee substantively altered K.S.A. 21-5705 from a mandatory rebuttable presumption to a permissive inference. The committee presumably understood that mandatory rebuttable presumptions are suspect while permissive inferences are routine and are constitutionally permitted. See, e.g., *State v. Kriss*, 232 Kan. 301, 304-05, 654 P.2d 942 (1982) ("'Because [a] permissive [inference] leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the "beyond a reasonable doubt" standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference. For only in that situation is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination.'").

Following the PIK committee's work, it appears that—at least judging by the cases that have reached Kansas appellate courts—everyone involved at the trial court level (including prosecutors, defendants, and district court judges) has recognized the potential constitutional deficiencies in K.S.A. 21-5705 and has been satisfied to give juries the permissive inference instruction drafted by the PIK committee and contained in PIK Crim. 4th 57.022 (2013 Supp.).

But then our court began to weigh in. First in *State v. Holder*, 314 Kan. 799, 502 P.3d 1039 (2022), and *State v. Valdez*, 316 Kan. 1, 4, 512 P.3d 1125 (2022), and continuing today in *Strong*, *Slusser*, *Martinez*, and *Bentley*. *State v. Strong*, 317 Kan. ___ (No. 121,865, this day decided); *State v. Slusser*, 317 Kan. ___ (No. 121,460, this day decided); *State v. Martinez*, 317 Kan. ___ (No. 121,204, this day decided); *State v. Bentley*, 317 Kan. ___ (No. 123,185, this day decided). In the process, we have confused our broader jury instruction rules while steadfastly declining to reach the constitutional question at the heart of the matter. Here I will continue to explain my dissenting view—though framed as a concurrence in the result—begun in *Valdez*. 316 Kan. at 28 (Stegall, J., concurring).

Given the fact that, as noted above, the juries in these cases were all given the permissive inference instruction rather than an instruction containing the actual mandatory rebuttable presumption rule stated in K.S.A. 21-5705, we have been unable to reach the merits of the constitutionality of the statute. Instead, we have been mired in a debate over whether PIK Crim. 4th 57.022 is "legally appropriate." The result has created bizarre anomalies that cannot withstand a commonsense examination.

After discussing the question of legal appropriateness in *Holder* (but not reaching the question because we relied instead on factual appropriateness), a majority of the court in *Valdez* held that PIK Crim. 4th 57.022 is not legally appropriate because it "does not

fairly and accurately reflect the statutory rebuttable presumption" contained in K.S.A. 21-5705. 316 Kan. at 9. In response, I observed that the majority conclusion "throws into doubt a bedrock principle of how juries may consider evidence." 316 Kan. at 30 (Stegall, J., concurring). After all, how can a correct statement of the law be "legally inappropriate"? For example, are jurors no longer "permitted to draw reasonable inferences about intent from the amount of illegal drugs possessed by a defendant?" 316 Kan. at 30 (Stegall, J., concurring). What about prosecutors? Would it be error for a prosecutor to tell "a jury it may infer a defendant intended to sell drugs due to the large quantity in evidence"? 316 Kan. at 30 (Stegall, J., concurring).

Instead of comparing PIK Crim. 4th 57.022 to K.S.A. 21-5705 and asking only the myopic question of whether they match (obviously they do not), I proposed instead that "we ought to ask if the permissive inference instruction—standing alone—is a correct statement of the law." 316 Kan. at 31 (Stegall, J., concurring). And I answered, "[c]learly, it is . . . because permissive inferences are always lawful so long as the facts make such inferences reasonable." 316 Kan. at 31 (Stegall, J., concurring).

In today's cases, in response to these concerns, the majority makes it clear that permissive inferences are still lawful. The majority observes that "the jury may reasonably infer an intent to distribute based on a defendant's possession of a large quantity of narcotics" and that "if such an inference is reasonably grounded in evidence, the prosecutor may also encourage the jury to make this inference." *Strong*, 317 Kan. at ___, slip op. at 12.

Nevertheless, the majority insists that PIK Crim. 4th 57.022, while being a correct statement of the law, is still legally inappropriate because it "fails to incorporate the mandatory presumption" from K.S.A. 21-5705 and therefore it does not "fairly and accurately state the *applicable law*." *Strong*, 317 Kan. at ___, slip op. at 12. It is a consolation, I suppose, that the majority expressly preserves a longstanding evidentiary

rule by conceding that PIK Crim. 4th 57.022 is legally correct. Unfortunately, this conclusion only deepens the confusion with respect to rules pertaining to jury instructions.

This is my takeaway—the rule created by the majority is that a legally correct jury instruction is not legally appropriate if it does not incorporate a statute that is almost certainly unconstitutional and is recognized as such by the PIK committee, by the parties to the underlying criminal litigation, and by the district court judges charged with giving the instructions. Such a rule cannot survive basic questioning.

For example, what if our Legislature passed a statute that simply said, "In Kansas, there shall no longer be a presumption of innocence in criminal proceedings." Such a statute would be plainly and obviously unconstitutional. See *State v. Ward*, 292 Kan. 541, 570, 256 P.3d 801 (2011) (The right to a fair trial and presumption of innocence are guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.).

Assume that because of this brazen unconstitutionality, the PIK committee decides not to draft a pattern instruction implementing the statute. Additionally, the prosecutors of the State know not to request an instruction based on the statute, and the district court judges understand such an instruction would almost guarantee a reversal. Are we really to think that this court, following the rule of law we pronounce today, would say that jury instructions are erroneous and do not "fairly and accurately state the applicable law" if they don't tell the jury that "in Kansas a criminal defendant is not presumed innocent until proven guilty"? This is the kind of outcome I imagine in the mind of Mr. Bumble (of Dickensian fame) when he declared, "If the law supposes that, . . . the law is a[n] ass." Dickens, Oliver Twist 451 (First Tor ed.: 1998 [1838]).

It seems to me the majority is hung up on the technical question of what is the "applicable law" in this instance. Being procedurally prevented from reaching an explicit holding that K.S.A. 21-5705 is formally declared unconstitutional has acted as the proverbial headlight to our frozen deer. We seem powerless—due to an overweening sense of procedural propriety—to take the commonsense step of simply acknowledging that of course the Constitution is also "applicable law." And that if the legal community charged with "getting it right" at the trial court level has uniformly decided not to give the jury a constitutionally questionable instruction (thereby also denying the possibility of appellate review), we shouldn't step in to declare an otherwise correct statement of the law is error simply because everyone below did the substantively correct thing.

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