IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 122,156

STATE OF KANSAS,
Appellee,

v.

MICHAEL WAYNE COUCH,
Appellant.

SYLLABUS BY THE COURT

1.

Under the Sixth Amendment to the United States Constitution, criminal defendants generally have the right to self-representation provided that they knowingly and intelligently forgo their right to counsel and that they are able and willing to abide by rules of procedure and courtroom protocol.

2.

To invoke the right to self-representation, a defendant must clearly and unequivocally express a desire to proceed pro se. If a defendant invokes the right after trial starts, the district court has discretion in deciding whether to grant the request. If invoked before trial, our court has described the right as "unqualified." But an unqualified right to self-representation does not mean the right is absolute. In fact, the unqualified right to self-representation rests on an implied presumption that the court will be able to achieve reasonable cooperation from the pro se defendant. The right to self-representation does not permit defendants to abuse the dignity of the courtroom or to disregard the relevant rules of procedural and substantive law. Thus, a district court may deny a pretrial request to proceed pro se based on defendant's serious and obstructionist misconduct.

3.

To justify denial of a timely pretrial request to proceed pro se, a criminal defendant must have exhibited seriously disruptive behavior during pretrial proceedings, and that behavior must strongly indicate the defendant will continue to be disruptive in the courtroom.

4.

When a district court denies a defendant's request to proceed pro se based on the defendant's seriously disruptive behavior, we review the district court's decision using a bifurcated standard of review. We review the district court's fact-findings about the defendant's behavior for substantial competent evidence, and we review the district court's legal conclusion de novo.

5.

When the jury instructions define the essential elements of the offense more narrowly than the charging document, due process considerations require the reviewing court to measure the sufficiency of the evidence against the narrower statutory elements of the jury instructions, rather than the broader statutory elements charged in the complaint.

6.

In determining whether a lesser-included offense instruction is factually appropriate, the question is not whether the evidence is more likely to support a conviction for the greater offense. Instead, the question is whether the court would uphold a conviction for the lesser offense in the face of a challenge to the sufficiency of the evidence.

Review of the judgment of the Court of Appeals in an unpublished opinion filed August 19, 2022. Appeal from Finney District Court; MICHAEL L. QUINT, judge. Oral argument held March 30, 2023. Opinion filed August 11, 2023. Judgment of the Court of Appeals affirming the district court on the issues subject to review is affirmed in part and reversed in part. Judgment of the district court is affirmed in part and reversed in part on the issues subject to review, and the case is remanded with directions.

Kai Tate Mann, of Kansas Appellate Defender Office, argued the cause and was on the brief for appellant.

Tamara S. Hicks, assistant county attorney, argued the cause, and *Susan Lynn Hillier Richmeier*, county attorney, and *Derek Schmidt*, attorney general, were with her on the brief for appellee.

The opinion of the court was delivered by

WALL, J.: Michael Wayne Couch broke into the home of H.D., threatened her with a knife, and then raped and sodomized her. The State charged Couch with several offenses, including aggravated battery, aggravated kidnapping, aggravated criminal sodomy, and rape. Dissatisfied with his appointed counsel, Couch filed a pretrial motion to represent himself, but the district court denied the motion based on his previous courtroom behaviors. Couch's case proceeded to trial, and the jury convicted Couch on all charges.

Couch appealed his convictions and sentence to a panel of the Court of Appeals, raising several claims of error. The panel affirmed Couch's convictions. It also affirmed Couch's sentence, except for an attorney-fee assessment not relevant to this opinion. Couch now argues the panel erred in holding that: (1) the district court properly denied his request to proceed pro se; (2) Couch's aggravated-kidnapping conviction is supported by sufficient evidence; (3) lesser-included-offense instructions for aggravated battery were not factually appropriate; and (4) cumulative error did not deprive him of a fair trial.

We agree with the judgment of the panel of the Court of Appeals, if not its rationale, on all but one of Couch's issues. As to Couch's pretrial motion to proceed pro se, we conclude that substantial competent evidence supports the district court's fact-findings about Couch's disruptive pretrial behavior. And that behavior provided a lawful basis for the district court to deny Couch's request to represent himself at trial.

But as to the sufficiency of the evidence supporting Couch's aggravated-kidnapping conviction, we conclude the State did not present sufficient evidence to sustain that conviction. While the State charged Couch with kidnapping to "facilitate flight or the commission of any crime," the jury instructions more narrowly defined the crime by including only the specific intent to facilitate "commission of any crime" and eliminating the specific intent to "facilitate flight." See K.S.A. 2018 Supp. 21-5408(a)(2). Due process considerations require us to measure the sufficiency of the evidence against the theory of criminal liability reflected in the jury instructions. And while the record evidence may have supported an aggravated kidnapping with intent to facilitate flight, there is insufficient evidence to sustain an aggravated kidnapping with intent to facilitate any crime. In short, the evidence failed to show the crimes of rape or sodomy were facilitated by a confinement independent of the force used to carry out the sex crimes, as required under *State v. Buggs*, 219 Kan. 203, 214, 547 P.2d 720 (1976).

As to Couch's instructional-error claim, we agree with Couch that the panel erred by holding that jury instructions on the lesser-included offenses of aggravated battery were not factually appropriate. But we affirm the panel's judgment because the instructional error does not warrant reversal of Couch's aggravated-battery conviction.

Finally, as to Couch's cumulative-error claim, even assuming the cumulative-error doctrine applies, the cumulative effect of the trial errors do not require reversal.

In sum, we reverse Couch's conviction for aggravated kidnapping and vacate his sentence for that conviction. We affirm Couch's remaining convictions and remand for resentencing under K.S.A. 2022 Supp. 21-6819(b)(5).

FACTS AND PROCEDURAL BACKGROUND

On the morning of December 18, 2018, H.D. traveled to Walmart. She returned home at about 10:50 a.m. She left the garage door open because she planned to be home for only a few minutes before leaving to meet a friend for lunch.

While wrapping a gift for her friend at the dining room table, H.D. heard the access door connecting the garage to the kitchen open. As she went to shut the door, a stranger came through the door, pushed H.D. against the kitchen sink, and held a knife to her throat. As H.D. struggled with her assailant, she grabbed his knife trying to protect herself and cut her hands. H.D. fell to the ground screaming for help, but the assailant threatened to hurt her if she did not stop yelling. About that time, H.D. and the assailant noticed the cuts on H.D.'s hands. The assailant repeatedly said, "oh shit," and let H.D. wash her hands and wrap them in a towel. The assailant then grabbed H.D.'s right arm and began to lead her out of the kitchen. H.D. reached for her phone, but the assailant pushed the phone back onto the counter and told H.D. she would not need it. The assailant then took H.D. to the master bedroom.

The assailant placed H.D. on the bed, unbuckled her belt, and pulled her pants and underwear off. The assailant demanded that H.D. kneel on the floor and ordered her to put his penis in her mouth, but he soon became frustrated when he could not maintain an erection. He ordered H.D. back onto the bed and penetrated her vagina with his fingers. The assailant threatened H.D. with a pocketknife, telling her he would hurt her if she "didn't finish the job." He then penetrated H.D.'s vagina with his penis. As he did so, he lifted his sweatshirt, and H.D. noticed he had three swastika tattoos on his right abdomen.

Still unable to maintain an erection, the assailant became increasingly frustrated. He retrieved H.D.'s toothbrush from her bathroom and forcibly anally sodomized her with it. He then demanded H.D. come to the nearby hallway bathroom with him. In the bathroom, he put some lotion on her hands. He then ordered H.D. to follow him back to the bedroom and forced her to manipulate his penis. He again told her he would hurt her if she "didn't finish the job," and demanded that she put his penis in her mouth.

Sometime during the attack, H.D. used her Apple Watch to contact her emergency contact, and her husband, parents, and sister began calling her. The assailant then tore off her Apple Watch and threw it on the ground.

After the attack, the assailant told H.D. his name was Michael and H.D.'s husband had paid him to rape her. He wrapped H.D. in a comforter, pulled the charging cords for H.D.'s phone and Apple Watch from the wall, and used the cords to bind her hands and feet. He also left his knife so she could cut herself free but told her not to use it until he had left. After the assailant left, H.D. wriggled her arms out of the restraints and cut her legs free. She retrieved her phone from the kitchen and informed her husband she had been attacked. She then grabbed a gun, hid in the bedroom closet, and called 911.

H.D. described her assailant as wearing a black stocking cap, a brown work jacket, and a gray sweatshirt with the words "Nova Scotia" on it. Law enforcement showed her several photo lineups, but she did not identify Couch, who was depicted in one of the photo arrays. She also told police that a bottle of lotion, a bottle of hand soap, and her toothbrush were missing from her home after the attack.

The sexual assault nurse who examined H.D. reported that H.D. had injuries to her genitalia and rectum consistent with her reported history. H.D. had cuts on three of her

left fingers and two of her right fingers, all of which required sutures. She also had four superficial lacerations on her neck, ligature abrasions on both her wrists, and bruising on her right upper arm.

Surveillance video collected by police showed that a white truck had followed H.D. home from Walmart on the day of the attack. Garden City police posted an image of the truck on social media and later received a tip that the truck was in an impound lot in Goodland, Kansas. Apparently, a few days after the attack, local police had encountered Couch in Goodland. They arrested Couch and impounded the white truck after learning it was stolen. At the time Couch was arrested, he was wearing a black stocking cap, a brown work jacket, and a gray sweatshirt with the words "Nova Scotia" on it. Booking photos also showed he had several swastika tattoos on his torso.

During a search of the white truck, officers found a duffel bag containing a bottle of the same type of lotion used during H.D.'s attack and a bottle of hand soap. The lotion bottle found in the truck contained a mixture of DNA from at least two individuals, with a major DNA profile consistent with H.D. and a partial minor DNA profile consistent with Couch. Police also found a suitcase in the white truck with a pair of blue jeans inside. DNA testing of several blood stains on the jeans revealed DNA profiles consistent with H.D. and Couch.

At trial, the State presented more DNA evidence tying Couch to the scene. A vaginal swab taken during H.D.'s sexual assault examination, a swab of a blood stain on the knife H.D. used to free herself, and a swab of the doorknob from the access door to the garage all contained a male DNA haplotype consistent with Couch. And a swab of a blood stain from the access door showed a major DNA profile consistent with Couch.

H.D. also identified Couch as her assailant at trial. She said she had trouble picking him out of the photo lineups because she could not see his body or hear his voice, and she only wanted to identify him if she was "110 percent certain."

Couch testified in his own defense. He said he drove to Liberal, Kansas, on the evening of December 17, 2018. There, he picked up a stranger, began drinking, and then passed out in his truck. He later woke up in Colby, Kansas, on the afternoon of December 18 but could not remember how he had gotten there. He saw the stranger he had picked up standing outside wearing Couch's brown work jacket. Couch demanded his jacket back, and then drove to Goodland without the stranger. He was then arrested in Goodland for reasons unrelated to the attack on H.D. Couch admitted telling an investigating officer: "Couldn't control myself and that's what happened. I cut the fucking dog shit out of her, blood everywhere."

A jury convicted Couch of three counts of aggravated criminal sodomy and one count each of rape, aggravated burglary, aggravated battery, and aggravated kidnapping. The district court sentenced Couch to 1,306 months' imprisonment and ordered Couch to pay $3,962.84 in restitution, and $31,612.50 in BIDS attorney fees.

Couch appealed, raising several issues related to his convictions and sentence. On appeal, the State conceded that the district court erred in imposing BIDS attorney fees, and the Court of Appeals vacated that order. *State v. Couch*, No. 122,156, 2022 WL 3570874, at *10 (Kan. App. 2022) (unpublished opinion). But the panel otherwise affirmed Couch's convictions, sentence, and restitution. 2022 WL 3570874, at *1.

Couch petitioned for review, and we granted review of all issues raised in his petition. We heard oral argument in March 2023. Jurisdiction is proper. See K.S.A. 60-2101(b) (providing for Kansas Supreme Court review of Court of Appeals decisions).

ANALYSIS

Couch raises four claims of error. First, he argues the district court violated his right to self-representation when it improperly denied his pretrial request to proceed pro se. Second, he argues there was insufficient evidence to support his conviction for aggravated kidnapping. Third, he argues the district court erred in failing to instruct the jury on the lesser-included offenses of aggravated battery. Finally, he argues cumulative error deprived him of a fair trial. We address these issues in turn.

I. *The District Court Did Not Commit Structural Error by Denying Couch's Motion to Represent Himself*

For his first issue, Couch argues the panel erred by affirming the district court's denial of his pretrial request to proceed pro se. Couch contends his right to proceed pro se was "unqualified" because he timely asserted it before trial. And he argues the panel erred in affirming the district court's decision based on Couch's lack of decorum at pretrial proceedings. Couch claims these rulings deprived him of his right to self-representation —a structural error requiring reversal of all his convictions. See *State v. Bunyard*, 307 Kan. 463, 471, 410 P.3d 902 (2018) (failure to honor the defendant's properly asserted right to self-representation is structural error).

To resolve Couch's challenge, we first identify additional facts relevant to his pretrial motion. Then, we review the controlling legal framework governing a defendant's constitutional right to self-representation. Finally, we apply that framework by analyzing whether substantial competent evidence supports the district court's fact-findings and whether those fact-findings support the court's legal conclusion. Ultimately, we affirm the panel's holding.

A. *Additional Facts Relevant to Couch's Pretrial Motion*

A month before trial, Couch moved to represent himself. At a hearing on the motion, the district court provided Couch with an opportunity to argue his position. Couch explained he was "tired of lawyers" and said his appointed attorneys had accused him of committing the crimes. He then explained what he believed were the weaknesses in the State's case against him. He said he "ha[d] a lot of motions to put in, Your Honor." At one point, he said, "[F]or the prosecution to say that that is my DNA on that vagina swab, excuse me, but fuck you. And you too." And later he told the court, "The fucking dude's [perpetrator's] fingerprints are on the Goddamn cell phone. If you want to gag me, that's fine. But gag me after I say this. His fingerprints are on the Goddamn cell phone, which I'm putting a motion in to have that tested."

Later in the hearing, when one of Couch's attorneys addressed the court, Couch told her, "Ma'am, if you continue I'll bite your fucking face off." The district court then inquired into Couch's education level. The court also asked if Couch had any legal training, to which he responded, "Illegal, that's it."

The district court then denied Couch's request to proceed pro se:

> "I'm going to make the finding that you are not competent even in your own case to represent yourself for purposes of trial. The concern I have is that you have on numerous occasions in my presence spoke out at a time when other people were talking or trying to represent their position to the court. You have effectively threatened your own attorney here in today's hearing . . . Court is not going to grant your request for pro se representation.
>
> . . . .

". . . And, to be honest, in every hearing that we've had, other than the waiver of the preliminary hearing, you have been disruptive of the proceedings and, frankly, you've been threatened with at least some form of contempt action on at least two occasions.

"I would anticipate that if you cannot control your own actions, there is a very real possibility you'll be watching your trial from a camera and that you won't be allowed to be personally present. That may pose problems for your appeal or for your proper representation, but we will not have disruptive behavior in the courtroom, which seems to go with your—your approach to this particular case at least. So the attorneys will continue to act as your primary legal representative."

The district court later filed a journal entry addressing several pretrial motions. In that journal entry, the court summarized its findings and conclusions on Couch's motion to proceed pro se, explaining:

"Despite the defendant's experience in criminal cases, the defendant has shown lack of restraint and understanding the full scope of defenses that are available to him at his upcoming trial. He has, on at least three occasions given verbal out bursts when he disapproves of something that's been said or presented in court. On one particular occasion, the defendant specifically threatened his defense attorney with language to both threaten and disturb his attorney. Court finds defendant lacks both legal understanding and restraint to approach criminal jury trial in a professional manner. Defense counsel will be given exclusively, the right to cross examine State's witnesses and present evidence on behalf of the defense."

On the first and second days of trial, Couch continued to engage in disruptive behavior. He used profanity, insulted the prosecutor, and claimed he would strangle someone if his restraints were removed. Couch renewed his request to represent himself on two more occasions, but the district court affirmed its earlier ruling on his motion. Eventually, the court ordered Couch's removal from the courtroom on the second day of

trial, and he was placed in a separate room where he could observe his trial via closed-circuit television. Couch remained physically absent from the courtroom until the fourth day of trial when he testified in his own defense.

B. *Standard of Review and Relevant Legal Framework*

Generally, we review questions related to the rights of assistance of counsel and the related right to self-representation de novo. *Bunyard*, 307 Kan. at 470. But in denying Couch's request, the district court made fact-findings about Couch's behavior during pretrial proceedings. Thus, we will apply a bifurcated standard of review, reviewing the district court's fact-findings for substantial competent evidence and the district court's legal conclusion de novo. See, e.g., *State v. Allen*, 62 Kan. App. 2d 802, 808, 522 P.3d 355 (2022) (exercising unlimited review over questions related to right to counsel and self-representation but reviewing district court fact-findings related to waiver of counsel for substantial competent evidence); see also *United States v. Tucker*, 451 F.3d 1176, 1180 (10th Cir. 2006) (in reviewing trial court's denial of request to proceed pro se, appellate court reviews factual findings for clear error and ultimate question of whether constitutional violation occurred de novo).

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

While the Sixth Amendment does not expressly provide for the right to self-representation, the United States Supreme Court has held that such a right is implied from the Sixth Amendment's guarantee of the right to counsel. *Faretta v. California*, 422 U.S. 806, 821, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). And the Court has clarified that defendants have the right to conduct their own defense, "provided only that [defendant] knowingly and intelligently forgoes [the] right to counsel and that [defendant] is able and willing to abide by rules of procedure and courtroom protocol." *McKaskle v. Wiggins*, 465 U.S. 168, 173, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984).

Section 10 of the Kansas Constitution Bill of Rights also provides that "[i]n all prosecutions, the accused shall be allowed to appear and defend in person, or by counsel." And we have authority to interpret the Kansas Constitution independent of corresponding provisions of the United States Constitution. Comparing section 10 with the Sixth Amendment, the two provisions have obvious textual differences. And such textual differences may provide a basis for recognizing different constitutional guarantees under our state Constitution. See *State v. Albano*, 313 Kan. 638, 644, 487 P.3d 750 (2021) (recognizing textual and structural differences between Sixth Amendment's jury trial right and section 5 of the Kansas Constitution Bill of Rights' jury trial right means the provisions may not provide the same protections in all cases); *Hodes & Nauser, MDs v. Schmidt*, 309 Kan. 610, 624-25, 638, 440 P.3d 461 (2019) (independently interpreting section 1 of the Kansas Constitution Bill of Rights in manner different from the Fourteenth Amendment to the United States Constitution based on textual differences). But we have not previously analyzed the text of section 10 to determine whether the scope of the right to self-representation is coextensive with or broader than the right as guaranteed by the Sixth Amendment.

Couch bases his constitutional challenge on both the Sixth Amendment and section 10. But his briefing does not use our established rules of constitutional interpretation to analyze whether the textual differences between section 10 and the Sixth

Amendment are legally significant. See *State v. Hillard*, 315 Kan. 732, 759, 511 P.3d 883 (2022) (Issues not adequately briefed are deemed waived and abandoned.). Further, both his petition for review and his briefing rely on federal caselaw interpreting the Sixth Amendment's right to self-representation and Kansas decisions applying this federal caselaw. Thus, we analyze Couch's alleged error under Sixth Amendment principles only.

C. *The District Court Properly Denied Couch's Motion to Proceed Pro Se Based on Couch's Disruptive Behavior*

To invoke the right to self-representation, a defendant must clearly and unequivocally express a desire to proceed pro se. *State v. Vann*, 280 Kan. 782, 793, 127 P.3d 307 (2006). Couch did just that by filing a pretrial motion requesting to represent himself. If defendant invokes the right after trial starts, the district court has discretion in deciding whether to grant the request for self-representation. *State v. Cromwell*, 253 Kan. 495, 505, 856 P.2d 1299 (1993). If invoked before trial starts, our court has described the right to self-representation as "unqualified." 253 Kan. at 505.

But an "unqualified" right to self-representation does not mean the right is absolute. See *Indiana v. Edwards*, 554 U.S. 164, 171, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008) (right to self-representation is not absolute); *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 161, 120 S. Ct. 684, 145 L. Ed. 2d 597 (2000) (same). In fact, an unqualified right to self-representation "rests on an implied presumption that the court will be able to achieve reasonable cooperation" from the pro se defendant. *United States v. Dougherty*, 473 F.2d 1113, 1126 (D.C. Cir. 1972). The right to self-representation "permits defendants neither 'to abuse the dignity of the courtroom' nor to disregard the 'relevant rules of procedural and substantive law.'" *United States v. Taylor*, 21 F.4th 94, 104 (3d Cir. 2021) (quoting *Faretta*, 422 U.S. at 834 n.46). Thus, a district court "may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." *Faretta*, 422 U.S. at 834 n.46. And "a

defendant's conduct may prove obstreperous enough to justify denying his request [to proceed pro se] at the outset in some cases." *Taylor*, 21 F.4th at 104; see also *Tucker*, 451 F.3d at 1180 ("To properly invoke the right to self-representation . . . the defendant 'must be "'able and willing to abide by rules of procedure and courtroom protocol."'"); *Davis v. Grant*, 532 F.3d 132, 143 (2d Cir. 2008) ("[A] judge *may* use willingness and ability to abide by courtroom protocol as prerequisites for accepting a defendant's waiver of his right to counsel.").

That said, behavior which merely tries the district court's patience is not enough to deny a defendant's request to proceed pro se. See *Taylor*, 21 F.4th at 104-05. Rather, to justify denial of a timely pretrial request to proceed pro se, the defendant must have exhibited seriously disruptive behavior during pretrial proceedings, and that behavior must strongly indicate the defendant will continue to be disruptive in the courtroom. See *United States v. Smith*, 830 F.3d 803, 810-11 (8th Cir. 2016); *United States v. Flewitt*, 874 F.2d 669, 674 (9th Cir. 1989); *Vanisi v. State*, 117 Nev. 330, 340, 22 P.3d 1164 (2001); *People v. Battle*, 200 A.D.3d 1712, 1715, 158 N.Y.S.3d 517 (2021), *rev. denied* 38 N.Y.3d 1132 (2022). Such extreme behavior was exhibited by the defendant in *United States v. Hausa*, 922 F.3d 129 (2d Cir. 2019), when he hummed and screamed, and rambled incoherently; cursed at the judge and threatened to kill him; and repeatedly had to be removed from pretrial hearings. The Second Circuit held the defendant's conduct provided an independent basis for denying his pretrial request to proceed pro se. 922 F.3d at 136.

In denying Couch's initial motion to proceed pro se, the district court mainly focused on Couch's disruptive behavior, finding Couch had regularly been disruptive at pretrial hearings and had threatened his attorney. The district court also reasoned that Couch lacked the legal understanding to represent himself. Couch focuses on this latter rationale, arguing it is not a valid basis for denying a pretrial request to proceed pro se.

Couch is correct that a "'defendant's "technical legal knowledge" is "not relevant" to the determination whether he is competent to waive his right to counsel'" and proceed pro se. *State v. Burden*, 311 Kan. 859, 865, 467 P.3d 495 (2020) (quoting *Godinez v. Moran*, 509 U.S. 389, 400, 113 S. Ct. 2680, 125 L. Ed. 2d 321 [1993]). And if the district court also considered Couch's motive or reasons underlying his request to proceed pro se, that would also be an invalid basis for denying a pretrial request to proceed pro se—a court may only consider that factor when ruling on a request made after trial has started. See *Cromwell*, 253 Kan. at 505.

Even so, the heart of the district court's decision rested on Couch's disruptive pretrial behavior. Indeed, the Court of Appeals upheld the district court's denial of Couch's motion because "the true foundation for its denial was Couch's inability to restrain himself." *Couch*, 2022 WL 3570874, at *4. Because a defendant's seriously disruptive behavior is valid grounds for denying a motion to proceed pro se, we may still affirm the district court's decision despite its other comments about Couch's legal acumen. See *United States v. Simpson*, 845 F.3d 1039, 1051 (10th Cir. 2017) ("Our case law permits us to affirm the district court['s denial of motion to proceed pro se], notwithstanding the court's statements about a defendant's lack of preparedness, if the district court's decision appears to be justified by a valid reason.").

Here, the record supports the district court's fact-findings about Couch's unruly pretrial conduct. For example, at Couch's first appearance, he was absent from the courtroom because he "refus[ed] to cooperate to come into court." Couch spoke out of turn at multiple pretrial hearings, used profanity, and often tried to argue about the strength of the State's case against him. The district court also warned Couch twice that he would be removed if he could not be quiet.

As an illustration of Couch's conduct, the following exchange took place during a pretrial hearing on Couch's motion for DNA testing:

"THE COURT: [Addressing defense counsel.] Do you know who would be testing it? Have you identified the scientist that—

"Mr. Couch, you are probably being heard by your attorney, but I can't hear you, and that's okay. I don't need to hear you so long as you are passing the message. If you would like a tablet to write on to pass messages to her, that would probably be well for you and her both, if that would help you in any way.

"[COUCH]: I just—I want everything tested, Your Honor. I want everything tested. Anything that the victim says that he touched, I want it fingerprinted. I mean—hey—no, no, enough! The victim says, hey, he touched my cell phone.

"[DEFENSE COUNSEL]: Mr. Couch—

"[COUCH]: —but the detectives did not test that cell phone. They didn't even fingerprint it. What kind of a detective agency wouldn't even fingerprint a cell phone? I don't care about the DNA. Find the motherfucker—

"[DEFENSE COUNSEL]: Mr. Couch—

"[THE COURT]: Okay. My question is, whether there is enough time between now and trial time for [DNA] test results to be validly taken."

Later at that same hearing, the prosecutor offered some DNA reports into evidence only for evaluating the veracity of Couch's statements about the DNA test results. The following exchange took place:

"[PROSECUTOR]: . . . Mr. Couch caused me to pull these [reports] and I asked to admit them sooner than I would have other than—

"[COUCH]: Please, Your Honor, please look at those reports.

"[PROSECUTOR]: —once I got through my argument. That's also part and parcel—

"[COUCH]: Oh, shit.

"[PROSECUTOR]: —with the arguments, though. May I approach judge?

"[THE COURT]: Yeah.

"[COUCH]: By all means, approach.

"[THE COURT]: Mr. Couch, I think you need to be quiet. If I need to, we can gag you. I don't want to do that, so please—

"[COUCH]: What the hell.

"[THE COURT]: —participate quietly or send messages to your attorney in written form.

"[COUCH]: Yes, sir."

Couch was also recalcitrant when given a chance to argue in support of his motion to proceed pro se. He told the prosecutor, "Fuck you," and began cursing while discussing the State's failure to fingerprint H.D.'s cellphone. He also threatened to "bite [his counsel's] fucking face off."

In its opening brief, the State also highlights some of Couch's behavior on the first and second day of trial. But by that point, the district court had denied Couch's motion. So we do not consider this behavior in determining whether the district court erred in denying Couch's initial request to proceed pro se. See *United States v. Dougherty*, 473

F.2d 1113, 1126 (D.C. Cir. 1972) ("We begin by rejecting the Government's approach of using 'disruptive' incidents following the denial of the *pro se* motions as reasons to support that denial.").

The district court's findings about Couch's pretrial misconduct are supported by substantial competent evidence. And these findings provide a lawful basis for the district court's ruling. Even if one were to argue that Couch's pretrial conduct was not as extreme as the defendant's conduct in *Hausa*, Couch's conduct still demonstrated that he was unwilling or unable to abide by rules of procedure and courtroom decorum. His continued interruptions after warnings from the court, his ongoing use of profanity, his combative attitude, and his threat to "bite [his attorney's] fucking face off" show that Couch had engaged in serious obstructionist misconduct. And these behaviors provided the district court with good cause to believe the disruptions would continue. See *United States v. Atkins*, 52 F.4th 745, 751 (8th Cir. 2022) (trial court properly denied defendant's pretrial request to proceed pro se when defendant interrupted and argued with the court; refused to provide responsive answers; insisted trial was not going to happened; and at least once was removed from the courtroom for unruly behavior); *State v. Johnson*, 328 S.W.3d 385, 396-97 (Mo. Ct. App. 2010) (defendant's pretrial behavior provided sufficient grounds to deny his request to proceed pro se when defendant launched into diatribes against his lawyers and the State, refused to cooperate with order to provide fingerprints, and cursed at the district court judge).

In sum, our review of the record confirms that substantial competent evidence supports the district court's findings about Couch's disruptive pretrial behavior. And that behavior was egregious enough to lawfully support the district court's decision to deny Couch's pretrial request to represent himself. Thus, the district court's ruling did not improperly deprive Couch of his right to self-representation, and we affirm the judgments of the district court and Court of Appeals on this issue.

II. *The Evidence Does Not Support Couch's Conviction for Aggravated Kidnapping when Measured Against the Jury Instructions*

Next, Couch challenges the sufficiency of the evidence supporting his conviction for aggravated kidnapping under K.S.A. 2018 Supp. 21-5408(a)(2) and (b). He claims the State relied only on his act of grabbing H.D.'s arm and dragging her to the bedroom to support this conviction. And he argues this act is not separate and distinct from the underlying sex crimes, as required to support a conviction under our precedent in *Buggs*.

To resolve Couch's second issue, we first identify the standard of review and consider whether the sufficiency of the evidence should be measured against the statutory elements of the offense, the elements as charged, or the elements described in the jury instructions. Through this analysis, we conclude that due-process considerations require us to measure the sufficiency of the evidence against the narrower statutory elements defined in the jury instructions. Finally, we examine the record evidence against this standard and conclude that it cannot support Couch's conviction for aggravated kidnapping with intent to facilitate the commission of a crime.

A. *Standard of Review and the Proper Measure for Examining the Sufficiency of the Evidence*

The standard for appellate review of a challenge to the sufficiency of the evidence supporting a defendant's conviction is well-established:

> "When a criminal defendant challenges the sufficiency of the evidence used to support a conviction, an appellate court looks at all the evidence 'in a light most favorable to the State to determine whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt.' A reviewing court 'generally will "not reweigh evidence, resolve evidentiary conflicts, or make witness credibility determinations."' [Citations omitted.]" *State v. Harris*, 310 Kan. 1026, 1030, 453 P.3d 1172 (2019).

In reviewing a sufficiency challenge, appellate courts often look to the jury instructions to determine the elements of the offense that the State needed to prove. But when the jury instructions do not accurately recite the statutory elements of the crime or do not match the elements of the crime as charged, we have departed from this approach. For example, in *State v. Fitzgerald*, 308 Kan. 659, 423 P.3d 497 (2018), the charging document listed the statutory elements of aggravated criminal sodomy under one subsection of the relevant statute, but the jury was instructed on the statutory elements of that crime under a different subsection. And in that case, we measured sufficiency of the evidence against the statutory elements of the charged crime rather than the elements of the crime as described in the jury instructions. 308 Kan. at 666.

Here, we are presented with a different type of variance—the elements in the jury instructions are narrower than those identified in the charging document. Couch was charged with aggravated kidnapping under K.S.A. 2018 Supp. 21-5408(a)(2) and (b). Kidnapping as defined in subsection (a)(2) is "the taking or confining of any person, accomplished by force, threat or deception, with the intent to hold such person . . . to facilitate flight or the commission of any crime." K.S.A. 2022 Supp. 21-5408(a)(2). Aggravated kidnapping requires the added element that bodily harm be inflicted on the victim. K.S.A. 2022 Supp. 21-5408(b).

The complaint, as amended before trial, accurately reflects these statutory elements by alleging Couch "did unlawfully and feloniously take or confine a person, to wit: [H.D.], accomplished by force, threat or deception and with the intent to hold said person to facilitate flight or the commission of any crime, and with bodily harm being inflicted on [H.D.]."

But the jury instructions identifying the elements of aggravated kidnapping defined the crime more narrowly than the complaint. At the State's request, the district court gave the following aggravated kidnapping instruction:

"1. The defendant confined [H.D.] by force.

"2. The defendant did so with the intent to hold [H.D.] for the commission of any crime.

"3. Bodily harm was inflicted upon [H.D.].

"4. This act occurred on or about the 18th day of December, 2018, in Finney County, Kansas."

By including only "confining" and not "taking," the instruction eliminated one of the alternative means of committing kidnapping or aggravated kidnapping. See *State v. Haberlein*, 296 Kan. 195, 208, 290 P.3d 640 (2012) ("taking or confining" are alternative means of committing kidnapping). By including only "by force," the instruction also eliminated the "by threat or deception" options within a means for committing aggravated kidnapping. 296 Kan. at 208 ("force, threat or deception" are options within a means). Finally, the instruction included only the option of "facilitate . . . the commission of any crime" and eliminated the "facilitat[ing] flight" option for committing aggravated kidnapping. 296 Kan. at 209 ("facilitate flight or the commission of any crime" are options within a means).

Given the disparity between the complaint and the jury instructions, we must first decide which of the two offers the proper measure for assessing the sufficiency of the evidence supporting Couch's aggravated-kidnapping conviction. Couch argues sufficiency of the evidence should be measured against the narrower jury instructions. But with no exposition, the Court of Appeals panel appears to have measured sufficiency of the evidence against the broader statutory elements of the charged offense. See *Couch*, 2022 WL 3570874, at *4.

The jury instructions did not omit any essential element of the statutory offense of aggravated kidnapping. But they did narrow the scope of the charged offense by eliminating alternative means and options within a means for committing aggravated

kidnapping that were in the charging document. In these circumstances, we hold that due process considerations require us to measure the sufficiency of the evidence against the elements in the jury instructions, rather than the elements in the charging document.

In reviewing the sufficiency of the evidence, one of our primary objectives is to give effect to defendant's due process right to receive a jury finding of guilt beyond a reasonable doubt on each element of the offense of conviction. *Musacchio v. United States*, 577 U.S. 237, 243-44, 136 S. Ct. 709, 193 L. Ed. 2d 639 (2016). And here, the elements instruction for aggravated kidnapping permitted the jury to convict Couch only if he confined H.D. with the intent to facilitate commission of any crime. Because the jury was never instructed on any other methods of committing aggravated kidnapping, the jury could not have found Couch guilty beyond a reasonable doubt based on those omitted methods. See *Chiarella v. United States*, 445 U.S. 222, 236, 100 S. Ct. 1108, 63 L. Ed. 2d 348 (1980) ("[W]e cannot affirm a criminal conviction on the basis of a theory not presented to the jury."); see also *People v. Johnson*, 498 P.3d 157, 161 (Colo. App. 2021) (recognizing sufficiency of evidence generally measured against statutory elements rather than jury instructions but measuring against instructions which listed only one method of committing crime because "we cannot decide a factual issue not presented to the jury"), *aff'd on other grounds* 524 P.3d 36 (Colo. 2023). In sum, we cannot uphold Couch's conviction for aggravated kidnapping based on a theory of criminal liability that was not included in the instructions to the jury.

The State does not object to this analytical approach. In fact, at oral argument, the State agreed that the sufficiency of the evidence should be measured against the jury instructions given at Couch's trial. Thus, in conducting our review, we consider whether the State offered sufficient evidence to prove the elements of aggravated kidnapping as defined by the jury instructions.

B. *The Evidence Does Not Support Couch's Conviction for Aggravated Kidnapping when Measured Against the Jury Instructions*

To sustain a conviction for aggravated kidnapping as defined by the jury instructions, the State needed to prove beyond reasonable doubt that Couch confined H.D. by force to facilitate the commission of any crime. During closing argument, the State argued Couch confined H.D. by grabbing her arm and dragging her to the bedroom and he did so with the intent to facilitate commission of the rape and sodomies. On appeal, Couch argues the act of grabbing H.D.'s arm and dragging her to the bedroom is not distinct enough from the sex crimes to support a conviction for aggravated kidnapping under this court's holding in *Buggs*.

Buggs held that "a kidnapping statute is not reasonably intended to cover movements and confinements which are slight and 'merely incidental' to the commission of an underlying lesser crime." 219 Kan. at 215. There, defendant accosted the victim in a parking lot and forced her inside a store, where he raped and robbed her. The defendant challenged his aggravated-kidnapping conviction on appeal, arguing the movement and confinement of the victim were merely incidental to the rape and robbery.

In analyzing the defendant's claim of error, *Buggs* interpreted the term "facilitate" in the Kansas kidnapping statute to mean "something more than just to make more convenient." 219 Kan. at 215. The court then identified a three-part test for determining whether a taking or confinement was distinct enough from the underlying crime to support a conviction for kidnapping:

> "[I]f a taking or confinement is alleged to have been done to facilitate the commission of another crime, to be kidnapping the resulting movement or confinement:
>
> "(*a*) Must not be slight, inconsequential and merely incidental to the other crime;
>
> "(*b*) Must not be of the kind inherent in the nature of the other crime; and

> "(*c*) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection." 219 Kan. at 216.

And to illustrate the application of this framework, *Buggs* explained:

> "A standstill robbery on the street is not a kidnapping; the forced removal of the victim to a dark alley for robbery is. The removal of a rape victim from room to room within a dwelling solely for the convenience and comfort of the rapist is not a kidnapping; the removal from a public place to a place of seclusion is. The forced direction of a store clerk to cross the store to open a cash register is not a kidnapping; locking him in a cooler to facilitate escape is. The list is not meant to be exhaustive, and may be subject to some qualification when actual cases arise; it nevertheless is illustrative of our holding." 219 Kan. at 216.

Buggs affirmed the defendant's kidnapping conviction, reasoning that moving the victim from the parking lot "where they were subject to public view" to the "relative seclusion of the inside of the store . . . substantially reduced the risk of detection not only of the robbery but of the rape." 219 Kan. at 216.

Some may question our continued adherence to *Buggs* given more recent developments in our multiplicity jurisprudence. Nevertheless, for nearly a half-century, our appellate courts have consistently relied on *Buggs* to determine whether a taking or confinement to facilitate the commission of any crime can support a conviction for kidnapping apart from the underlying crime. Neither party has asked us to overrule *Buggs*. Nor have they provided an argument justifying a departure from the doctrine of stare decisis in this case. See *State v. Clark*, 313 Kan. 556, 565, 486 P.3d 591 (2021) (doctrine of stare decisis provides that points of law established by a court are generally followed by the same court and courts of lower rank in later cases in which the same legal issue is raised). And we have previously declined to reconsider precedent under

similar circumstances. See *Nguyen v. State*, 309 Kan. 96, 108-09, 431 P.3d 862 (2018) (declining to reconsider precedent construing statute when parties did not ask court to reconsider that precedent or brief the issue); *Central Kansas Medical Center v. Hatesohl*, 308 Kan. 992, 1006-07, 425 P.3d 1253 (2018) (declining to reconsider precedent because no party asked court to do so). Thus, for the purpose of analyzing Couch's sufficiency challenge, we apply *Buggs*.

Here, the act of grabbing H.D. and dragging her to the bedroom does not meet the requirements of the *Buggs* test because the act had no independent significance apart from the rape and sodomies. Couch's exertion of physical control over H.D. and his confinement of her within her home were inherent in, and incidental to, the force or fear supporting Couch's rape and aggravated criminal sodomy charges. See *State v. Cabral*, 228 Kan. 741, 745, 619 P.2d 1163 (1980) (confinement of rape victim within automobile was inherent in the nature of forcible rape and incidental to its commission); *State v. Olsman*, 58 Kan. App. 2d 638, 649, 473 P.3d 937 (2020) ("Rape through force necessarily and inherently requires confinement of the victim to a particular place where the rape occurs.").

Moreover, grabbing H.D.'s arm and taking her to the bedroom neither made the rape and sodomies substantially easier to commit nor substantially lessened the risk of detection. See *Buggs*, 219 Kan. at 216. Nothing suggests that it would have been significantly harder for Couch to commit the sex crimes in the kitchen than the bedroom. See 219 Kan. at 216 (removal of rape victim from room to room within dwelling solely for convenience and comfort of the rapist is not kidnapping). Nor does the evidence suggest that taking H.D. to the bedroom substantially lessened the risk of detection. See *Olsman*, 58 Kan. App. 2d at 649 (evidence did not show movement of victim from one room to another within the seclusion of the home substantially reduced risk of detection).

Granted, this court has affirmed convictions where the victim was confined within a home or taken from room to room. But in those cases, the victim was moved multiple times, restrained for a long time, or secreted away from potential witnesses. For example, in *State v. Chears*, 231 Kan. 161, 164, 643 P.2d 154 (1982), the defendant moved the victim from the living room to the bedroom to sodomize her, "ensur[ing] there would be but one witness" because the defendant's accomplices and the victim's husband and daughter were in the living room and could not see what was happening in the bedroom. In *State v. Howard*, 243 Kan. 699, 702, 763 P.2d 607 (1988), the defendant confined the victim in his bedroom for at least one and a half hours (and possibly as long as three hours) as he raped and sodomized her. And when the victim tried to flee down a hallway, the defendant forced her back into the bedroom. 243 Kan. at 702. And most recently, in *Harris*, 310 Kan. at 1032-33, the defendant restrained the victim in her apartment for two hours, forcibly moving her from room to room while repeatedly demanding money and acting to prevent her from escaping.

But *Chears*, *Howard*, and *Harris* are all distinguishable from this case. H.D.'s husband was at work at the time of the attack, and there is no evidence that any other potential witnesses were present in the home at the time of the crimes. The evidence also shows H.D.'s confinement lasted less than an hour. H.D. testified she got home from Walmart around 10:50 a.m. on the day of the attack. H.D.'s husband testified that H.D. sent out the emergency alert around 11:30 and he got in contact with her about five minutes later. And an officer testified that she responded to a burglary-in-progress call at H.D.'s home around 11:40 a.m.

In its brief, the State points out that Couch prevented H.D. from picking up her phone before taking her out of the kitchen, and thus he lessened the risk of detection by preventing her from reporting the crime. But as noted, Couch's exertion of physical control over H.D., which would include preventing her from picking up her phone, was incidental to and inherent in the rape and sodomies.

The State also argues that by taking H.D. to the bedroom during the sex crimes, Couch had easier access to the items in the bathroom as well as the charging cords he used to tie her up. But to satisfy *Buggs*, the taking or confinement must have made the rape and sodomies *substantially* easier to commit. Quicker access to items used during and after commission of the sex crimes would not have made those crimes substantially easier to commit. See *Buggs*, 219 Kan. at 215 ("'facilitate' . . . means something more than just to make more convenient").

Along with grabbing H.D.'s arm and dragging her to the bedroom, the evidence shows that Couch also bound H.D.'s arms and legs after he completed the sex crimes. But because the act of binding H.D. occurred after Couch had completed those sex crimes, it could not have facilitated their commission. The State has identified no other crime that may have been facilitated by H.D.'s physical restraint after commission of the rape and sodomies. And while Couch's decision to bind H.D. may have facilitated Couch's flight from the crime scene, the jury was never instructed (nor did the State argue) that Couch could be found guilty of aggravated kidnapping if he confined H.D. with the intent to facilitate flight.

In sum, the evidence shows Couch's actions were violent and degrading, and he may have aided his escape by tying up H.D. after raping and sodomizing her. But the jury instructions permitted the jury to convict Couch under a narrow theory of aggravated kidnapping. Thus, we are left to consider only whether the evidence shows beyond a reasonable doubt that Couch's acts were done to facilitate the commission of any crime. We hold that the evidence cannot establish this element beyond a reasonable doubt under our precedent in *Buggs*. We thus reverse Couch's conviction for aggravated kidnapping.

III. *The District Court Erred by Failing to Give Instructions on the Lesser-Included Offenses of Aggravated Battery Under K.S.A. 2018 Supp. 21-5413(b)(1)(A), but that Error Does Not Require Reversal*

Next, Couch argues the district court erred by failing to give instructions on the lesser-included offenses of aggravated battery under K.S.A. 2018 Supp. 21-5413(b)(1)(A). To resolve this issue, we first identify the well-established standard and framework for examining instructional error. Then, we apply this framework to the instructional challenge. Through this analysis, we hold that the panel erred by concluding that the lesser-included offense instructions were factually inappropriate. Even so, we affirm the panel's judgment because this error does not warrant reversal.

A. *Standard of Review and Relevant Legal Framework*

The multi-step process for reviewing instructional errors is well-known: 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).

Couch was charged with, and convicted of, aggravated battery under K.S.A. 2018 Supp. 21-5413(b)(1)(A). K.S.A. 2022 Supp. 21-5413(b) defines aggravated battery as:

> "(1)(A) Knowingly causing great bodily harm to another person or disfigurement of another person;
>
> (B) knowingly causing bodily harm to another person with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted; or

(C) knowingly causing physical contact with another person when done in a rude, insulting or angry manner with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted;

"(2)(A) recklessly causing great bodily harm to another person or disfigurement of another person;

(B) recklessly causing bodily harm to another person with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted."

Couch now argues that the district court erred in failing to instruct the jury on the lesser-included versions of aggravated battery as defined in subsections (b)(1)(B), (b)(1)(C), (b)(2)(A), and (b)(2)(B).

Couch concedes he did not request jury instructions on these lesser-included offenses or object to their absence, so any error will be reviewed for clear error. This means we must affirm his conviction for aggravated battery under K.S.A. 2022 Supp. 21-5413(b)(1)(A) unless we are firmly convinced that the jury would have reached a different verdict had any instructional error not occurred. *State v. Berkstresser*, 316 Kan. 597, 605, 520 P.3d 718 (2022).

B. *The Lesser-Included Offense Instructions Were Legally Appropriate*

Jury instructions on lesser-included offenses are generally legally appropriate. *State v. Gentry*, 310 Kan. 715, 721, 449 P.3d 429 (2019). And a lesser-included offense includes a lesser degree of the same crime. K.S.A. 2022 Supp. 21-5109(b)(1).

Aggravated battery as defined in subsection (b)(1)(A) is a severity level 4 person felony. K.S.A. 2022 Supp. 21-5413(g)(2)(A). Aggravated battery as defined in subsection (b)(2)(A) is a severity level 5 person felony. K.S.A. 2022 Supp. 21-5413(g)(2)(C).

Aggravated battery as defined in subsections (b)(1)(B) and (b)(1)(C) is a severity level 7 person felony. K.S.A. 2022 Supp. 21-5413(g)(2)(B). And aggravated battery as defined in (b)(2)(B) is a severity level 8 person felony. K.S.A. 2022 Supp. 21-5413(g)(2)(D).

Because the versions of aggravated battery defined in subsections (b)(1)(B), (b)(1)(C), (b)(2)(A), and (b)(2)(B) are lesser degrees of aggravated battery charged under subsection (b)(1)(A), the Court of Appeals correctly held the instructions on those lesser-included offenses were legally appropriate. *Couch*, 2022 WL 3570874, at *6.

C. *The Lesser-Included Offense Instructions Were Factually Appropriate*

Next, we must consider whether the lesser-included offense instructions were factually appropriate. "A legally appropriate lesser included offense instruction must be given when there is some evidence, viewed in a light most favorable to the defendant, emanating from whatever source and proffered by whichever party, that would reasonably justify the defendant's conviction for that lesser included crime." *Berkstresser*, 316 Kan. at 601; see also K.S.A. 2022 Supp. 22-3414(3) ("In cases where there is some evidence which would reasonably justify a conviction of some lesser included crime . . . the judge shall instruct the jury as to the crime charged and any such lesser included crime."). In determining whether a lesser-included-offense instruction is factually appropriate, the question is not whether the evidence is more likely to support a conviction for the greater offense. Instead, the question is whether the court would uphold a conviction for the lesser offense in the face of a challenge to the sufficiency of the evidence. See 316 Kan. at 602.

The lesser-included offenses of aggravated battery under K.S.A. 2022 Supp. 21-5413(b)(1)(A) can generally be divided into two categories: (1) those versions of

aggravated battery that require a culpable mental state of knowingly but require less harm or injury than subsection (b)(1)(A); and (2) those versions of aggravated battery that require a culpable mental state of recklessly rather than knowingly.

In rejecting Couch's claim of error, the Court of Appeals held that none of the lesser-included offense instructions were factually appropriate. The panel concluded that no evidence showed H.D. suffered anything less than great bodily harm. *Couch*, 2022 WL 3570874, at *8. Likewise, the panel held that the evidence showed that Couch acted knowingly rather than recklessly. 2022 WL 3570874, at *8.

In reaching its conclusion, the panel appears to have analyzed whether the evidence was more likely to support a conviction for the charged offense, aggravated battery under K.S.A. 2022 Supp. 21-5413(b)(1)(A), rather than the lesser-included offenses. But that is not the appropriate inquiry when determining whether a lesser-included-offense instruction is factually appropriate. Rather, the question is whether the evidence would have been sufficient to support a conviction for the lesser-included versions of the offense. Here, the evidence was sufficient to support a conviction for those lesser-included offenses. And we bolster this conclusion by discussing the evidence supporting each of the two general categories of lesser-included offenses: knowing aggravated battery requiring some harm less than great bodily harm and reckless aggravated battery.

1. *Instructions on the Lesser-Included Offenses of Knowing Aggravated Battery Were Factually Appropriate*

K.S.A. 2022 Supp. 21-5413(b)(1) sets forth three versions of the crime of aggravated battery when committed with a culpable mental state of "knowingly." The distinction between these three crimes is the degree of bodily harm inflicted. K.S.A. 2022 Supp. 21-5413(b)(1)(A) criminalizes causing great bodily harm or disfigurement. K.S.A.

2022 Supp. 21-5413(b)(1)(B) criminalizes causing bodily harm with a deadly weapon or in any way which could inflict great bodily harm, disfigurement, or death. And K.S.A. 2022 Supp. 21-5413(b)(1)(C) criminalizes causing physical contact in a rude, insulting, or angry manner with a deadly weapon, or in any way which could inflict great bodily harm, disfigurement, or death.

We have defined "bodily harm as "'any touching of the victim against [the victim's] will, with physical force, in an intentional hostile and aggravated manner.'" *State v. Robinson*, 306 Kan. 1012, 1027, 399 P.3d 194 (2017). And we have defined "great bodily harm" as "'more than slight, trivial, minor, or moderate harm, [that] does not include mere bruising, which is likely to be sustained by simple battery.'" 306 Kan. at 1027. "Ordinarily, whether a victim has suffered great bodily harm is a question of fact for the jury to decide." *State v. Williams*, 295 Kan. 506, 523, 286 P.3d 195 (2012).

Here, the evidence showed Couch rushed at H.D. while holding a knife, H.D.'s hands were cut with the knife during a struggle, and those cuts required sutures. This evidence, which supported Couch's conviction for knowing aggravated battery causing great bodily harm, would also be enough to show he caused mere bodily harm or simply physical contact in a manner which could cause great bodily harm. See *Williams*, 295 Kan. at 522-23 (Instruction on lesser-included offense for aggravated battery was factually appropriate where evidence showed victim was stabbed in the head with kitchen knife, wound required many stitches, but did not cause excessive pain or require ongoing follow-up care; facts reasonably could have supported a finding of either great bodily harm or mere bodily harm in a manner that could have caused great bodily harm.). Because the evidence was sufficient to support a conviction for aggravated battery under subsection (b)(1)(B) and (b)(1)(C), the district court erred in failing to instruct the jury on those offenses.

2. *Instructions for Reckless Aggravated Battery Were Factually Appropriate*

The primary difference between aggravated battery as defined in K.S.A. 2022 Supp. 21-5413(b)(1) and (b)(2) is the culpable mental state. The versions of aggravated battery set forth in subsection (b)(1) require a culpable mental state of "knowingly." K.S.A. 2022 Supp. 21-5202(i) defines the culpable mental state of "knowingly" as:

> "A person acts 'knowingly,' or 'with knowledge,' with respect to the nature of such person's conduct or to circumstances surrounding such person's conduct when such person is aware of the nature of such person's conduct or that the circumstances exist. A person acts 'knowingly,' or 'with knowledge,' with respect to a result of such person's conduct when such person is aware that such person's conduct is reasonably certain to cause the result."

And we have held that under K.S.A. 2011 Supp. 21-5413(b)(1)(A), a person acts knowingly if "he or she acted while knowing that any great bodily harm or disfigurement of the victim was reasonably certain to result from the action." *State v. Hobbs*, 301 Kan. 203, 211, 340 P.3d 1179 (2015).

On the other hand, aggravated battery under K.S.A. 2022 Supp. 21-5413(b)(2) requires a culpable mental state of "recklessly." "A person acts 'recklessly' or is 'reckless' when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." K.S.A. 2022 Supp. 21-5202(j).

Thus, the primary difference between knowing aggravated battery and reckless aggravated battery would be the defendant's degree of awareness that their actions will

cause some degree of bodily harm. *State v. Trefethen,* No. 119,981, 2021 WL 1433246, at *6 (Kan. App.) (unpublished opinion), *rev. denied* 314 Kan. 859 (2021).

The State argues the evidence shows that Couch acted knowingly because he entered the home with the knife and used it to gain control and threaten H.D. And the panel agreed, holding the evidence "reflects an unquestionable awareness of the conduct undertaken and its attendant results" and that Couch "must have known that the infliction of great bodily harm was reasonably certain." *Couch*, 2022 WL 3570874, at *8.

But as Couch argues, there is at least some evidence that Couch acted recklessly rather than knowingly. While Couch may have held the knife to H.D.'s throat, there was no evidence that he swiped or jabbed at H.D. Indeed, H.D. testified she cut her hands when she grabbed at the knife. And Couch's stream of expletives upon realizing H.D. had been cut suggests surprise at H.D.'s injuries. This evidence would support a finding that Couch consciously disregarded a substantial and unjustifiable risk that he would cause H.D. bodily harm. See *State v. Logue*, No. 123,432, 2022 WL 2188028, at *4 (Kan. App. 2022) (unpublished opinion), *rev. denied* 317 Kan. ___ (March 30, 2023) (finding sufficient evidence to support defendant's conviction for reckless aggravated battery when defendant pulled out a knife during an argument and victim was cut during physical struggle with defendant).

Thus, instructions on reckless aggravated battery under K.S.A. 2018 Supp. 21-5413(b)(2)(A) and (b)(2)(B) were factually appropriate, and the district court erred in failing to give them.

D. *The Instructional Error Does Not Amount to Clear Error*

Having concluded the district court erred in failing to instruct the jury on the lesser-included offenses of aggravated battery under K.S.A. 2018 Supp. 21-

5413(b)(1)(A), we must now consider whether that error requires reversal. Because Couch did not properly preserve his instructional challenge, he bears the burden to firmly convince us the jury would have reached a different verdict had the instructional error not occurred. *Berkstresser*, 316 Kan. at 605.

Based on the evidence at trial, it is *possible* that the jury could have reasonably convicted Couch of one of the lesser-included versions of aggravated battery. This conclusion holds especially true for those versions of aggravated battery requiring lesser degrees of bodily harm. See *Williams*, 295 Kan. at 523 (Whether a victim has suffered great bodily harm or mere bodily harm is a question of fact for the jury to decide.).

But it is not enough that a rational jury *could* have convicted Couch of a lesser degree of aggravated battery—Couch must show the jury *would* have convicted him of the lesser offense if given the chance. See *Berkstresser*, 316 Kan. at 605. But the evidence here does not support his claim. Couch forced his way into H.D.'s home with a knife, shoved her against the kitchen sink, and held a knife to her neck to gain control over her. During the struggle, H.D. received deep cuts on her hands, causing blood loss and requiring sutures. And Couch himself told an officer, he "cut the fucking dog shit out of her, blood everywhere."

As we have noted, in explaining why the lesser-included instructions were not factually appropriate, the Court of Appeals actually explained why the evidence would more likely support a conviction for aggravated battery under K.S.A. 2018 Supp. 21-5413(b)(1)(A). While this is not a relevant consideration for determining whether a lesser-included instruction is factually appropriate, it is a relevant consideration in determining harmlessness. And we agree with the panel that the evidence would more likely support a conviction of the charged offense. H.D.'s injuries were more severe than ones she would likely have sustained from simple battery. See *Robinson*, 306 Kan. at 1027. And Couch's conduct overall reflects an awareness that bodily harm was

reasonably certain to result, even if he did not foresee the specific type of harm. See *Hobbs*, 301 Kan. at 211 (accused need not have foreseen specific harm that resulted as along as he or she acted while knowing any great bodily harm was reasonably certain to result).

In sum, the Court of Appeals erred in concluding that instructions on the lesser-included versions of aggravated battery under K.S.A. 2018 Supp. 21-5413(b)(1)(B), (b)(1)(C), (b)(2)(A), and (b)(2)(B) were not factually appropriate. Even so, we affirm the judgment of the Court of Appeals because this instructional error does not require reversal. See *State v. Brown*, 314 Kan. 292, 306, 498 P.3d 167 (2021) (affirming the Court of Appeals judgment as right, although on different grounds).

IV. *Cumulative Error Did Not Deprive Couch of a Fair Trial*

Finally, Couch asserts the denial of his request to proceed pro se, the insufficient evidence to support his aggravated kidnapping conviction, and the aggravated battery instructional error cumulatively deprived him of a fair trial. We disagree.

A. *Standard of Review and Relevant Legal Framework*

In conducting cumulative error review, "an appellate court aggregates all errors, even if they are individually reversible or individually harmless." *State v. Taylor*, 314 Kan. 166, 173, 496 P.3d 526 (2021).

> "The test for cumulative error is whether the errors substantially prejudiced the defendant and denied the defendant a fair trial given the totality of the circumstances. In making the assessment, an appellate court examines the errors in context, considers how the district court judge addressed the errors, reviews the nature and number of errors and whether they are connected, and weighs the strength of the evidence. If any of the errors being aggregated are constitutional, the constitutional harmless error test of *Chapman* [*v.*

> *California*, 386 U.S. 18] applies, and the party benefitting from the errors must establish beyond a reasonable doubt that the cumulative effect of the errors did not affect the outcome. Where, as here, the State benefitted from the errors, it has the burden of establishing the errors were harmless. [Citations omitted.]" *State v. Thomas*, 311 Kan. 905, 914, 468 P.3d 323 (2020).

The Court of Appeals found there were no errors and thus concluded Couch had no right to relief based on cumulative error. *Couch*, 2022 WL 3570874, at *9; see *State v. Lemmie*, 311 Kan. 439, 455, 462 P.3d 161 (2020) (if no error, or only single error, doctrine of cumulative error does not apply).

But we have identified two errors: insufficient evidence to support Couch's aggravated kidnapping conviction and the district court's failure to instruct on lesser-included versions of aggravated battery. And a conviction based on insufficient evidence is an error of constitutional magnitude. See *State v. Barker*, 18 Kan. App. 2d 292, 295-96, 851 P.2d 394 (1993) ("A conviction based upon insufficient evidence is *a fortiori* in violation of a defendant's due process rights."). Thus, the harmlessness test from *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), applies. Under that standard, we may declare the errors harmless if we are convinced beyond a reasonable doubt that they did not affect the outcome of the trial in light of the entire record. *State v. Ward*, 292 Kan. 541, 568-69, 256 P.3d 801 (2011) (citing *Chapman*, 386 U.S. 18).

B. *Even in the Aggregate, the Two Identified Trial Errors Did Not Deprive Couch of a Fair Trial*

Before addressing whether these two errors cumulatively require reversal, we pause to note an as-yet-unaddressed issue in applying the cumulative error doctrine under Kansas law. Kansas courts have often included unpreserved instructional errors that do not amount to clear error in cumulative error analyses. See, e.g., *State v. Williams*, 308 Kan. 1439, 1462-63, 430 P.3d 448 (2018); *State v. Seba*, 305 Kan. 185, 215-16, 380 P.3d

209 (2016). But we have never squarely addressed whether it is appropriate to do so, and we recognize the potential for disagreement on this point. See *State v. Logan*, No. 123,151, 2022 WL 1592702, at *5 (Kan. App. 2022) (unpublished opinion) (Atcheson, J., concurring) (disagreeing with majority decision's exclusion of unpreserved instructional error from cumulative error analysis). Nevertheless, for the purposes of our decision today, we assume, without deciding, that such errors may properly be included in a cumulative error analysis.

The aggregate effect of the two errors we have identified did not deprive Couch of a fair trial. The two errors were not interrelated. One was a failure of proof on the State's part to sustain a conviction for aggravated kidnapping. The other was an instructional error related to Couch's aggravated battery conviction. Further, the insufficiency of the evidence to sustain Couch's aggravated kidnapping conviction is not the type of error which would render his trial unfair. See *Burks v. United States*, 437 U.S. 1, 15-16, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978) (explaining reversal for insufficient evidence results from failure of proof on part of the State after being given a fair opportunity to prove the defendant's guilt, while reversal for trial error "is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect"). Thus, the prejudicial effect of these errors is no greater when considered together than when the errors are viewed in isolation.

CONCLUSION

We affirm the Court of Appeals judgment on three of the four issues Couch raised. First, as to Couch's Sixth Amendment claim, we agree with the panel that the district court lawfully denied Couch's motion to proceed pro se. Substantial competent evidence supports the district court's fact-findings about Couch's disruptive pretrial behavior, and that behavior provided a valid basis for denying his right to represent himself at trial.

Second, as to the instructional-error claim, we agree that the panel erred by holding that the lesser-included-offense instructions for aggravated battery were factually inappropriate. But we affirm the panel's judgment because the error was harmless.

Third, as for cumulative error, we agree that the doctrine applies. But we hold that the cumulative effect of the trial errors does not require reversal.

But we reverse the Court of Appeals judgment affirming Couch's conviction for aggravated kidnapping under K.S.A. 2018 Supp. 21-5413(a)(2) and (b). There was insufficient evidence to establish all the elements of aggravated kidnapping, as defined in the jury instructions, beyond reasonable doubt. And because Couch's conviction for aggravated kidnapping was designated his primary offense for sentencing purposes, we remand the case for resentencing of Couch's other convictions. K.S.A. 2022 Supp. 21-6819(b)(5).

Judgment of the Court of Appeals is affirmed in part and reversed in part on the issues subject to review. Judgment of the district court is affirmed in part and reversed in part on the issues subject to review, and the case is remanded with directions.

* * *

STEGALL, J., dissenting: Decades ago, our court decided that the Legislature could not have intended all or most rapes to also result in an aggravated kidnapping conviction. This arose out of a recognition that factually, it is likely impossible to commit a rape without simultaneously "confining" the victim to "facilitate" the rape. Apparently, the court was alarmed by the possibility of multiple convictions arising out of one occurrence. See *State v. Butler*, 317 Kan. ___ (No. 123,742, this day decided), slip op. at 9 ("[A]t its core, the [*Buggs*] test appears to be designed to inoculate against multiplicity."). To avoid this outcome, we concluded Kansas' "kidnapping statute is not

reasonably intended to cover movements and confinements which are slight and 'merely incidental' to the commission of an underlying lesser crime." *State v. Buggs*, 219 Kan. 203, 215, 547 P.2d 720 (1976).

The problem is that such convictions (rape and aggravated kidnapping for confining the victim to facilitate the rape) do not violate our more recent and well-developed multiplicity doctrine. This is because they contain different elements—so convictions for both offenses arising out of the same conduct would not violate the same elements test for determining whether convictions are multiplicitous. See *State v. Schoonover*, 281 Kan. 453, Syl. ¶ 12, 133 P.3d 48 (2006). Because the Legislature has crafted different elements in defining these offenses—and those elements are clearly satisfied here—I would overrule *Buggs* and affirm Couch's convictions for aggravated kidnapping and rape.

In Kansas, kidnapping is any "taking or confining of any person, accomplished by force, threat or deception, with the intent to hold such person . . . to facilitate flight or the commission of any crime." K.S.A. 2022 Supp. 21-5408. The *Buggs* court construed the term "facilitate" to mean the "taking or confining" must not be "slight, inconsequential [or] merely incidental to the other crime . . . [and] not . . . of a kind inherent in the nature of the other crime," "something more than just to make more convenient," but rather something having "significant bearing on making the commission of the crime 'easier.'" 219 Kan. 203, Syl. ¶¶ 9-10. And our court relies on this rule today to overturn Couch's conviction for aggravated kidnapping. *Couch*, 317 Kan. at ___, slip op. at 25.

Not only is the *Buggs* rule untenable as a species of our multiplicity doctrine, it fails as a matter of ordinary statutory interpretation. The *Buggs* court never conducted a plain language analysis of the kidnapping statute and never found it to be ambiguous. Its analysis of the word "facilitate" in our kidnapping statute thus falls well short of our more recent and rigorous approach to statutory interpretation—one requiring we begin with the

legislative intent as expressed through the plain language of the statute and only turn to other tools of construction after first determining the statutory language is unclear or ambiguous. See, e.g., *In re Estate of Taylor*, 312 Kan. 678, 681, 479 P.3d 476 (2021); *State v. Thompson*, 287 Kan. 238, 243, 200 P.3d 22 (2009) ("When the language of a statute is plain and unambiguous, the court must give effect to that language, rather than determine what the law should or should not be."). In doing so, we "'giv[e] common words their ordinary meaning.'" *State v. Eckert*, 317 Kan. 21, 27, 522 P.3d 796 (2023).

Instead of simply asking what the plain meaning of "facilitate" was in our kidnapping statute, the *Buggs* court considered a variety of other sources including: (1) the common-law definition of kidnapping; (2) caselaw from other states; (3) former iterations of the Kansas kidnapping statute; (4) the current statute's legislative history and Judicial Council notes; and (5) the statute's corresponding elements in the Model Penal Code. 219 Kan. at 209-13.

In my view, the *Buggs* court improperly departed from the plain language of the statute to construe the statute in a way it believed would avoid potentially multiplicitous convictions for rape and kidnapping. But I find the statutory language of the aggravated kidnapping statute to be plain and unambiguous. An aggravated kidnapping conviction requires a showing that the defendant "confined" the victim by force "to facilitate the commission" of a crime. Confinement is accomplished by "restraining someone." Confinement, Black's Law Dictionary 373 (11th ed. 2019). "Facilitate" is defined as "mak[ing] the occurrence of (something) easier; to render less difficult," and in the context of criminal law, it is to render "the commission of (a crime) easier." Facilitate, Black's Law Dictionary 734-35 (11th ed. 2019). Giving these words their ordinary meaning—as again, we must under our well-established rules of statutory construction—there is no doubt that by pinning the victim down on the bed or holding her at knifepoint to rape her, a defendant can be said to be "restraining someone" "to make the commission of a rape easier." These actions align with the plain language of the aggravated

kidnapping statute, i.e., confining the victim by force to facilitate a crime. And whether the commission of one crime (in this case rape) will almost always result in the commission of a second crime (aggravated kidnapping) should not be a judicial consideration when evaluating the plain language of a statute.

And as already pointed out, there is no multiplicity concern under this plain language approach. We apply the same-elements test to questions of multiplicity as first announced in *Schoonover*, 281 Kan. 453, Syl. ¶ 12. The same-elements test is used to determine whether multiple convictions arising from the same course of conduct violate § 10 of the Kansas Constitution Bill of Rights. It asks "whether each offense requires proof of an element not necessary to prove the other offense. If so, the charges stemming from a single act are not multiplicitous and do not constitute a double jeopardy violation." 281 Kan. 453, Syl. ¶ 12.

To determine whether an aggravated kidnapping conviction would be multiplicitous with rape or aggravated criminal sodomy, then, we look to the elements of each offense and determine if each requires proof of an element not necessary to prove the other offense. 281 Kan. 453, Syl. ¶ 12; see *State v. George*, 311 Kan. 693, 699, 466 P.3d 469 (2020).

First, the jury was instructed that to be guilty of aggravated kidnapping, Couch must have confined H.D. by force to facilitate the commission of any crime. K.S.A. 2018 Supp. 21-5408(a)(2) and (b). Aggravated criminal sodomy is "sodomy with a victim who does not consent" "[w]hen the victim is overcome by force or fear." K.S.A. 2022 Supp. 21-5504(b)(3)(A). And lastly, rape is "[k]nowingly engaging in sexual intercourse with a victim who does not consent to the sexual intercourse . . . [w]hen the victim is overcome by force or fear." K.S.A. 2022 Supp. 21-5503(a)(1)(A). Because each of these offenses contain elements independent of the other, the convictions are not multiplicitous.

The majority here and in *Butler*, 317 Kan. at ___, slip op. at 9, acknowledge that *Buggs*' approach to multiplicity appears "out of step" with the same-elements test, yet it continues to apply it by invoking the doctrine of stare decisis. It is true that once we have established a particular point of law we generally will follow that point of law in subsequent cases where the same legal issue is raised. But we are not inexorably bound by our own precedents. *Herington v. City of Wichita*, 314 Kan. 447, 457, 500 P.3d 1168 (2021). We may depart from them if we are clearly convinced that the rule was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent. *McCullough v. Wilson*, 308 Kan. 1025, 1036, 426 P.3d 494 (2018).

Stare decisis is weak when the precedent has proven difficult to apply. See *State v. Hoeck*, 284 Kan. 441, 463, 163 P.3d 252 (2007) ("[S]tare decisis . . . should not constrain a court from disapproving its own holdings 'when governing decisions are unworkable.'"); *State v. Marsh*, 278 Kan. 520, 579, 102 P.3d 445 (2004) (McFarland, C.J., dissenting) (departure from the rule of stare decisis may be justified when "the decision sought to be overturned has proven to be intolerable simply in defying practical 'workability'") (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854-55, 112 S. Ct. 2791, 120 L. Ed. 2d 674 [1992]), *rev'd on other grounds* 548 U.S. 163, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006).

And indeed, the *Buggs* rule has proven ambiguous and difficult to apply. See, e.g., *State v. Fisher*, 257 Kan. 65, 77, 891 P.2d 1065 (1995) (discussing at length many previous kidnapping cases while attempting to conform to *Buggs* when the facts presented a close call); *State v. Olsman*, 58 Kan. App. 2d 638, 665, 473 P.3d 937 (2020) (Warner, J., dissenting) (describing how the *Buggs* standard is "difficult to apply"); *State v. Richard*, No. 88,893, 2004 WL 556747, at *4 (Kan. App. 2004) (unpublished opinion) ("This is a difficult and complex problem. If one were to attempt to explain to the layperson what the crime of kidnapping consists of in this state, one might be greeted

with a blank stare. It is very difficult to define kidnapping. Theoretically, in this state, a movement of 10 feet, if done for the right reason, can constitute kidnapping. On the other hand, a movement of 10 miles, if done for other reasons, would not constitute kidnapping. The conundrum of defining kidnapping is a never ending one, and it is very difficult in this particular case.").

We also take into consideration whether the rule "'is subject to a kind of reliance that would lend a special hardship to the consequences of overruling,'" because "[s]tare decisis is especially compelling when reliance interests are involved." *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 615, 214 P.3d 676 (2009) (McFarland, C.J., dissenting); *State v. Sims*, 308 Kan. 1488, 1504, 431 P.3d 288 (2018). Here, no reliance interest is at stake.

Most significantly, the statutory language at issue is plain and unambiguous. We have repeatedly recognized that the Legislature, not the courts, is the primary policy-making branch of government and that it is not within our power to rewrite statutes to satisfy our policy preferences. See, e.g., *Jarvis v. Kansas Dept. of Revenue*, 312 Kan. 156, 170, 473 P.3d 869 (2020) ("'[Q]uestions of public policy are for legislative and not judicial determination, and where the legislature does so declare, and there is no constitutional impediment, the question of the wisdom, justice, or expediency of the legislation is for that body and not for the courts.'"); *Fisher v. DeCarvalho*, 298 Kan. 482, 498, 314 P.3d 214 (2013) ("'"[T]he court cannot delete vital provisions or supply vital omissions in a statute"' . . . no matter how ludicrous an appellate court may find a legislative enactment to be, the court is not free to completely rewrite the statute to make the law conform to what the court believes it should be."). This approach is fundamental to our basic respect for the constitutionally mandated separation of powers between our three branches of government. See *Glaze v. J.K. Williams*, 309 Kan. 562, 567-68, 439 P.3d 920 (2019) (explaining this court's efforts "to introduce more discipline into our

frequent tasks of statutory interpretation" which requires the court to "deliberately" stick to a "disciplined path . . . because it advances embedded values of judicial restraint and modesty and preserves respect for separation of powers and institutional competency").

In my view, vindicating these principles far outweighs continued adherence to a wrongly decided and badly reasoned precedent. See *Sims*, 308 Kan. at 1503-04. Especially when there are no real reliance interests at stake and the precedent has proven difficult and cumbersome to apply. As such, I would abandon the *Buggs* rule. I dissent from the majority's decision to reverse Couch's aggravated kidnapping conviction and instead, would affirm all of the convictions.

LUCKERT, C.J., and WILSON, J., join the foregoing dissenting opinion.