No. 123,650

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

CAROL SUE BURRIS,
Appellant.

SYLLABUS BY THE COURT

1.

Mistreatment of a dependent adult includes knowingly omitting or depriving an individual 18 years of age or older, who is cared for in a private residence, of the treatment, goods, or services necessary to maintain their physical or mental health when that individual is unable to protect his or her own interests.

2.

Mistreatment of a dependent adult does not require the State to prove that the offender had any independent legal duty to the victim. Once a person affirmatively assumes the role of caregiver to a dependent adult, and discourages or precludes others from filling that role, that person has the responsibility to act reasonably in fulfilling the obligations required of that role.

3.

When a dependent adult living in a private residence is unable to tend to their own needs, and the person caring for them neglects to provide or withholds life-sustaining care, with an awareness that such care is required, that caretaker may be subject to criminal prosecution for such neglect.

4.

When an individual assumes sole responsibility for the physical and mental health of a dependent adult, but neglects to provide or withholds such life-sustaining care to the point of death, that individual may be subject to criminal prosecution for the unintentional, reckless second-degree murder of that dependent adult.

5.

A prosecutor is afforded wide latitude in summarizing their case to a jury in closing argument. Discussion of the wedding vows taken between a dependent adult and their caregiver strains the bounds of that latitude to impermissibly play upon the passion and prejudice of the jury.

6.

A district court has the discretion to order a competency evaluation for a criminal defendant on its own initiative when it has a real doubt that the offender possesses the sanity or mental capacity to properly defend his or her case. The court's decision on the matter will not be disturbed absent a clearly demonstrated abuse of its sound judicial discretion.

Appeal from Coffey District Court; TAYLOR J. WINE, judge. Opinion filed March 31, 2023. Affirmed.

Caroline M. Zuschek and *Kasper Schirer*, of Kansas Appellate Defender Office, for appellant.

Steven J. Obermeier, assistant solicitor general, and *Derek Schmidt*, attorney general, for appellee.

Before ISHERWOOD, P.J., SCHROEDER and WARNER, JJ.

ISHERWOOD, J.: Michael Burris, a man who suffered from dementia and other significant health issues, died in 2017. A medical examiner later determined pneumonia to be the official cause of death with severe emaciation as a significant underlying factor. Soon after, the State charged his wife, Carol Sue Burris, with mistreatment of a dependent adult and reckless second-degree murder. A jury convicted Carol on both counts and the district court sentenced her to 125 months in prison. On appeal, Burris makes four arguments: (1) She had no legal duty to care for Michael, so her failure to provide adequate care did not violate the statutes under which she was convicted; (2) the State failed to present sufficient evidence to support a conviction of reckless second-degree murder; (3) the prosecutor committed reversible error during closing argument; and (4) the district court abused its discretion when it refused to order a competency evaluation for Carol. After carefully filtering each issue through their respective legal frameworks we decline to find reversal is warranted. Thus, both of Carol's convictions are affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Carol's neglect and Michael's deteriorating health*

In April 2016, two paramedics were dispatched to the home of Carol and Michael Burris after receiving a report that Michael fell and needed assistance. When paramedics arrived, Carol directed them to a back room of the home where they found Michael on the floor in underwear stained yellow, smelling of urine, and with sores on his legs that suggested he lay on the floor for an extended period of time. One of the paramedics, Roy Rickel, also observed that Michael was very thin, appeared to be dehydrated, and had several cuts across his arms in various stages of healing. After Carol left the room, Michael told Rickel that he remained on the floor for about two weeks after falling and resorted to cutting himself with the hope it would induce Carol to call for help. He said

Carol provided him with doughnuts and water and occasionally cleaned his urine and feces off the floor.

Michael was transported to the hospital where doctors diagnosed an infection in his leg, an ulcer caused by a pressure sore, low potassium levels, and dehydration. Michael informed a nurse that he had not eaten recently because Carol would not cook for him, but he could not call for help because Carol took his cell phone away. He also told his sister, Terry Taylor, that Carol refused to give him his cell phone and left him on the floor for several days after he asked her to call for help. Michelle Gast, a social worker for the Department for Children and Families, investigated allegations that Carol subjected Michael to neglect. Carol told Gast she felt responsible for caring for Michael, providing his meals, assisting with his toileting needs, and transporting him to medical appointments. Yet when Gast asked whether Carol gave Michael his prescribed medications, Carol said she gave him her own medications instead because she could not get him out of the house to see the doctor. Carol acknowledged Michael remained on the floor for an unknown duration after his fall but remarked that it was not possible for her to move him given the disparity in their respective sizes. When Gast inquired why Michael cut himself Carol refused to answer.

Dr. John Shell recommended Michael be discharged to Life Care Center, a nursing home facility, so he could increase his strength, ambulate on his own, and care for himself more independently before returning home. Michael believed that Life Care presented a good option but told Lucas Markowitz, a social worker, that he wanted to speak with Carol first. Following his conversation with Carol, Michael expressed a change of heart about his care and requested to return home immediately. He did agree to receive home health services.

Michael remained in the hospital for nine more days and was then transported home by paramedic Aaron Williams. Upon their arrival, Carol cautioned Williams to not

disturb their dogs and to get Michael inside as quietly as possible. Williams tried to give Carol the necessary instructions for Michael's care, but she grew annoyed and spoke over him. The hospital's home health department called the Burrises to speak with Williams while he was at the house, but Carol refused to allow the communication. Williams left the residence fearing that Michael was at risk of neglect, so he filed a report with the Kansas Department for Children and Families.

Paramedics returned to the home nine days later in response to a call from Carol that Michael fell again. Roy Rickel was again among the responders and found Michael in a position much like that he was in following his first fall. This time, Michael apparently fell out of his chair three or four hours before the paramedics arrived. They transported him back to the hospital, and Dr. Shell diagnosed him with high levels of potassium. Michael was discharged to Life Care Center and treated for elevated potassium levels, diabetes, and hypothyroidism. He was also diagnosed with mild-to-moderate dementia. The facility discharged Michael roughly three weeks later and sent him home with prescriptions for Synthroid, Metformin, Mirtazapine, and Amlodipine to be taken daily. Carol told Life Care that home health assistance was unnecessary because she planned to care for Michael herself.

Michael's sister, Terry, called from time to time to check on his health after he returned home, but no one answered her calls for days at a time, so she finally left a message in which she threatened to call the police for a welfare check. About 10 minutes after Terry left that message, Carol called back and permitted her to speak with Michael. Terry offered to allow the couple to move into her guest house so they could be closer to her, but Carol declined. Carol also complained to Terry that she could not even take care of herself well because of the constant care and attention Michael required from her. Terry encouraged her to explore government-funded home healthcare programs, but Carol dismissed the suggestions because neither she nor her dogs liked when healthcare professionals visited the home.

Around this time, Gast visited the Burris' home to check on Michael's well-being, but Carol slammed the door in her face. As Gast returned to her car, Carol yelled from the porch that they were tired of people coming to their house and wanted to be left alone. Gast again requested to see Michael, but Carol claimed he did not have any clothing on. When Gast suggested that she simply cover him with a blanket, Carol asserted that if Gast came inside she did not have a place to put her dogs. Gast persisted but Carol remained steadfast in her refusal and then claimed that a visit was not possible because Michael was asleep, and she needed to leave to get his medication. Gast finally left without seeing Michael. She advised Adult Protective Services (APS) that she substantiated the allegations of Carol's abuse of Michael, and that Carol "failed to obtain medical services for [Michael] after he fell on the floor despite his request for assistance and [that he cut] himself to get medical attention."" APS sent notices of the report to Carol and Michael.

B. *Michael's third trip to the hospital and death*

Paramedics were ultimately dispatched to the Burris' home for a third and final time. When they entered Michael's room at the back of the house, they were overwhelmed by the stench of stale urine and feces. When one of the paramedics, Jared Saiz, reached for a light switch, Carol shoved his hand away and told him not to turn the light on. Michael was lying on the couch wrapped in layers of blankets, with his eyes closed, and mouth open gasping for air. Saiz peeled back the blankets and observed that Michael was severely thin with his flesh sucked up under his rib cage. He assessed Michael for a possible intubation and noticed Michael's mouth was completely dry. Carol claimed that Michael ate four meals—which consisted of her pouring juice into his mouth—and spoke with her just the day before. When Saiz loaded Michael onto the stretcher to take him to the hospital, he noticed Michael's blankets were caked in feces.

Dr. Christopher Jarvis treated Michael at Coffey County Hospital and immediately observed Michael was extremely emaciated and covered in human waste. Jarvis, who had practiced medicine in the area for 20 years, had never witnessed a person as emaciated as Michael. Once Michael was stabilized, Jarvis ordered his transfer to Stormont Vail Hospital in Topeka as it was equipped to provide a higher level of care. A charge nurse who examined Michael upon his arrival at Stormont Vail noted a litany of health problems including several pressure injuries, open peeling areas on his back, dirt covering his body, matted hair on his head, foul-smelling exposed necrotic tissue, round open wounds on his buttocks and legs, bruises on his right forearm, and severe emaciation. Terry traveled to Topeka to visit Michael and then called Carol who remarked that she thought Michael had already passed. Carol never visited Michael before he died.

Michael died only a few hours after his arrival in Topeka. He was returned to the Coffey County Hospital, where Dr. Jarvis declared pneumonia to be the official cause of death and that it was the product of his critically emaciated state. Michael's driver's license reflected he weighed 250 pounds in 2012; at his autopsy, he weighed only 124 pounds. Jarvis classified Michael's death as a homicide because given his severe emaciation "it seemed appropriate that whoever was caring for him would have sought care long before he reached that point so [*sic*] neglect." Dr. Erik Mitchell, a forensic pathologist, later found a breakdown of Michael's skin surface consistent with long periods of immobility and determined that he failed to sustain an adequate caloric intake over a significant period of time as required to maintain his physical structure.

C. *Criminal investigation, pretrial proceedings, and trial of Carol Burris*

The Coffey County Sheriff's Department executed a search warrant on the Burris' home and Undersheriff Thomas Johnson interviewed Carol. During their discussion, Carol was consistently distracted by her dogs' need to be kenneled and commented that

she refused home healthcare services because her dogs did not like them. Carol also told Johnson that she did not give Michael his prescribed medications because she could not get to the doctor to have them filled. Officers recovered Michael's discharge summaries and care instructions from Carol's bedroom.

In September 2018, the State charged Carol with one count each of mistreatment of a dependent adult and reckless second-degree murder. During a pretrial hearing the district court inquired whether either party intended to request a competency evaluation. Defense counsel responded that he initially considered requesting one but ultimately concluded it was unnecessary because he did not intend to raise mental impairment as a defense. The prosecutor remarked that the State also did not intend to request an evaluation.

The case proceeded to trial, and the State presented testimony from paramedics, hospital staff, medical examiners, Michelle Gast, Terry Taylor, and law enforcement personnel. It also admitted the photographs from Michael's autopsy and various items obtained from the search of the Burris' home into evidence.

During closing arguments, the prosecutor summarized the State's evidence and commented on what he perceived to be a lack of evidence from Carol:

> "You heard no evidence from her. She had two and a half hours. You heard that she said—well, there was questions from the defense insinuating that he said that he had a loss of appetite, refused food, right? You heard no evidence of that. None. Not one person testified to that, that that happened."

The prosecutor then closed with the following remarks:

> "She absolutely had the capability of making a phone call and asking someone for help. And the fact that she didn't under these circumstances is reckless indifference, extreme

> indifference. Reckless extreme indifference to human life. There is just no other way to see it. The evidence is overwhelming just like the smell was when those EMTs went into that room."

The jury returned guilty verdicts for both charged offenses, and the district court sentenced Carol to a prison term of 125 months.

Carol timely brings the case to us for an analysis of her allegations that various trial errors demand reversal of her convictions.

LEGAL ANALYSIS

Carol's failure to provide life-sustaining care for Michael after unequivocally assuming the responsibility to do so properly subjected her to prosecution for both charged offenses.

In her first claim of error, Carol contends that she was under no legal obligation to care for Michael and, therefore, neither her failure to address his needs, nor his death, subject her to criminal liability. She relies on K.S.A. 2022 Supp. 21-5201(b) as the foundation for her assertion. That provision states that "[a] person who omits to perform an act does not commit a crime unless a law provides that the omission is an offense or otherwise provides that such person has a duty to perform the act." K.S.A. 2022 Supp. 21-5201(b). The district court was not given the opportunity to analyze this issue, but we may consider issues raised for the first time on appeal when the newly asserted claim is a purely legal one. *State v. Rhoiney*, 314 Kan. 497, 500, 501 P.3d 368 (2021).

Standard of Review

The issue we must resolve is whether Carol's extreme neglect of Michael places her within the scope of K.S.A. 2016 Supp. 21-5417, mistreatment of a dependent adult, and ultimately, K.S.A. 2016 Supp. 21-5403(a)(2), reckless second-degree murder.

Statutory interpretation involves a question of law over which we exercise unlimited review. *State v. King*, 297 Kan. 955, 971, 305 P.3d 641 (2013). When a statute is plain and unambiguous, a court merely interprets the language as it appears; it is not free to speculate and cannot read language into the statute which is not readily found therein. *State v. Brown*, 295 Kan. 181, Syl. ¶ 5, 284 P.3d 977 (2012). "[I]n construing statutes, statutory words are presumed to have been and should be treated as consciously chosen, with an understanding of their ordinary and common meaning and with the legislature having meant what it said." *State v. Bennett*, 26 Kan. App. 2d 157, 162, 980 P.2d 597 (1999) (quoting *International Ass'n of Firefighters v. City of Kansas City*, 264 Kan. 17, 31, 954 P.2d 1079 [1998]).

Carol was charged and convicted under K.S.A. 2016 Supp. 21-5417(a)(3) which defines mistreatment of a dependent adult as the knowing "omission or deprivation of treatment, goods or services that are necessary to maintain the physical or mental health of such dependent adult." She contends that the provision fails to specifically identify *who* bears the responsibility to act, thus it failed to impose any duty upon her and, in the absence of such a duty, she cannot be held criminally liable for failing to ensure Michael received life-sustaining care.

We begin by looking at who the statute is intended to protect. The Legislature clarified that with its definition of a "dependent adult," which states, as relevant for our precise inquiry, that it means "an individual 18 years of age or older who is unable to protect the individual's own interests," and specifically includes persons, such as Michael, who are "cared for in a private residence." K.S.A. 2016 Supp. 21-5417(g)(2)(B).

Next, we consider the conduct it is intended to address, the "omission" or "deprivation" of life-sustaining care. "Omission" is understood to mean "apathy toward or neglect of duty." Webster's Third New International Dictionary 1574 (3d ed. 1993).

"Deprivation" is "a withholding of something that one needs, esp. in order to be healthy." Black's Law Dictionary 556 (11th ed. 2019).

Finally, we note that the neglect must occur or the care must be withheld knowingly. K.S.A. 2022 Supp. 21-5202(i) defines 'knowing' conduct in the following manner:

> "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."

Thus, according to the plain language of K.S.A. 2016 Supp. 21-5417(a)(3), when an adult living in a private residence is unable to tend to their own needs, and the person caring for them neglects to provide or withholds life-sustaining care, with an awareness that such care is required, that caretaker may be subject to prosecution.

Next, we filter the facts of this case through that framework. It is undisputed that Michael was just shy of 70 years old, lived at home with only his wife, and suffered from a variety of health issues including moderate dementia and the inability to ambulate independently. He required daily physical and medical assistance, together with the standard human necessities of nutrients, hydration, and hygiene.

The record before us also reflects that not only did Carol refuse to allow Michael to reside in a nursing facility where he could receive the necessary care, she likewise rejected offers for assistance in their home from either a family member or home health services agencies. Thus, by her own design, Carol was the individual solely responsible for ensuring Michael's needs were met.

Finally, the evidence established acts of neglect on Carol's part or decisions to otherwise withhold the care Michael required, with an awareness of the nature of her actions. On two separate occasions, Carol called paramedics to the home after Michael suffered a fall but only after Michael lay in the position in which he had fallen for a significant number of days. On both occasions it was clear to paramedics that Carol scarcely fed or moved Michael and left him to languish in his own waste. The evidence further bears out that Michael was admitted to the hospital following both incidents and upon discharge received specific care instructions as well as multiple prescriptions to be taken daily. Yet, Carol made the conscious decision to administer her own medication to him instead. There is every indication that each time Michael went home to Carol, she returned him to the same room, closed the door, and turned her back on all responsibilities associated with his care. Michael eventually succumbed to complications arising out of Carol's extreme neglect.

When Carol insisted on acting as the sole resource for Michael's needs, she had the responsibility to ensure those needs were adequately met. Her failure to honor her obligation properly subjected her to prosecution under K.S.A. 2016 Supp. 21-5417 for mistreatment of a dependent adult.

We find support for our conclusion in *State v. Young*, 26 Kan. App. 2d 680, 684, 11 P.3d 55 (1999), where Young was convicted of the mistreatment of John, a dependent adult, in violation of the prior version of the statute, K.S.A. 21-3437 (Furse 1995). That provision stated, in pertinent part, that the offense occurred when a caretaker or another person knowingly and intentionally omitted or deprived a dependent adult of treatment, goods, or services necessary to maintain their physical or mental health. On appeal, Young challenged the sufficiency of the evidence to support her conviction. Similar to the facts before us, John resided in Young's home and she admitted to being John's caretaker. The reviewing court found those two factors offered compelling evidence to establish that Young knowingly acted or failed to act. It then went on to find that

photographic evidence and testimony from the paramedics, the emergency room nurse, treating physicians, and law enforcement officers which detailed John's physical condition and living situation supported a finding that Young deprived John of treatment, goods, or services that were necessary to his health.

An argument similar to what Carol presents to us was before the Supreme Court for consideration in *State v. Walker*, 244 Kan. 275, 768 P.2d 290 (1989), although in relation to the offense of child endangerment. In that case, Walker was the stepmother of two young boys and tasked with the responsibility of caring for them during the day while their father was at work. Unfortunately, Walker exploited that time with the boys to inflict physical abuse on one of the children. She also forced them to perform oral sex on her. Finally, she failed to properly clothe, bathe, or feed the children and refused to ensure they received proper medical care or their necessary medications. A jury ultimately convicted her of two counts each of endangerment of a child, among other things.

On appeal, Walker alleged there was insufficient evidence to sustain her convictions because the State failed to prove that, as a stepmother, she had a legal duty to care for the children. To sustain a conviction for endangerment under the statute in effect at the time, the State needed to prove that Walker willfully and unreasonably caused or permitted a child under the age of 18 years to be placed in a situation in which its life, body, or health may be injured or endangered. K.S.A. 21-3608(1)(b) (Ensley 1981) (currently K.S.A. 2022 Supp. 21-5601[a]). According to Walker, as a mere stepparent she was not legally required to care for the children and, therefore, could not be convicted of child endangerment despite her actions towards and actual relationship to the children, including her voluntary assumption of the role of caregiver. The Supreme Court was not persuaded and noted that the statute does not require the State to prove that the offender had any independent legal duty to the victim, only that her conduct was willful and unreasonable. Thus, because Walker undertook the responsibility to care for the children,

she had the duty to carry out that task reasonably and avoid the creation of circumstances injurious to the boys. *Walker*, 244 Kan. at 281.

The court revisited *Walker* roughly a decade later while distinguishing it from *State v. Wilson*, 267 Kan. 550, 562, 987 P.2d 1060 (1999). In doing so, the court observed that *Walker* presented a very specific situation where Walker asserted that she was not legally required to care for the children and, therefore, was arguably insulated from a claim of child endangerment. The court found this argument "untenable" and noted that because Walker affirmatively undertook the responsibility to care for the children she had the obligation to carry out those tasks reasonably and not create a situation which posed a risk of harm to the children. *Wilson*, 267 Kan. at 562. In support of its conclusion the court highlighted the principles articulated by LaFave and Scott, 1 Substantive Criminal Law § 3.3(a)(1), (4), and (5), pp. 282-88 (1986) ("Absent a special relationship, one generally has no legal duty to aid or care for another person; once a person steps into the role of caregiver, such that others are discouraged or precluded from filling that role, that person has a duty to act reasonably in fulfilling the adopted role."). *Wilson*, 267 Kan. at 562.

We see no reason not to extend that concept to the protection of other vulnerable victims in the context of mistreatment of a dependent adult. The plain language of that provision likewise imposes no independent duty, but when an individual assumes that responsibility, he or she has an obligation to ensure that the needs of the individual, for whom they are solely responsible, are reasonably met. We note that such an application has been made in other jurisdictions. In *State v. Gargus*, 462 S.W.3d 417, 422 (Mo. Ct. App. 2013), Gargus was convicted of elder abuse in the first degree for subjecting her elderly mother to neglect to the point of death. On appeal, Gargus argued the evidence was not sufficient to sustain her conviction, in part, because she owed no duty of care to her mother.

Elder abuse in the first degree under Mo. Rev. Stat. § 565.180.01, provides: "A person commits the crime of elder abuse in the first degree if he attempts to kill, knowingly causes or attempts to cause serious physical injury . . . to any person sixty years of age or older . . . ." Criminal liability is premised on conduct involving voluntary acts which include "[a]n omission to perform an act of which the actor is physically capable." Mo. Rev. Stat. § 562.011.2(2). Nevertheless, a "person is not guilty of an offense based solely upon an omission to perform an act unless the law defining the offense expressly so provides, or a duty to perform the omitted act is otherwise imposed by law." Mo. Rev. Stat. § 562.011.4. In resolving the question of whether the law imposed a duty to act to preserve the life of another, the court observed that the provision's commentary included an example of liability for manslaughter '"based on the failure to perform some act, such as supplying medical assistance to a close relative.'" 462 S.W.3d at 422. Thus, the court determined that when the legislation was drafted, the legislature explicitly contemplated the circumstances present in Gargus' case. Mo. Rev. Stat. § 562.011, Comment to 1973 Proposed Code, Subsection 4. *Gargus*, 462 S.W.3d at 422. Once it found the duty existed, the court determined that it was triggered in Gargus' case solely by her voluntary assumption of her mother's care, where her mother was a vulnerable person dependent on Gargus for basic life-sustaining measures including food, clothing, shelter, and medical care. 462 S.W.3d at 423-24.

Gargus was preceded by a somewhat similar finding in *State v. Shrout*, 415 S.W.3d 123, 125 (Mo. Ct. App. 2013). In that case, Shrout argued she could not be held criminally liable for involuntary manslaughter following the death of her mentally handicapped adult son because, while the law imposed an obligation on parents to protect and care for their minor children, no such duty of care existed for adult children. The court rejected this argument and found that a duty of care arose when Shrout voluntarily sought out custody of her son in juvenile court and accepted the same with a full awareness of his physical and mental challenges and the care required for those conditions. See also *Woods v. State*, 361 Ga. App. 259, 263, 863 S.E.2d 738 (2021)

(Evidence was sufficient to support Woods' conviction for neglect of a disabled person, despite Woods' argument that he, as the son of victim's long-time caretaker, lacked a legal duty to obtain medical care for the victim; there was evidence that Woods voluntarily offered some level of care to the victim and interfered with efforts by others to seek medical treatment for her.); *State v. Stubbs*, 271 N.C. App. 778, 785, 845 S.E.2d 125 (2020) (Sufficient evidence supported finding that Stubbs voluntarily assumed responsibility for her mother, so as to be mother's caretaker, to support conviction for neglect of elder adult by caretaker resulting in serious physical injury.).

Carol and Michael were the sole occupants of their private residence, and Carol was keenly aware of the care Michael required. Carol demanded to be solely responsible for his needs and refused assistance from various medical providers. When she did so, it came with the obligation to ensure he received that care. Correspondingly, when she neglected to provide those services and withheld the food, hydration, and medical care he required to survive, she was properly subject to criminal prosecution.

Carol reiterates the same argument with respect to her conviction for reckless second-degree murder—that she cannot be held responsible for failing to perform a duty that no law or contract imposed upon her. And where she never assumed the duty to provide life-sustaining care for Michael, she cannot be held criminally liable when a lack of care led to his death. "Reckless" conduct is present when the offender "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). A formal duty of care is unnecessary to sustain a conviction under K.S.A. 2022 Supp. 21-5403(a)(2). The statute simply defines the offense as "the killing of a human being . . . recklessly under circumstances manifesting extreme indifference to the value of human life," and a failure to act is included within its reach. K.S.A. 2022 Supp. 21-5403(a)(2).

State v. Davidson, 267 Kan. 667, 987 P.2d 335 (1999), offers some measure of guidance in addressing Carol's claim. In that case, Davidson was convicted of reckless second-degree murder and endangering a child after her Rottweiler dogs attacked and killed a young boy. On appeal she argued her conduct did not constitute reckless second-degree murder as a matter of law because she merely failed to confine the dogs, an act better characterized as a negligent omission sufficient to support a charge of involuntary manslaughter, as opposed to the manifestation of an extreme indifference to human life required for reckless second-degree murder.

An assessment of her actual conduct reflected that she owned several dogs with the potential for aggressive behavior and she fostered such behavior by failing to properly train them. Various experts attempted to offer assistance with training the dogs and instructing Davidson on what measures to take to head off potentially troublesome situations, but Davidson rebuffed their efforts. Thus, she was aware of the risks inherent to her situation, had access to information that would help her establish a safe environment, and ignored various warning signs that emerged as a result of her failure to properly train and confine the dogs.

Similarly, Carol knew from conversations with various medical professionals, as well as Michael's hospital discharge papers, what precise medical needs must be met. As a fellow human being she was aware of the basic components required to sustain life—nourishment, hydration, and hygiene. Yet, she failed or refused to act in accordance with that information despite its clearly evident catastrophic results. Carol, like Davidson, was properly prosecuted for reckless second-degree murder as her conduct undeniably meets the classification of an extreme indifference to the value of human life.

As a final matter in this issue, Carol argues, for the first time on appeal, that she cannot be held criminally liable for breach of an implied legal duty to care for Michael because to do so would violate her 14th Amendment due process right to fair warning.

Generally, constitutional issues cannot be raised for the first time on appeal. *State v. Daniel*, 307 Kan. 428, 430, 410 P.3d 877 (2018) (citing *State v. Godfrey*, 301 Kan. 1041, 1043, 350 P.3d 1068 [2015]). There are several exceptions to this general rule, including: (1) The newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) resolution of the question is necessary to serve the ends of justice or to prevent denial of fundamental rights; and (3) the district court was right for the wrong reason. *State v. Johnson*, 309 Kan. 992, 995, 441 P.3d 1036 (2019).

Kansas Supreme Court Rule 6.02(a)(5) (2022 Kan. S. Ct. R. at 36) requires an appellant to explain why an issue that was not raised below should be considered for the first time on appeal. *Johnson*, 309 Kan. at 995. Our Supreme Court has repeatedly warned that Rule 6.02(a)(5) would be strictly enforced, and litigants who failed to comply with this rule risked a finding that the issue was improperly briefed, and it would then be deemed waived or abandoned. See *Daniel*, 307 Kan. at 430 (citing *Godfrey*, 301 Kan. at 1043-44; *State v. Williams*, 298 Kan. 1075, 1085, 319 P.3d 528 [2014]).

Carol does not even acknowledge that the issue is being raised for the first time on appeal, thus there is no corresponding analysis for how one or more of the exceptions enables her to clear the procedural hurdles she faces. As an appellate court, our decision to review an unpreserved claim is a prudential one, and even if one of the exceptions were satisfied, we are under no obligation to review the newly asserted claim. *State v. Robison*, 314 Kan. 245, 248, 496 P.3d 892 (2021); see also *State v. Gray*, 311 Kan. 164, 170, 459 P.3d 165 (2020) (Declining to reach an unpreserved claim and finding the failure to present the argument to the district court "deprived the trial judge of the opportunity to address the issue in the context of this case and such an analysis would have benefitted our review."). Finding Carol's constitutional claim is not preserved, we decline to exercise our appellate jurisdiction to address it for the first time on appeal.

The resolution Carol requests from us in this overall issue constrains the reach of both statutes under which she was convicted. Because Carol insisted upon independently managing Michael's caretaking needs, separate and apart from her relationship as his spouse, she fell within the ambit of the statute. She is not entitled to the relief she seeks.

The State presented sufficient evidence to prove beyond a reasonable doubt that Carol committed reckless second-degree murder.

In her next claim of error, Carol contends the State failed to sustain its burden to prove that she "'consciously disregarded a substantial and unjustifiable risk' that Michael would die." This court reviews challenges to the sufficiency of evidence to determine whether, considering the entire record and viewed in the light most favorable to the prosecution, a reasonable fact-finder could have found the accused guilty beyond a reasonable doubt. *State v. Woods*, 301 Kan. 852, 874, 348 P.3d 583 (2015). In doing so, we do not reweigh the evidence, resolve evidentiary conflicts, or make witness credibility determinations. *State v. Gonzalez*, 307 Kan. 575, 586, 412 P.3d 968 (2018).

Carol stands convicted of unintentional, reckless second-degree murder for Michael's death. Such killings are not purposeful, willful, or knowing, but result from an act performed with knowledge that the victim is in imminent danger, although the death is not foreseen. *State v. Johnson*, 304 Kan. 924, Syl. ¶ 5, 376 P.3d 70 (2016). Under K.S.A. 2022 Supp. 21-5403(a)(2), the result—the killing—must be unintentional, but borne out of reckless conduct. See *State v. Deal*, 293 Kan. 872, 883-84, 269 P.3d 1282 (2012). Carol asserts that reversal of her conviction is warranted because she was never made aware of "the severity of Michael's condition, or the dangers of not doing more."

The State presented a significant amount of evidence which indicated Carol was on notice, or otherwise aware, that Michael required greater care than she was providing. First, the discharge statement from Michael's first hospital visit, that Carol kept on the

dresser in her bedroom, ordered that Michael receive a "diabetic diet" consisting of "regular texture, regular liquids," and outlined the six different medications he needed to take each day. Yet Michael lost over half of his body weight in the four years preceding his death, and Carol chose to not fill the listed prescriptions but simply administer her own medications to him instead. Additionally, those documents directed that Michael needed to visit his treating physician and secure physical therapy, occupational therapy, and speech therapy through outpatient services. Carol took none of those steps.

Additionally, paramedic Roy Rickel testified that Michael only told him about Carol's neglect after she left the room, suggesting his awareness that it would upset Carol if he told others about her lack of care. Michelle Gast testified that Carol slammed the door in her face and offered several excuses for why Gast could not speak with Michael, which arguably indicates Carol did not want Gast to witness Michael's poor health and the conditions in which he existed. Also, after Gast reported her allegations of neglect to APS, a copy of the report, in which Carol was specifically identified as a perpetrator of abuse and neglect, was sent to the Burris' home. That report noted that Carol "failed to obtain medical services for the involved adult after he fell on the floor despite his request for assistance and cutting on himself to get medical attention."

Finally, Carol's awareness of or appreciation for "the severity of Michael's condition, or the dangers of not doing more" was not merely readily ascertainable through the aforementioned formal measures, but also from a fundamentally human level. At the time of his death, Michael was severely emaciated and catastrophically dehydrated. By contrast, Carol's dogs were well cared for and enjoyed meals courtesy of Carol's bi-weekly Schwan's delivery. Thus, she possessed a general understanding of how to provide life-sustaining care to other living things.

A plaque of dirt and a crust of urine and feces coated Michael's body, and he had patches of necrotic tissue and suffered from multiple deep tissue injuries. The latter of

these afflictions is incredibly painful and likely induced cries of discomfort. Importantly, none of these conditions develop within a day or two but manifest over a period of several weeks. The room he was relegated to was dark, filthy, and bore every indication Carol simply closed the door and left Michael to die.

Viewing the evidence in a light most favorable to the State, as we are required to do under our governing standard of review, it does not indicate Carol simply failed to ask for help. Rather, it is a remarkable illustration of someone who exhibited extreme indifference to the value of human life, and another person died as a result of that neglect. Carol's conviction for reckless second-degree murder is affirmed.

The prosecutor's closing argument does not contain reversible error.

Carol next contends the prosecutor committed reversible error during closing arguments. She first accuses him of resorting to an inflammatory line of argument that impermissibly focused on their wedding vows. Next, she claims improper comments were uttered about her choice to not testify. Her final claim of error is that the prosecutor improperly commented on the strength of the State's evidence against her.

We review allegations of prosecutorial error using a two-step process. First, we must determine whether an error occurred. Next, if an error is identified, we consider whether it requires reversal. *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016). A prosecutor errs when he or she exceeds the wide latitude they are afforded by misstating the law or arguing facts not based in evidence. *State v. Wilson*, 309 Kan. 67, 78, 431 P.3d 841 (2018). An error requires reversal if, after an application of the constitutional harmless error inquiry, it is apparent the challenged remarks prejudiced the accused's due process rights to a fair trial. *Sherman*, 305 Kan. at 109. This means the State must prove there is "no 'reasonable possibility'" the errors contributed to the verdict.

State v. Berkstresser, 316 Kan. 597, 606, 520 P.3d 718 (2022). We will address each of Carol's allegations in turn.

A. *The prosecutor's comment on wedding vows*

This claim of error arises out of the following portion of the prosecutor's closing argument:

> "I take thee to be my wedded husband, to have and to hold from this day forward, for better for worse, for richer for poorer, in sickness and in health, to love and to cherish till death do us part.
>
> . . . .
>
> "But here's the thing, whether you're married 45 years, 30 years, or ten minutes, a marriage is defined by certain things. Lot of people think it's defined by that wedding day, right, when the dress is so pretty, when the suit is all pressed, when the flowers smell so good, and the cake tastes so sweet, right. The reality is the marriage isn't defined by that day.
>
> "The marriage is defined by when one is at their lowest, the darkest moments, when they are in despair, when they are vulnerable, and when they are in their most need. That's when a marriage is defined because then the question is those hands that held each other on that wedding day, are they still holding each other. That's a question you should ask as you deliberate when considering whether Miss Burris had extreme indifference to the human life of Mr. Burris."

Carol claims this passage illustrates an effort by the prosecutor to inflame the passion of the jury and distract from the proper matter at hand. Closing remarks from a prosecutor which serve to inflame the emotions or prejudices of a jury and shift its focus from its duty to decide the case on the evidence and controlling law are barred. *State v. Nesbitt*, 308 Kan. 45, 56, 417 P.3d 1058 (2018).

As part of the closing arguments in *Nesbitt*, the prosecutor described the 100-year-old victim of rape and felony murder as her family's "treasure." 308 Kan. at 56. The

Kansas Supreme Court held these remarks were erroneous because they "had no purpose other than inflaming the passions of jurors, distracting them from their task." 308 Kan. at 57. Carol also directs us to *State v. Henry*, 273 Kan. 608, 44 P.3d 466 (2002), where Henry was on trial for the rape and murder of a woman. After the victim's mother testified, the prosecutor told the jury to "think about Mother's Day yesterday, her mom how she must have felt. How [the victim] will never have a chance to be a mother, this young professional sharp, security conscious woman . . . ." 273 Kan. at 640. The Kansas Supreme Court again found that the comments were irrelevant to the jury's fact-finding duties, and the prosecutor clearly intended to fan the flame of passion and prejudice. 273 Kan. at 641. Carol analogizes the prosecutor's comments in her case with those in *Nesbitt* and *Henry* and asserts that whether the hands that held each other on the Burris wedding day were still holding one another was irrelevant to a determination of whether the State satisfied its burden of proof.

The State argues the prosecutor's comments were distinguishable from those deemed problematic in the aforementioned cases because here, the prosecutor explicitly told the jury not to make its determination based on sympathy for the victim and directed it to the jury instruction that contained the same order. The State also highlights the prosecutor's comment which advised the jury to confine its deliberations to only the facts presented and asserts that statement is a salve to any error attributable to the challenged comments. We are not persuaded. The allusion to the couple's wedding day had no bearing on the matter at hand. Rather, the prosecutor's comments conflated the vows Carol took on her wedding day with her responsibility to ensure that Michael received the care she assured him, his sister, and medical professionals that she would provide. The jury's task was not to determine whether Carol violated her vows—it was to determine whether Carol violated the law. The prosecutor's inflammatory remarks strayed beyond the latitude he was allowed in presenting his case and distracted the jury from its obligation.

In accordance with our dual pronged standard of review, having identified an error, we must now assess whether it necessitates reversal of Carol's convictions. An error does not require reversal if the State shows "beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, i.e., where there is no reasonable possibility that the error contributed to the verdict." *State v. Ward*, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 (2011). Carol contends the prosecutor's comments amount to reversible error because they essentially asked the jury to subject Carol's behavior to a moral judgment.

Returning to *Nesbitt*, after finding the prosecutor's "treasure" comment erroneous, the court addressed reversibility. 308 Kan. at 56. It concluded that the State's argument was otherwise "entirely appropriate" and noted that, following closing arguments, the district court reminded the jury that the statements made by counsel in closing arguments were not evidence for the jury to consider. 308 Kan. at 57. The court held that "[g]iven the limited nature of the prosecutor's mistake, it would be unreasonable to believe that the comment caused reversible prejudice." 308 Kan. at 57. Similarly, in *State v. Lowery*, 308 Kan. 1183, 1208, 427 P.3d 865 (2018), the Kansas Supreme Court found that the prosecutor made an improper "golden rule" argument when they suggested the jury place themselves in the victim's position. On reversibility, the court found the single error was but a small part of a two-week trial and noted that the prosecutor also reminded the jury that it could only consider those things testified to by witnesses and exhibits admitted into evidence. Then, following closing arguments, the district court informed the jury it must disregard statements made by counsel that were not supported by the evidence. For those collective reasons, the court determined the prosecutor's lone error did not require reversal. 308 Kan. at 1212. Finally, in *State v. McGee-Darby*, No. 118,776, 2019 WL 1868323, at *7-9 (Kan. App. 2019) (unpublished opinion), a panel of this court held the prosecutor erred when he told the jury to consider the fact that the victim was "broken" during her testimony, characterizing it as an improper appeal to the jurors' emotions which distracted from the facts of the case. But in its reversibility analysis, the panel

noted that the district court instructed the jury to disregard statements by counsel that were not supported by the evidence. Moreover, in the defendant's closing, he rebutted the State's erroneous comments and provided an alternative interpretation of the victim's demeanor. Thus, the State's "broken" comment was harmless and did not warrant reversal. 2019 WL 1868323, at *10.

Many of the curative factors from *Nesbitt*, *Lowery*, and *McGee-Darby* are also present here. First, the comment was a small part of a lengthy closing argument that occurred at the end of a four-day trial and, after it was made, the prosecutor told the jury it must confine its decision making to the facts presented. This reminder, much like the prosecutor's comments in *Lowery*, helped clarify the jury's duties and dilute any prejudicial effects associated with the erroneous comment. Next, the record reflects that Carol's counsel rebutted the prosecutor's wedding vow comments when he told the jury, "You are presented with a woman who took on the care of her husband *for better or for worse* after 45 years of marriage. She did the best she could. She tried. Maybe she didn't do a very good job. . . . But she did not see alternatives." (Emphasis added.) This responsive remark, like the prosecutor's, also invoked the couple's wedding vows and, in that regard, creates a parallel with *McGee-Darby*, where defense counsel addressed the State's erroneous comments about the victim's appearance and provided an alternative explanation. Finally, the district court informed the jury that counsel's statements were not evidence and "[i]f any statements are made that are not supported by evidence, they should be disregarded." This instruction, like the instructions in *Nesbitt*, *Lowery*, and *McGee-Darby*, favors the State. Each of these factors weighs in the State's favor and supports a finding that there is "no 'reasonable possibility'" the error contributed to the verdict. See *Berkstresser*, 316 Kan. at 606.

B. *The prosecutor's comment on Carol's right to not testify*

In her next claim of error Carol contends the prosecutor improperly commented on her choice not to testify when he stated, "You heard no evidence from her." The State asserts that in making this argument Carol extracts the comment from its proper context but that once the two are reunited, its innocuousness is evident.

When analyzing a prosecutor's statements for error, we do not isolate the challenged comments but consider them in the context in which they were made. *State v. Butler*, 307 Kan. 831, 865, 416 P.3d 116 (2018). Fair comment on trial tactics and interpretation of evidence is allowed, so long as care is taken by the State not to inappropriately denigrate opposing counsel or inject personal evaluations of the honesty of witnesses. *State v. Crum*, 286 Kan. 145, 150, 184 P.3d 222 (2008).

The prosecutor's comment that the jury "heard no evidence" from Carol occurred during the following portion of his closing argument:

> "*You heard no evidence from her*. She had two and a half hours. You heard that she said—well, there was questions from the defense insinuating that he said that he had a loss of appetite, refused food, right? You heard no evidence of that. None. Not one person testified to that, that that happened. And more importantly if that had happened, in two and a half hours she talked about everything. In two and a half hours, don't you think that would have been the first thing, look, he wanted to die. Look, he didn't want to eat. Look, he had a loss of appetite. She doesn't say that. She says he didn't have a problem other than his teeth but I just chopped it up into small bits." (Emphasis added.)

Viewing the comment in its broader context, the State's remark simply served to highlight for the jury that Carol's counsel merely stated or insinuated that Michael experienced a loss of appetite or refused food, it had no foundation in the evidence and amounted to nothing more than comments from counsel. Such remarks do not constitute error. Jury deliberations are restricted to consideration of the evidence presented and the

law governing the issues. The challenged remark was simply a reminder to the jury of that responsibility.

C. *The comment concerning the strength of the evidence*

Carol's third objection emanates from the prosecutor's final comment, when he stated, "The evidence is overwhelming just like the smell was when those EMTs went into [Michael's] room." According to Carol, this amounts to an impermissible airing of the prosecutor's personal opinion about the weight of the evidence.

The wide latitude permitted a prosecutor in discussing the evidence during closing argument in a criminal case includes at least limited room for rhetoric and persuasion, even for eloquence and modest spectacle. *State v. Chandler*, 307 Kan. 657, 688, 414 P.3d 713 (2018). But prosecutors may not share their personal opinion about the guilt or innocence of the accused. *State v. Peppers*, 294 Kan. 377, 399, 276 P.3d 148 (2012). Carol claims a similar remark was determined to be problematic in *Peppers*. There, the prosecutor told the jury that it should find Peppers guilty of murder "because he did it." 294 Kan. at 399. On appeal, the Supreme Court classified it as an improper expression of personal opinion because prosecutors are restricted to "something akin to 'the evidence shows defendant's guilt' in order to make a statement merely directional." 294 Kan. at 400.

The prosecutor's comment here is distinctly different from that at issue in *Peppers*. There, the prosecutor shared his opinion on the ultimate factual question in the case—whether Peppers was the perpetrator—without referring to the weight of supporting evidence. By contrast, the prosecutor here said the evidence of Carol's guilt was overwhelming—almost the precise comment the *Pepper*s court recommended that prosecutors make.

In sum, the prosecutor erred when he conflated Carol's duty under her wedding vows with her legal duty of care, but this error was harmless. The remaining two comments with which Carol takes issue were not erroneous.

The district court did not abuse its discretion when it failed to independently order a competency evaluation for Carol.

Carol's fourth and final contention of error consists of a claim that the district court should have taken the initiative to order a competency evaluation for her. She asserts the court failed to appreciate the power and obligation it possessed to order the evaluation "even though both her attorney and the State elected not to do so."

Carol never entered such an objection when she was in front of the district court. But she argues we should still review her claim because it implicates her fundamental due process rights. As stated earlier in this opinion, constitutional grounds for reversal asserted for the first time on appeal are not properly before the appellate court for review, but there are exceptions: (1) The newly asserted claim involves only a question of law arising on proved or admitted facts; (2) consideration of the claim is necessary to serve the ends of justice or to prevent the denial of fundamental rights; and (3) the district court is right for the wrong reason. *State v. Ortega-Cadelan*, 287 Kan. 157, 159, 194 P.3d 1195 (2008). Carol, citing *State v. Davis*, 277 Kan. 309, 322, 85 P.3d 1164 (2004), argues her claim falls under the second exception because her competency to stand trial implicates her fundamental rights.

The law presumes the defendant is competent to stand trial. *State v. Groschang*, 272 Kan. 652, 659, 36 P.3d 231 (2001). It is the trial court in whose mind a real doubt of sanity or mental capacity to properly defend must be created before that court can order an evaluation solely on its own initiative. The necessity for such an inquiry lies within the discretion of the court, and its decision will not be disturbed without demonstrated abuse

of its sound judicial discretion. *State v. Harkness*, 252 Kan. 510, 516-17, 847 P.2d 1191 (1993).

Carol cites *State v. Gregor*, No. 96,021, 2007 WL 4158072, at *1 (Kan. App. 2007) (unpublished opinion), where Gregor's counsel told the district court that Gregor had "'a mental defect and part of her brain is missing,'" but neither the parties nor the district court ordered a competency evaluation. On appeal, a panel of this court acknowledged Gregor's claim was unpreserved, but held that it was "inappropriate to determine that a defendant waived a competency claim when, if incompetent, the defendant would not have the capacity to waive a competency defense." 2007 WL 4158072, at *2 (citing *Pate v. Robinson*, 383 U.S. 375, 384, 86 S. Ct. 836, 15 L. Ed. 2d 815 [1966]). Unlike *Gregor* though, Carol's counsel never mentioned her possible lack of competency to the district court judge. Rather, her counsel told the court that he did not intend to raise her mental impairment as a defense. One would think such a statement was the product of a calculated, informed decision made following interactions with the client. The district court, speaking about Carol's apparent competency in her recorded interview, later said, "[S]he appeared to be distracted regarding her canines and not a mental type condition, in other words, she was concerned with her dogs." So here, unlike in *Gregor*, the record contains no evidence that the district court ignored concerns about Carol's competence. To that end, resolution of the claim is unnecessary to preserve Carol's fundamental rights.

CONCLUSION

A person who voluntarily assumes the responsibility of providing a resident in their home with the services necessary to maintain their physical and mental health, such as food and medical assistance, but then fails to adequately meet those needs may be held liable for harm resulting to the resident as a result of the caretaker's failure to act.

The evidence adduced at trial was sufficient to sustain a conviction for reckless second-degree murder. This was not a case where Carol simply refused to seek help in meeting Michael's needs. Rather, she neglected to provide for his basic needs and medical care for an extended period of time and, in so doing, exhibited an extreme indifference toward human life.

A prosecutor is afforded wide latitude in presenting their case to the jury but may not stray into arguments that encourage the jury to arrive at a verdict based on factors outside the evidence and beyond the controlling law. Highlighting the wedding vows taken between the victim and defendant was improper and irrelevant to the issue of whether Carol committed the charged offenses.

K.S.A. 2018 Supp. 22-3302(a) permits the district court to request a competency evaluation. There is no indication from the record that the judge in this case abused his discretion by failing to appreciate the authority he had to make such a request on his own initiative.

Affirmed.