NOT DESIGNATED FOR PUBLICATION

No. 124,597

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

STEVEN DALE DISHNER,
Appellant.

MEMORANDUM OPINION

Appeal from Shawnee District Court; NANCY E. PARRISH, judge. Opinion filed June 9, 2023. Affirmed.

Peter Maharry, of Kansas Appellate Defender Office, for appellant.

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

Before ATCHESON, P.J., SCHROEDER and GARDNER, JJ.

PER CURIAM: A jury sitting in Shawnee County District Court in 2021 convicted Defendant Steven Dale Dishner of one count of aggravated criminal sodomy with a child for which he received a life sentence without parole eligibility for 25 years. On appeal, Dishner contends the victim's testimony was patently unbelievable, his former wife's testimony unduly prejudiced the jury, and the prosecutor made an improper closing argument bolstering the victim's account. The points do not require reversal of the verdict and resulting sentence, although some of the testimony was irrelevant and a portion of the closing argument may have constituted prosecutorial error.

For some time, Dishner lived with J.R. and her two sons, D.T. and L.T., in a house his mother owned. Dishner and J.R. eventually married, then separated, and ultimately divorced in 2018. In June 2017, well after the separation, D.T. told his father that Dishner had sexually abused him about five or six years earlier. His father informed J.R., and D.T. briefly recounted the incident to her. J.R. contacted the Topeka Police Department the next day. A detective arranged a forensic interview of D.T. that was recorded and played for the jury.

The case was first tried to a jury in 2018, and Dishner was convicted. We reversed the conviction and ordered a new trial because the district court improperly instructed the jury to consider alternative means of committing aggravated criminal sodomy that the State neither actively pursued nor presented evidence on. *State v. Dishner*, No. 120,422, 2020 WL 593907, at *1 (Kan. App. 2020) (unpublished opinion). Apart from having precipitated the 2021 trial, that error is now beside the point.

In the second trial, D.T. testified that when he was about six years old, he was in the bathroom of the home where he lived with Dishner, J.R., and his brother. Disher was also in the bathroom. Dishner pulled down his pants and instructed D.T. to fellate him. Dishner threatened to paddle D.T. if he didn't comply. D.T. did as he was ordered. Based on the record evidence, Dishner did not otherwise sexually or physically abuse D.T. Dishner neither testified during the trial nor offered other defense evidence. The jury convicted Dishner of aggravated criminal sodomy of a child, an off-grid felony violation of K.S.A. 2011 Supp. 21-5504(b)(1) carrying a hard 25 sentence of life in prison. The district court duly imposed a life sentence on Dishner with his first parole consideration after serving 25 years. Dishner has appealed.

As we have indicated, Dishner has asserted three substantive points of error on appeal, along with a cumulative error claim. We take those up in order, supplementing our initial factual recitation as necessary.

First, Dishner contends D.T.'s testimony was both infected with inconsistencies and largely uncorroborated, rendering it inherently unreliable and, thus, insufficient to support the jury's guilty verdict. That's an argument, but it's not the law. There are some discrepancies in the multiple accounts D.T. has given of Dishner's sexual assault of him. He has said he was in the bathroom when Dishner entered but has also said Dishner was there first. He has given differing time estimates for the abusive act itself. And he recalled the bathroom as having black and white tiles, when that color scheme actually describes wallpaper there. Conversely, D.T. has consistently recounted how the core act of abuse happened.

Witnesses, as human beings, are subject to the foibles and weaknesses of imperfect memory. Details may be inaccurately perceived or imprecisely recalled; faulty memories may result from especially traumatic events, the passage of time, or both in combination. And the credibility of a witness who gives differing accounts of an event may be challenged for that reason. See *State v. Salem*, No. 118,351, 2019 WL 2237382, at *13 (Kan. App. 2019) (unpublished opinion); *State v. Salas*, No. 103,605, 2011 WL 2637432, at *2 (Kan. App. 2011) (unpublished opinion). In the criminal justice process, the jury's overarching function is to assess the credibility of testifying witnesses and otherwise weigh the evidence presented to them to determine who may have done what to whom. *State v. Franco*, 49 Kan. App. 2d 924, 936, 319 P.3d 551 (2014) ("Sorting out testimonial inconsistencies and evaluating credibility is a function uniquely entrusted to jurors."); *Salem*, 2019 WL 2237382, at *13. In short, the legal premise of Dishner's point cannot be reconciled with the role of juries generally and the role of this jury in particular. The jurors observed D.T. testify and were made aware of inconsistencies in his serial descriptions of Dishner's conduct. It was for them to assess D.T.'s credibility.

To advance his argument, Dishner turns to *State v. Matlock*, 233 Kan. 1, 6, 660 P.2d 945 (1983), in which a majority of the court found the account of a putative rape victim so at odds with a constellation of trial evidence—including testimony from

witnesses in the home and close to the room where the crime supposedly occurred— that no reasonable jury could accept her uncorroborated account. The court, therefore, reversed the defendant's conviction. The court explained that "where [the rape victim's] testimony is so incredible and improbable as to defy belief, the evidence is *not* sufficient to sustain a conviction." 233 Kan. at 3-4. That conclusion rested on a correct, if general, proposition: If the State fails to present evidence that could persuade a reasonable jury to find each element of the charged crime proved beyond a reasonable doubt, then the case is insufficient as a matter of law, and the district court should enter a judgment of acquittal without submitting the case the jury. See *State v. Ta*, 296 Kan. 230, 236, 290 P.3d 652 (2012) (standard for judgment of acquittal). But to invoke that proposition when the purported victim testifies to those elements is extraordinary, and *Matlock* stands as something of a one-off on unique facts. See *State v. Brinklow*, 288 Kan. 39, 53, 200 P.3d 1225 (2000) (describing *Matlock* as "the only case of its kind in this state" and characterized the result as "aberrant").

Here, unlike *Matlock*, Dishner did not produce any independent witnesses or evidence directly calling into question D.T.'s account. The Kansas Supreme Court has distinguished the outcome in *Matlock* in precisely that way. *State v. Borthwick*, 255 Kan. 899, 906-07, 880 P.2d 1261 (1994). And we recently did likewise. *State v. Foster*, No. 123,276, 2022 WL 1436383, at *3-4 (Kan. App. 2022) (unpublished opinion). Nothing about D.T.'s testimony or the trial evidence as a whole approximates anything remotely comparable to *Matlock*, and we reject the notion that the case could be considered analogous authority here.

Dishner next argues that J.R. testified at trial to legally irrelevant circumstances that unduly prejudiced him in the eyes of the jurors. The prosecutor asked J.R. about the collapse of her relationship with Dishner. In response, she described going to pick him up at work one day and finding him gone. J.R. took that as a sign Dishner had left her. She then went to the school D.T. and L.T. attended to get them and learned that Dishner had

not gotten his son, so she also picked him up. Dishner's trial lawyer then interposed a relevance objection the district court sustained.

On appeal, Dishner contends the line of questioning seemed to suggest he had abandoned both his employment and his child—representations that, even if true, had no bearing on the charged crime but tended to cast him in a poor light. As to the testimony about Dishner not being at work, his lawyer did not make a contemporaneous objection. In the absence of a timely objection, the point has not been preserved for appellate review, and we will not consider it. See K.S.A. 60-404 (codifying contemporaneous objection rule); *State v. Dupree*, 304 Kan. 43, 62, 371 P.3d 862 (2016) (appellate review limited by need for contemporaneous trial objection).

With respect to picking up the child, we assume the objection was timely, although J.R. had begun describing the situation. On appeal, the State concedes the line of inquiry was irrelevant. But we fail to see how the testimony so prejudiced Dishner as to deprive him of a fair trial. See *State v. Cruz*, 297 Kan. 1048, 1075, 307 P.3d 199 (2013) ("As we have recognized for decades, '[a] defendant is entitled to a *fair* trial but not a perfect one[.]'") (quoting *State v. Bly*, 215 Kan. 168, 178, 523 P.2d 397 [1974]). At most, the testimony presented before the defense objection simply showed Dishner was, perhaps, late in getting to the school, although no later than J.R. Nothing in that testimony or the balance of the trial record indicated Dishner, in fact, abandoned his child. There is no reason to suppose the jurors engaged in such a speculative leap from otherwise largely innocuous testimony.

We presume the district court erred in admitting the testimony. But the error would not require reversal of Dishner's conviction if it were otherwise harmless. We assess harmlessness under the standards set out in *State v. Ward*, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 (2011), for constitutional and nonconstitutional errors. The wrongful admission or exclusion of evidence typically creates a nonconstitutional error. See *State*

v. Broxton, 311 Kan. 357, 366, 461 P.3d 54 (2020) (erroneous exclusion of evidence); *State v. Torres*, 294 Kan. 135, 143-44, 273 P.3d 729 (2012) (erroneous admission of evidence). That's true here. Accordingly, the State, as the party benefiting from the error, has to show there was no reasonable probability the wrongfully admitted testimony affected the outcome of the trial in light of the record as a whole. *Broxton*, 311 Kan. at 366; *Ward*, 292 Kan. 541, Syl. ¶ 6. The State has met that threshold.

While it may have been error to admit J.R.'s irrelevant testimony, we find no factual or legal predicate to infer undue prejudice, let alone reversible error, from irrelevance alone. Precisely because the testimony was irrelevant, it had nothing to do with the issues the jurors were to decide. We have no sound reason to conclude the jurors otherwise appropriated it to find Dishner guilty. And we similarly have no basis to say the jurors drew the unfounded inference Dishner would have us impute to the otherwise innocuous testimony to convict him at least in part for having forsaken his own child.

Dishner next contends the prosecutor improperly vouched for D.T.'s credibility in closing argument by suggesting he should be believed because he came to court and testified at trial. Lawyers, including prosecutors, may not offer jurors their personal opinions on the credibility of witnesses. *State v. Butler*, 307 Kan. 831, 865, 416 P.3d 116 (2018); *State v. Kemp*, No. 115,812, 2018 WL 671182, at *13 (Kan. App. 2018) (unpublished opinion). Doing so invades the province of the jurors in assessing the truthfulness of trial witnesses. *State v. Akins*, 298 Kan. 592, Syl. ¶ 6, 315 P.3d 868 (2014). We examine these claims of prosecutorial overreach using an error and prejudice standard first outlined in *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016). See *State v. Frantz*, 316 Kan. 708, 745, 521 P.3d 1113 (2022) (reiterating and applying *Sherman* standard for prosecutorial error).

The *Sherman* analytical model first considers whether an error has occurred and then weighs any prejudice to the defendant resulting from the error. Comments made

during argument will be considered error if they fall outside that wide latitude afforded a prosecutor in discussing the evidence and the law. 305 Kan. at 109. If an appellate court finds the challenged argument to be prosecutorial error, it must then consider prejudice measured by the test set out in *Ward*, 292 Kan. 541, Syl. ¶ 6, for a constitutional wrong. The State, as the party benefiting from the error, must demonstrate "'beyond a reasonable doubt'" that the mistake "'did not affect the outcome of the trial'" taking account of the full trial record. 305 Kan. at 109 (quoting *Ward*, 292 Kan. 541, Syl. ¶ 6). That is, the appellate court must determine if the error compromised the defendant's right to a fair trial—a constitutional protection rooted both in due process and in the right to trial itself. 305 Kan. at 98-99, 109.

Here, the prosecutor offered an extended explanation in closing argument about how the evidence established D.T.'s credibility. The prosecutor pointed to the consistency of D.T.'s description of the sexual abuse and how uncomfortable D.T. seemed to be in the videotaped forensic interview when he disclosed what happened. The incident, thus, was embarrassing and distressing to D.T., and he had no apparent motive to lie about Dishner. The prosecutor suggested those circumstances all support truthfulness. That sort of suggestion in a closing argument falls within the realm of fair comment on the evidence. See *State v. Sean*, 306 Kan. 963, 980, 399 P.3d 168 (2017) ("[A] prosecutor does not act outside the wide latitude afforded if he or she merely observes that some reasonable inference about witness credibility may be drawn from evidence introduced at trial."); *State v. Peterson*, No. 116,931, 2021 WL 3823405, at *7-8 (Kan. App. 2021) (unpublished opinion).

In wrapping up that part of the closing argument, the prosecutor went on to tell the jurors:

> "Then [D.T.] comes to testify in court and here he had to talk about something that quite possibly might be the most terrifying and humiliating thing for a 14 year old to

> talk about. He's a 14 year old boy and you heard him tell his story. Why would he subject himself to this if it didn't happen?"

Dishner zeroes in on those remarks as prosecutorial error and cites a line of Massachusetts appellate cases finding error when a prosecutor argues a putative victim is credible because he or she has come to court and testified. See *Commonwealth v. Dirgo*, 474 Mass. 1012, 1013, 52 N.E.3d 160 (2016); *Commonwealth v. Beaudry*, 445 Mass. 577, 587-88, 839 N.E.2d 298 (2005); *Commonweath v. Ramos*, 73 Mass. App. Ct. 824, 826, 902 N.E.2d 948 (2009) ("'A prosecutor may not, however, suggest to the jury that a victim's testimony is entitled to greater credibility merely by virtue of her willingness to come into court to testify.'"); *Commonweath v. Helberg*, 73 Mass. App. Ct. 175, 179, 896 N.E.2d 651 (2008). Those cases do not, however, outline a rationale for the rule.

We may readily infer a reason: Prosecutors in Massachusetts presumably subpoena victims and other witnesses for criminal trials, so they appear in response to what amounts to a court order even if they might have shown up voluntarily anyway. An argument for credibility premised on the "willing" appearance of a witness actually under subpoena would tilt toward the potentially misleading without something more. See *Kemp*, 2018 WL 671182, at *11-12 (finding analogous argument to jury about appearance of out-of-state witness at criminal trial to be prosecutorial error). The something more would entail a digression into testimony from witnesses about whether they had been subpoenaed to appear and inviting assurances they would have come to court anyway—a line of inquiry both hypothetical and tangential to the jury's basic task. We discontinue *our* digression without commenting on the propriety of eliciting testimony from a witness that he or she appeared in court only because he or she had been either subpoenaed or detained as a material witness. See K.S.A. 22-2805 (material witness detention orders and appearance bonds).

The record on appeal indicates the State issued a subpoena for D.T. to appear at the trial. We, therefore, assume without deciding that the prosecutor's argument that D.T's appearance itself lent credibility to his account of sexual abuse amounts to error. Notwithstanding the stringent constitutional standard applied to prosecutorial error, we are persuaded beyond a reasonable doubt that the argument did not push the jurors across the line to find Dishner guilty.

The jurors were able to gauge D.T.'s credibility based on his taking of the oath, on what he then had to say and how he said it, and on his demeanor especially during cross-examination. As we have recognized: "'The judicial process treats an appearance on the witness stand, with the taking of an oath and the rigor of cross-examination, as perhaps the most discerning crucible for separating honesty and accuracy from mendacity and misstatement.'" *Franco*, 49 Kan. App. 2d at 936 (quoting *State v. Bellinger*, 47 Kan. App. 2d 776, 787, 278 P.3d 975 [2012] [Atcheson, J., dissenting]); see *State v. Shay*, No. 122,850, 2022 WL 987672, at *3-4 (Kan. App. 2022) (unpublished opinion). We are confident the jurors relied on what they saw and heard as D.T. testified and on the other trial evidence to find him credible rather than on an oblique comment from the prosecutor in closing argument. In turn, any error in the closing argument did not undermine the jury's guilty verdict.

Finally, Dishner submits cumulative errors in the district court deprived him of a fair trial. Appellate courts will weigh the collective impact of trial errors and may grant relief if the overall effect deprived the defendant of a fair hearing even when the errors considered individually would not necessarily require reversal of a conviction. *State v. Harris*, 310 Kan. 1026, 1041, 453 P.3d 1172 (2019); *State v. Smith-Parker*, 301 Kan. 132, 167-68, 340 P.3d 485 (2014). An appellate court examines the full trial record to assess the aggregate effect of multiple trial errors. 301 Kan. at 167-68. The assessment takes account of "how the trial judge dealt with the errors as they arose; the nature and number of errors and their interrelationship, if any; and the overall strength of the

evidence." *State v. Miller*, 308 Kan. 1119, 1176, 427 P.3d 907 (2018). We do not consider unpreserved errors. *State v. Sears*, No. 121,303, 2021 WL 4703254, at *4 (Kan. App. 2021) (unpublished opinion).

Here, we have identified two possible errors—the admission of J.R.'s otherwise irrelevant testimony about Dishner failing to pick up his child at school and the prosecutor's brief comment about D.T.'s appearance at trial as demonstrating credibility. Although we have simply assumed the second to be error, we should not retreat from that assumption now. The constitutional standard for harmlessness carries over because it governs the assessment of prosecutorial error. *State v. Thomas*, 311 Kan. 905, 914, 468 P.3d 323 (2020). As we have already explained, the errors individually had, at most, only a miniscule effect on the trial. They were not interlocking or pyramiding errors that had some synergistic explosiveness that together catapulted them into the atmosphere of reversible error. See *State v. Conaway*, No. 121,848, 2021 WL 4704029, at *7 (Kan. App. 2021) (unpublished opinion) (error in jury instruction on element of intent—"pivotal issue" in case—combined with prosecutor's related misstatement of law in closing argument had "synergistic effect" exacerbating adverse effect of each, collectively depriving defendant of fair trial).

Affirmed.