NOT DESIGNATED FOR PUBLICATION

No. 124,576

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

DEAN EDWARD CONNER,
Appellant.

MEMORANDUM OPINION

Appeal from Leavenworth District Court; GERALD R. KUCKELMAN, judge. Opinion filed March 24, 2023. Convictions affirmed, sentence affirmed in part and vacated in part, and case remanded with directions.

James M. Latta, of Kansas Appellate Defender Office, for appellant.

Natalie Chalmers, assistant solicitor general, and *Derek Schmidt*, attorney general, for appellee.

Before ATCHESON, PJ., SCHROEDER and GARDNER, JJ.

PER CURIAM: A jury convicted Dean Edward Conner of aggravated battery, driving as a habitual violator, and transporting an open container of alcohol. Conner appeals his conviction for aggravated battery, claiming insufficient evidence, instruction errors, and cumulative error. Finding no error on these claims, we affirm his conviction. Conner also appeals certain parts of his sentence, arguing that the district court mistakenly imposed a $1,500 fine and revoked his driver's license without statutory authority. The State agrees that this was error, as do we. We thus vacate those orders and remand with directions as to the fine.

Factual and Procedural Background

At around 4 p.m. on February 19, 2019, police officer Heather Mowery left work to drive to the gym in an unmarked detective car. On the way, Mowery noticed a Jeep driving erratically. Fearing for the driver's safety and the safety of others on the road, she followed the driver (Conner), took a picture of the Jeep, and called for backup.

As Mowery followed Conner through an area with several businesses, she struggled to keep up with his high speed. Eventually Mowery saw Conner pull over, exit his Jeep, and urinate on the side of the road. Mowery parked about a block behind Conner and notified dispatch. As Conner reentered his Jeep, Mowery yelled at him to stop, as she did not want him to continue driving.

Despite having heard Mowery's yell, Conner did not comply. Instead, he got in the Jeep, put it in reverse, and apparently tried to ram Mowery's vehicle. Mowery avoided the collision by quickly putting her car in reverse and driving away. Still, Conner followed her. And as Mowery slowed down at an intersection, Conner rammed the back of her car, knocking its license plate off. Mowery continued to flee but Conner eventually caught up with her and struck her vehicle a second time. These collisions caused Mowery to suffer back spasms and whiplash.

Other officers eventually stopped and arrested Conner. An officer saw in Conner's information that he was a "habitual violator" of driving laws and was thus no longer permitted to drive. And during a search of his Jeep, police found an open bottle of whiskey. They later found the cap to that bottle in the driver's seat.

The State charged Conner with aggravated battery, driving as a habitual violator, and transporting an open container of alcohol. At trial, Conner claimed that he first followed and struck Mowery's vehicle out of "self-defense," arguing he did not

understand why someone had yelled at him when he was parked. Conner claimed he had been "pistol-whipped" the year before and this explained why he feared Mowery and believed he needed to protect himself.

Contrary to Mowery's testimony that Conner had purposefully chased and rammed her vehicle, Conner testified that he had unintentionally hit Mowery's car the second time they collided; he had accidentally hit the gas pedal instead of the brake pedal and Mowery braked too quickly for him to avoid a collision.

The jury saw video of some of the chase, captured by a nearby business' surveillance cameras. That video showed Conner following Mowery very closely. Conner testified that he did so because he was trying to read her license plate.

The jury ultimately convicted Conner as charged. The district court imposed a controlling 32-month prison sentence for the aggravated battery. And for the habitual violator conviction, the district court imposed a $1,500 fine and revoked Conner's driver's license for three years.

Conner timely appeals.

Does Sufficient Evidence Support Conner's Conviction for Aggravated Battery?

Conner first challenges the sufficiency of the evidence for his aggravated battery conviction. Conner claims that because our Supreme Court in *State v. Phillips*, 312 Kan. 643, 671, 479 P.3d 176 (2021), broadly defines "bodily harm" as "any touching of the victim . . . with physical force," the "physical contact" necessary here under K.S.A. 2018 Supp. 21-5413(b)(1)(C) must require proof of something more specific: a "direct touching." Conner thus suggests that "direct touching" means body-to-body, or at least

deadly weapon-to-body, contact. He then argues that the State's evidence showing his car hit Mowery's car proves no "direct touching."

Standard of Review and Basic Legal Principles

Conner's argument requires statutory interpretation, which presents a question of law over which this court exercises unlimited review. *State v. Betts*, 316 Kan. 191, 197, 514 P.3d 341 (2022). During this review, we will not reweigh the evidence, question credibility determinations, or resolve evidentiary conflicts. *State v. Chandler,* 307 Kan. 657, 668, 414 P.3d 713 (2018).

When interpreting statutes, this court first looks at the plain language of the statute,

> """to give effect to the intent of the legislature as expressed through the language of the statutory scheme it enacted. When a statute is plain and unambiguous, the court must give effect to express language, rather than determine what the law should or should not be. Stated another way, when a statute is plain and unambiguous, the appellate courts will not speculate as to the legislative intent behind it and will not read such a statute so as to add something not readily found in the statute. Stated yet another way, a clear and unambiguous statute must be given effect as written. If a statute is clear and unambiguous, then there is no need to resort to statutory construction or employ any of the canons that support such construction."' [Citation omitted.]" *Betts*, 316 Kan. at 198.

Conner's aggravated battery conviction does not require proof of a "direct touching."

The State charged Conner with aggravated battery under K.S.A. 2018 Supp. 21-5413(b)(1)(C), alleging that

> "on or about the 19th day of February, 2019, in Leavenworth County, Kansas, Dean Edward Conner, then and there being present did unlawfully, feloniously and knowingly

> cause physical contact in a rude, insulting or angry manner with another person, to wit: Heather Vogel, with a deadly weapon, to wit: Jeep Renegade, or in any manner whereby great bodily harm, disfigurement or death can be inflicted. In violation of K.S.A. 21-5413(b)(1)(C), Aggravated Battery, a severity level 7 person felony."

Aggravated battery is defined in K.S.A. 2018 Supp. 21-5413(b) 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." K.S.A. 2018 Supp. 21-5413(b).

Consistent with subsection (C), the district court instructed the jury to decide whether Conner "knowingly caused physical contact with [Mowery] in a rude, insulting or angry manner with a deadly weapon."

Conner claims that to prove the necessary physical contact, the State had to prove that he or his Jeep directly touched Mowery's body. Conner relies on this definition of bodily harm—"'"any touching of the victim against [the victim's] will, with physical force, in an intentional hostile and aggravated manner."' [Citations omitted.]" *Phillips*, 312 Kan. at 671. Conner argues that because basic rules of statutory interpretation compel us to give meaning to every word in a statute, we cannot interpret bodily harm and physical contact to mean the same thing.

Our criminal code does not define "bodily harm" or "physical contact," so we apply the general principle that ordinary words are presumed to carry their ordinary, natural, common meanings. See *State v. Moler*, 316 Kan. 565, 572, 519 P.3d 794 (2022) (citing *State v. Sandoval*, 308 Kan. 960, 963, 425 P.3d 365 [2018]).

As Conner notes, Webster's New World College Dictionary 1101 (5th ed. 2014), defines "physical" as "of the body, as opposed to the mind." Webster's defines "contact" as "[t]he act or state of touching or meeting," i.e., "[two surfaces in contact]." Webster's New World College Dictionary 320 (5th ed. 2014).

"Physical contact" is a common term, and as used in K.S.A. 2018 Supp. 21-5413(b)(1)(C)—"causing physical contact with another"—we agree it should be interpreted as a touching of the victim's person. It does not necessarily follow, however, that this touching is limited to a "direct touching," i.e., person-to-person, as Conner argues. Instead, as the State correctly notes, K.S.A. 2018 Supp. 21-5413(b)(1)(C) provides that physical contact may be done "with a deadly weapon," i.e., an object such as a vehicle. The plain language of the statute thus contradicts Conner's assertion that subsection (C) requires person-to-person contact.

To this, Conner argues that a perpetrator may commit aggravated battery only by touching objects "intimately connected to the [victim's] body," unlike a vehicle. But Conner does not support this point with any pertinent authority, so we find that argument abandoned. See *State v. Meggerson*, 312 Kan. 238, 246, 474 P.3d 761 (2020).

And this court has upheld aggravated battery convictions based on physical contact caused by hitting the victim's car with the defendant's car, although without addressing this specific claim. See, e.g., *State v. Zeiner*, No. 102,088, 2010 WL 2545665, at *2 (Kan. App. 2010) (unpublished opinion) (affirming physical contact aggravated battery conviction in case involving collision with law enforcement officer's patrol car during police chase); *State v. Forgy*, No. 111,699, 2015 WL 4486807, at *4 (Kan. App. 2015) (unpublished opinion) (affirming aggravated battery conviction when record showed defendant intentionally collided with his wife's car). We see no error in those conclusions.

Our appellate courts have never held that "bodily harm" and "physical contact" mean the same thing. To the contrary, our courts have recognized in the context of lesser included offense jury instructions that bodily harm requires more than physical contact. For example, in *State v. O'Connor*, No. 118,519, 2019 WL 1868327, at *6 (Kan. App. 2019) (unpublished opinion), this court recognized that bodily harm, unlike physical contact, requires evidence of an injury:

> "Charging O'Connor with making physical contact did not put her on notice that she could be convicted of causing bodily harm; 'bodily harm' ostensibly requires more evidence to prove than mere 'physical contact.' For example, for a jury to find that a defendant caused 'bodily harm,' they would likely have to hear evidence detailing the victim's injuries. On the other hand, for a jury to convict a defendant for making 'physical contact,' they would only need to hear evidence that the defendant in some way made physical contact with the victim. While a complaint alleging 'bodily harm' likely puts a defendant on notice that they could be found guilty by way of 'physical contact' because the physical contact of aggravated battery is likely a necessary precursor of the bodily harm, such is not necessarily true of the inverse. For example, you can have physical contact with somebody without causing or resulting in bodily harm. Bodily harm requires some kind of injury to the body." 2019 WL 1868327, at *6.

We agree with that reasoning.

In *Phillips*, our Supreme Court distinguished the *O'Connor* ruling. 312 Kan. at 671. There, the State claimed that "physical contact" was broader than "bodily harm" for purposes of lesser included offense instructions. 312 Kan. at 669. The Supreme Court rejected that claim, agreeing with the *O'Connor* panel's finding that physical contact "'is likely a necessary precursor of the bodily harm,'" because bodily harm was regularly defined as "'any touching of the victim against [the victim's] will, with physical force, in an intentional hostile and aggravated manner.' [Citations omitted.]" *Phillips*, 312 Kan. at 671. And when reviewing the instruction for clear error, the *Phillips* court determined that the defendant could not show that he caused "only physical contact" when the

evidence better supported a showing of bodily harm. 312 Kan. at 673. *Phillips* thus recognized an overlap in these terms, but by applying the plain language of the statute, the court agreed that "bodily harm" requires more evidence than "'mere "physical contact,"'" i.e., proof of some form of injury. *Phillips*, 312 Kan. at 671 (quoting *O'Connor*, 2019 WL 1868327, at *6). Cf. *State v. Dubish*, 234 Kan. 708, 715-16, 675 P.2d 877 (1984) (noting difference between "bodily harm" and "great bodily harm.").

K.S.A. 2018 Supp. 21-5413(b)(1)(C) is clear and its terms are not redundant of those in K.S.A. 2018 Supp. 21-5413(b)(1)(B). We thus decline Conner's invitation to read additional words into the statute and instead apply the statute as written. See *State v. Pulliam*, 308 Kan. 1354, 1364, 430 P.3d 39 (2018) ("'When a statute is plain and unambiguous, an appellate court does not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it.'"). Thus Conner could have caused physical contact with Mowery by running his car into hers.

Sufficient Evidence supports Conner's aggravated battery conviction.

Conner next contends that the evidence fails to show that he knowingly "cause[d] physical contact" with Mowery in a "rude, insulting or angry manner with a deadly weapon." See K.S.A. 2018 Supp. 21-5413(b)(1)(C). Conner concedes that his Jeep qualifies as a deadly weapon and does not dispute that he acted in a rude, insulting, or angry manner. Conner challenges only the sufficiency of the evidence showing he caused physical contact with Mowery.

In his trial testimony, however, Conner admitted that he intentionally caused the first collision, ramming his Jeep into Mowery's car allegedly in self-defense. Mowery's testimony also revealed that Conner intentionally hit her car, causing her whiplash and back spasms. Conner downplayed the significance of his acts at trial, testifying that his

intentional ramming was just an "escalation of force" and that he "did not want to hurt any[one]."

Yet when reviewing sufficiency of the evidence challenges, we must determine whether, after reviewing all the evidence in the light most favorable to the State, a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. *Chandler*, 307 Kan. at 668. The evidence, viewed in the light most favorable to the State, sufficiently shows Conner caused physical contact with Mowery in a rude, insulting or angry manner with a deadly weapon. That is the offense of aggravated battery under K.S.A. 2018 Supp. 21-5413(b)(1)(C).

Did the District Court Err by Failing to Give a Jury Instruction Defining "Physical Contact"?

Conner next argues that the district court committed instructional error by failing to define "physical contact."

But Conner never asked the district court to define that term. Because Conner did not preserve this claim for appeal, we will reverse only if he establishes clear error. See K.S.A. 2021 Supp. 22-3414(3) ("No party may assign as error the giving or failure to give an instruction . . . unless the party objects thereto before the jury retires to consider its verdict . . . unless the instruction or the failure to give an instruction is clearly erroneous."). This means Conner bears the burden of firmly convincing us that the jury would have reached a different verdict had the error not occurred. *State v. Berkstresser*, 316 Kan. 597, Syl. ¶ 3, 520 P.3d 718 (2022).

Our appellate courts have long recognized that jurors are "expected to decipher many difficult phrases without receiving specific definitions." *State v. Robinson*, 261 Kan. 865, 877, 934 P.2d 38 (1997). So a trial court is not required to "define every word

or phrase in the instructions. It is only when the instructions as a whole would mislead the jury, or cause them to speculate, that additional terms should be defined." *State v. Norris*, 226 Kan. 90, 95, 595 P.2d 1110 (1979). A term widely used and readily comprehensible need not have a defining instruction. *State v. Armstrong*, 299 Kan. 405, 440, 324 P.3d 1052 (2014).

"Physical contact" is a widely used and readily understood term, not a term of art. The district court did not have to define this phrase in the aggravated battery instruction because the commonly understood meaning of "physical contact" does not differ from its legal meaning. See *State v. Patton*, 33 Kan. App. 2d 391, 397, 102 P.3d 1195 (2004). We thus find no error on this claim.

Did the District Court Err by Failing to Instruct the Jury on Lesser Included Offenses?

Conner next argues that the district court committed reversible error by failing to give unrequested instructions on three lesser included offenses:

(1) Aggravated battery by recklessly causing bodily harm with a deadly weapon, K.S.A. 21-5413(b)(2)(B);
(2) DUI offense as described in K.S.A. 8-1567, when bodily harm to another results from such act under circumstances whereby great bodily harm, disfigurement, or death could result, K.S.A. 21-5413(b)(3)(B); and
(3) Simple battery by knowingly or recklessly causing bodily harm to another person, K.S.A. 21-5413(a)(1).

We review claims of instruction error in a multi-step, "sequential manner." *Berkstresser*, 316 Kan. at 601 (citing *State v. Plummer*, 295 Kan. 156, Syl. ¶ 1, 283 P.3d 202 (2012). Those four steps are (1) reviewing the issue from both jurisdiction and preservation viewpoints, (2) determining the factual appropriateness of the instruction,

(3) determining the legal appropriateness of the issue, and (4) determining whether any error was reversible.

As to step one, we exercise unlimited review over whether an issue is preserved. *Plummer*, 295 Kan. 156, Syl. ¶ 1. When, as here, the error relates to a district court's failure to give an unrequested instruction, reversal is permitted only if the panel considers "the degree of resulting prejudice" and is "firmly convinced the jury would have reached a different verdict had this instructional error not occurred." *Berkstresser*, 316 Kan. at 598. Because Conner did not request these lesser included instructions during trial, he must show clear error now.

Conner, as the party claiming clear error, has the burden to show it. The clear error standard sets a high threshold or level of certainty as to whether the error affected the outcome. *Berkstresser*, 316 Kan. at 606. We ask not whether a jury *could have* reasonably acquitted the defendant of the charged offense had the jury been properly instructed, but whether the jury *would have* acquitted the defendant without the instructional error. *Berkstresser*, 316 Kan. at 606 ("[C]ould is used to talk about something that can happen, [and] would is used to talk about something that will happen in an imagined situation."); see Garner's Modern American Usage, p. 869 (3d. ed. 2009).The clear error standard bars a conviction's reversal unless the reviewing court determines the jury "'would have reached a different verdict.'" *State v. Valdez*, 316 Kan. 1, 6, 512 P.3d 1125 (2022). In other words, an instructional error is clearly erroneous when "the court is firmly convinced that the jury would have reached a different verdict if the instruction error had not occurred." *State v. Crosby*, 312 Kan. 630, 639, 479 P.3d 167 (2021). We cannot dilute the applicable test for prejudice, thus giving insufficient deference to the jury's verdict.

Here, the facts of the case show a "he said, she said" battle in which credibility and corroboration are crucial. *State v. White*, 60 Kan. App. 2d 458, 480, 494 P.3d 248

(2021), *aff'd,* 316 Kan. 208, 514 P.3d 368 (2022). See *State v. Boysaw*, 309 Kan. 526, 534, 439 P.3d 909 (2019). Conner painted the facts one way and Mowery painted them another. The jury had to decide which testimony to believe, and which version of events was best supported by other evidence, such as the videos. Under the Kansas Supreme Court's recent teaching about clear error in *Berkstresser*, we cannot find clear error here because the jury's verdict may be based on credibility. The determination of Conner's and Mowery's credibility was left to the jury, and we will not disturb that determination on appeal. *Chandler*, 307 Kan. at 668. And because the jury could have disbelieved Conner even if the district court had given all the lesser included offense instructions he now wishes he had requested, we cannot be firmly convinced that the jury would have reached a different verdict if the instruction error had not occurred, as the clear error standard requires. We thus find no reversible error in the court's assumed failure to instruct on lesser included offenses.

Did the District Court Err in Defining the Mental Culpability of "Knowingly"?

Conner's fourth argument on appeal is that the district court committed reversible instructional error by incorrectly defining "knowingly" in jury instruction No. 8. That instruction told the jury that "[a] defendant acts knowingly when the defendant is aware of the nature of his conduct that the state complains about." Yet Conner did not object to this instruction at the district court.

Conner argues that K.S.A. 2021 Supp. 21-5202(i)—defining the mental culpability of knowingly—requires evidence of two components: the nature of the defendant's conduct, and the result of that conduct. Conner thus claims that the instruction should have stated, "[a] defendant acts knowingly when the defendant is aware of the nature of his conduct and when he is aware that his conduct is reasonably certain to cause the result," (citing *State v. Hobbs*, 301 Kan. 203, 211, 340 P.3d 1179 [2015]). Because jury

instruction No. 8 included only the nature of his conduct but not the result, Conner asserts that the instruction was legally erroneous.

But here, as above, Conner did not object to the instruction in the district court, so he must show clear error to warrant reversal. See *State v. Gentry*, 310 Kan. 715, 721, 459 P.3d 429 (2019).

We again assume, without deciding, that the unrequested jury instruction was both factually and legally appropriate.

We thus reach the question whether Conner shows clear error, as is necessary to reverse. Conner argues that the jury would have reached a different verdict if the error had not occurred because his testimony demonstrates that he was not "reasonably certain" that he would cause the "physical contact" that Mowery endured. Conner concedes that he admitted at trial that he intentionally hit Mowery's car the first time in "self-defense," but argues that the jury would have relied more heavily on his other testimony in reaching a verdict. Conner claims that the jury would have been convinced that he did not act knowingly based on his testimony that he had followed Mowery very closely only to read her license plate and that the second contact happened accidentally when he mistook the gas pedal for the brake.

But essentially, Conner asks us to reweigh his own testimony. That we cannot do. So Conner cannot convincingly show that the jury would have disregarded the uncontroverted evidence—his testimony and Mowery's—that he knowingly and intentionally rammed his Jeep into Mowery's car in a rude, angry, or insulting manner had the district court defined "knowingly" as he wishes it had.

Additionally, Conner's accident theory, if believed by the jury, may negate an intentional act, but it fails to contradict a knowing act. In other words, even had the jury

believed that Conner's hitting Mowrey's car was unintentional, Conner could have been reasonably certain that his acts would result in physical contact with her car.

We thus find no clear error.

Did Cumulative Trial Errors Deny Conner a Fair Trial?

Conner argues that when considered cumulatively, trial errors denied him his right to a fair trial. Here, at most, the record may show two instructional errors by the district court. But even when we consider those errors together, we find they cannot support reversal under the cumulative effect rule.

> "'Cumulative trial errors, considered collectively, may be so great as to require reversal of a defendant's conviction. The test is whether the totality of the circumstances substantially prejudiced the defendant and denied the defendant a fair trial. No prejudicial error may be found under the cumulative effect rule if the evidence is overwhelming against a defendant. [*State v.*] *Plaskett,* 271 Kan. [995] at 1022, 27 P.3d 890 [(2001)].'" *State v. Nguyen*, 285 Kan. 418, 436, 172 P.3d 1165 (2007).

We are satisfied that Conner received a fundamentally fair trial, and we affirm his convictions.

Did the District Court Err in Sentencing Conner?

Finally, Conner asserts that the district court erred in sentencing him on Count 2 – his habitual violator conviction. He argues the district court lacked authority to fine him $1,500 or to revoke his driver's license for three years. The State agrees.

We view this issue as preserved, as this court may correct an illegal sentence while the defendant is serving such sentence under K.S.A. 2021 Supp. 22-3504.

When sentencing Conner on this count, the court stated solely:

> "On Count II, for the charge of driving as a habitual violator, which is a class A nonperson misdemeanor, the Court is going to impose a 12-month jail sentence. Additionally, the defendant's driving privileges are to be revoked for a period of three years. And the statutory fine for that charge is $1,500, and that will be imposed."

As to the license revocation, Conner claims that K.S.A. 8-286 grants the authority to revoke his license to the division of vehicles of the department of revenue, not the district court. The State agrees that the authority rests with the department of revenue, and not with the district court, to revoke Conner's license.

We agree that the district court's order revoking Conner's license was erroneous under K.S.A. 8-286:

> "Whenever the files and records of the division shall disclose that the record of convictions of any person is such that the person is an habitual violator, as prescribed by K.S.A. 8-285, and amendments thereto, *the division promptly shall revoke the person's driving privileges for a period of three years,* except as allowed under subsection (d)(4) of K.S.A. 8-235, and amendments thereto." (Emphasis added.)

"Division" is defined as "the division of vehicles of the department of revenue." K.S.A. 8-1413. Because the district court lacked authority to revoke Conner's license, we vacate that part of his sentence.

As to the fine, Conner argues that K.S.A. 8-287 provides for a $1,500 fine only if the person is found guilty of a "third or subsequent conviction" of the habitual violator statute. Conner maintains that he has, at most, two of these convictions. The State agrees that the record lacks evidence of three or more convictions under K.S.A. 8-287 to justify the $1,500 habitual violator fine.

Our review of the record confirms that conclusion. The statute states:

> "Except as allowed under subsection (d)(4) of K.S.A. 8-235, and amendments thereto, operation of a motor vehicle in this state while one's driving privileges are revoked pursuant to K.S.A. 8-286, and amendments thereto, is a class A nonperson misdemeanor. The person found guilty of a third or subsequent conviction of this section shall be sentenced to not less than 90 days' imprisonment and fined not less than $1,500." K.S.A. 8-287.

The district court lacked authority to impose a fine under K.S.A. 8-287 because the record lacks evidence of a "third or subsequent conviction" as the statute requires.

Still, the State contends that the district court was authorized under K.S.A. 2018 Supp. 21-6611(b)(1) to impose a fine for a Class A misdemeanor, so we should remand for that purpose. That statute states that a "person who has been convicted of a misdemeanor, in addition to or instead of the imprisonment authorized by law, may be sentenced to pay a fine which shall be fixed by the court as follows: (1) For a class A misdemeanor, a sum not exceeding $2,500." The State is thus correct that the district court had the authority under this statute to fine Conner $1,500 on this conviction for a Class A misdemeanor.

The State asks the panel to remand the fine issue to allow the district court to determine whether to exercise this option. See *State v. Warren*, 297 Kan. 881, 304 P.3d 1288 (2013). We believe this is the best option. The sentencing hearing transcript strongly suggests the district court did not base its ruling as to the amount of the fine on its discretion under the Class A misdemeanor statute. The court expressly and correctly found that Conner's conviction on Count 2, driving as a habitual violator, was a Class A misdemeanor. Yet it may have believed that it lacked discretion as to the amount of the fine, as it stated that "the statutory fine for that charge is $1,500, and that will be imposed." And "that charge" referred to "the charge of driving as a habitual violator."

The district court's short explanation of its decision seems to characterize the statutory fine of $1,500 under the habitual violator statute as the only legally permissible option. A district court effectively abuses its discretion either by failing to recognize the judicial discretion it has or by declining to exercise that discretion. *State v. Stewart*, 306 Kan. 237, 262, 393 P.3d 1031 (2017). Such is the case here.

True, the amount of fine imposed is easily justified and well within the broad range of discretion accorded district courts under K.S.A. 2018 Supp. 21-6611(b)(1). But it is possible that the amount of the fine will change with a new hearing, so we cannot say no purpose will be served by vacating the fine and remanding for another hearing. The amount could be higher or lower than $1,500, and we have no wish to substitute our judgment for that of the district court. We thus decline to find that the fine in the amount of $1,500 was correct, even though the district court erred in how it determined its amount. See *State v. Smith*, 309 Kan. 977, 986, 441 P.3d 1041 (2019) (district court may be affirmed if right for wrong reason).

We thus affirm Conner's conviction of aggravated battery. We affirm the trial court on sentencing except for its imposition of the $1,500 fine and its revocation of Conner's driver's license. We vacate the fine and the revocation of the license and remand for a hearing on whether to impose a fine under K.S.A. 2018 Supp. 21-6611(b)(1).

Convictions affirmed, sentence affirmed in part and vacated in part, and case remanded with directions.

* * *

ATCHESON, J., concurring: I join in my colleagues' disposition of Defendant Dean Edward Conner's sentence on his conviction for being a habitual violator and otherwise concur in the judgment affirming his conviction for aggravated battery.