NOT DESIGNATED FOR PUBLICATION

No. 124,627

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

SILKY L. DEMPSEY,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; JEFFREY SYRIOS, judge. Opinion filed March 17, 2023. Affirmed.

Michelle A. Davis, of Kansas Appellate Defender Office, for appellant.

Matt J. Maloney, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before GREEN, P.J., HURST, J., and TIMOTHY G. LAHEY, S.J.

PER CURIAM: Silky L. Dempsey appeals his convictions for attempted aggravated criminal sodomy, aggravated burglary, aggravated sexual battery, lewd and lascivious behavior, and stalking. On appeal, Dempsey, who proceeded pro se before the trial court, contends that the trial court erred when it denied his pretrial motions for standby counsel. Dempsey also contends that the trial court wrongly admitted evidence of his prior crimes during his jury trial. Nevertheless, as considered below, Dempsey has failed to establish error. Therefore, we affirm Dempsey's convictions.

FACTS

Around 9:50 a.m. on June 5, 2019, A.M. reported to law enforcement that Dempsey had attacked her earlier that morning. A.M. told law enforcement that she knew Dempsey because they lived in the same apartment complex. She also told them that about three years earlier, Dempsey had exposed his penis to her while smoking marijuana together.

As for the alleged attack, A.M. told law enforcement that around 4 a.m., she went outside to smoke a cigarette on her apartment porch while her daughter slept inside. She told them that as she was smoking, Dempsey walked towards her porch and exposed his penis. She told them that although she told Dempsey to leave, Dempsey continued towards her, grabbed her, "'bear hug[ged]'" her, and dry "hump[ed] her" with his exposed penis. She explained that as he did this, he asked her, "'Why you going to make me go to work all hard like this?'" And she explained that Dempsey stopped dry humping her when he asked her for a glass of water.

A.M. told law enforcement that she got back inside her apartment because Dempsey wanted water, closing the porch door behind her. Yet, she further explained that she returned to give Dempsey the glass of water, at which point Dempsey forced his way through her porch door into her apartment. According to A.M., Dempsey then sat down on her couch and started masturbating.

A.M. told law enforcement that after Dempsey started masturbating, she tried to physically remove Dempsey from her couch. But she explained that when she tried to do this, Dempsey grabbed her neck, forcing her face down towards his erect penis. A.M. told law enforcement that she believed Dempsey wanted her to perform oral sex on him. At the same time, she explained that the attack ended abruptly when Dempsey received a

phone call, indicated that he was late, said that he would return after work, and ran out of her apartment.

Law enforcement did not arrest Dempsey immediately after A.M. reported the alleged attack. Because A.M. was afraid to remain in her apartment while Dempsey remained at large, law enforcement arranged for her and her daughter to stay in a hotel. But that evening—the evening of June 5, 2019—the hotel desk clerk contacted law enforcement because a man matching Dempsey's description was at the front desk of the hotel and had been asking whether A.M. was staying at that hotel. Additionally, on June 10, 2019, A.M. called law enforcement, alleging that a neighbor had seen Dempsey staring at her apartment's front door for about two hours.

Citing Dempsey's alleged conduct between June 5, 2019, and June 10, 2019, the State charged Dempsey with attempted aggravated criminal sodomy, aggravated burglary, aggravated sexual battery, lewd and lascivious behavior, and stalking. Also, after the State filed its charges, forensic testing established that there was a 1 in 15.3 nonillion probability that the semen found on A.M.'s shirt from June 5, 2019, and that the semen found on the bedsheet covering A.M.'s couch on June 5, 2019, belonged to anyone other than Dempsey.

Although the trial court appointed an attorney to represent Dempsey against the State's charges, Dempsey moved to act pro se in August 2019—about two months after the State filed its charges. After discussing the factors outlined in *State v. Lowe*, 18 Kan. App. 2d 72, 76, 847 P.2d 1334 (1993), the trial court granted Dempsey's motion to proceed pro se. Nevertheless, in October 2019, Dempsey filed a pro se motion to appoint "standby co-counsel" to help him understand basic procedural and evidentiary requirements. He explained that he wanted an attorney appointed to "officiate in the capacity as standby co-counsel until further notice given by pro se litigant," who would "remain as primary attorney of record." He also cited *State v. Warren*, No. 110,949, 2015

WL 4879034 (Kan. App. 2015) (unpublished opinion), which relied on *McKaskle v. Wiggins*, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984), and *State v. Rassel*, No. 107,336, 2013 WL 1688930 (Kan. App. 2013) (unpublished opinion), to support his argument. Then, in June 2020 and November 2020, Dempsey filed somewhat similar pro se motions requesting legal assistance.

But the trial court denied each motion. In doing so, the trial court explained that the appointment of standby counsel was a discretionary decision. It explained that although the appointment of standby counsel was sometimes necessary, Dempsey had not proven that he needed standby counsel. It stressed that most attorneys refuse to serve as standby counsel "because of professional liability insurance coverage issues." It indicated that serving as standby counsel increases an attorney's risk for professional liability issues. Also, it stressed that "particularly . . . with the positions that [Dempsey had] argued and stated it would be difficult for an attorney to represent [him] as stand-by" counsel. Thus, the trial court denied Dempsey's motions because he had not established the need for standby counsel and because any attorney it appointed as standby counsel would face professional liability insurance coverage issues.

Ultimately, Dempsey's jury trial occurred in August 2021. At trial, the State relied on the testimony of the law enforcement officers and a forensic scientist involved in the case to establish its charges against Dempsey. In addition, the State presented the testimony of the hotel desk clerk who asserted that Dempsey asked her questions about A.M. the evening of June 5, 2019, and A.M.'s neighbor who said she saw Dempsey watching A.M.'s apartment's front door for about two hours on June 10, 2019.

But the State's primary evidence against Dempsey was A.M.'s testimony. Her testimony on behalf of the State largely matched her earlier statements to law enforcement. She testified that around 4:30 a.m., Dempsey walked towards her while she was smoking a cigarette on her porch. She explained that as Dempsey walked towards

her, she tossed him a cigarette, hoping that he would take the cigarette and leave her alone. But according to A.M., instead of leaving, Dempsey continued towards her, made verbal sexual advances, unzipped his pants, exposed his erect penis, bear hugged her, dry humped her, and then asked for a glass of water. A.M. testified that she went inside her apartment to get the glass of water. But she explained that when she returned to give Dempsey the glass of water, Dempsey immediately pushed his way through her porch door into her apartment. A.M. testified that once inside her apartment, Dempsey immediately went to her couch and started masturbating. She testified that as Dempsey masturbated on her couch, he told her to "[s]uck [his] dick." A.M. asserted that when she tried to remove Dempsey from her couch, Dempsey grabbed her neck and forced her head down towards his erect penis, which resulted in her mouth touching Dempsey's penis momentarily. She also asserted that Dempsey let go of her neck only because his ride to work called him. Lastly, through A.M.'s testimony, the State admitted evidence under K.S.A. 2021 Supp. 60-455(d) that Dempsey had exposed his penis to her twice before June 5, 2019.

Dempsey defended himself against the State's charges by presenting a total innocence defense, which had two parts. The first part of Dempsey's total innocence defense involved arguing that the State's evidence was unreliable. In making this argument, Dempsey seemingly alleged that the State manufactured evidence against him because law enforcement, forensic scientists, and prosecutors work together under the "good old buddy system." The second part of Dempsey's total innocence defense involved portraying A.M. as a spurned and obsessed woman. In short, Dempsey argued that A.M. lied about the June 5, 2019 incident because she was upset with him for rejecting her previous sexual advances.

During his narrative direct examination, Dempsey testified that a couple years before June 5, 2019, while he and A.M. smoked marijuana in A.M.'s apartment, A.M. performed oral sex on him without his consent. He testified that about a week before the

June 5, 2019 incident, A.M. approached him outside his apartment and asked, "[W]hy you act like you don't want to talk to me[?]" Dempsey testified that he responded that he did not have "time for that" because he "carr[ied] [him]self with a sense of respect." As for June 5, 2019, Dempsey asserted that early in the morning as he was waiting for a friend to pick him up for work, A.M. told him that she had been "missing [his] dick." He asserted that as A.M. said this, she reached out to stroke his penis, at which point he slapped her hand away. According to Dempsey, this was the entirety of his encounter with A.M. on June 5, 2019. He insisted that he never exposed his penis, entered A.M.'s apartment, or forced A.M.'s mouth onto his penis.

Of note, after Dempsey completed his narrative direct examination, the State asked the trial court whether Dempsey's testimony about "carry[ing] [him]self with a sense of respect" opened the door for it to admit evidence of some of Dempsey's prior convictions. Specifically, it asked whether it could admit evidence of his two robbery convictions from 2008, his theft conviction from 2008, his criminal restraint conviction from 2008, his aggravated burglary conviction from 2001, his aggravated assault conviction from 2001, and his domestic violence conviction from 2000. The State argued that Dempsey's testimony allowed it to admit this prior crimes evidence because it was "not respectful" to commit those prior crimes and because "the record" proved that Dempsey was "trying to paint himself out as a great guy."

The trial court agreed with the State that a person who carries himself or herself with respect would not commit the prior crimes at issue. It also agreed with the State that a "theme" of Dempsey's case was that "he's a man of good character, generous, helps people out and so forth." It found that Dempsey's statement about carrying himself with respect was directed at the jury about his overall character. And it found that when he made the disputed statement, his intent was to tell the jury that "he couldn't have committed [the crimes charged]." On that basis, *relying on K.S.A. 60-447 as authority*, the trial court let the State cross-examine Dempsey on his two robbery convictions from

2008, his theft conviction from 2008, his criminal restraint conviction from 2008, his aggravated burglary conviction from 2001, his aggravated assault conviction from 2001, and his domestic violence conviction from 2000 as those convictions concerned Dempsey's sense of respect.

In addition to his own testimony, Dempsey called Mary Baker and A.M. to support his contention that A.M. was a miffed sexual aggressor. Baker, who explained that she was previously a close friend of A.M., alleged that A.M. was "really in love with [Dempsey]." She testified that she remembered an incident about three years earlier, during which A.M. cried and told her that "all she wanted . . . to do was have oral sex with [Dempsey]." Also, Baker testified that after telling A.M. to "go on with her life," A.M. told her that she could not because "one day [she and Dempsey would] have some kids together." Nevertheless, when Dempsey asked A.M. about their past encounters, A.M. denied ever making sexual advances towards him. Instead, she testified that Dempsey had made all of the sexual advances, which were always unwanted. Finally, to contest the stalking charge, Dempsey called a woman who testified that the hotel desk clerk had previously told her that the person asking for A.M. on June 5, 2019, looked different than Dempsey.

In the end, the jury found Dempsey guilty of all charges. Later, the trial court sentenced Dempsey to a controlling term of 281 months' imprisonment followed by lifetime postrelease for his convictions.

Dempsey timely appeals.

ANALYSIS

Did the trial court err when it denied Dempsey's requests for standby counsel?

Although a defendant has a right to conduct his or her own defense under the Sixth Amendment to the United States Constitution, a defendant has no right to standby or hybrid counsel. *McKaskle*, 465 U.S. at 183; see also *State v. Holmes*, 278 Kan. 603, 620, 102 P.3d 406 (2004) (citing *State v. McKessor*, 246 Kan. 1, 12, 785 P.2d 1332 [1990]). Indeed, "[t]he appointment of standby counsel for pro se litigants rests within the sound discretion of the trial court." *State v. Breitenbach*, 313 Kan. 73, 94, 483 P.3d 448 (2021). And a trial court only abuses its discretion when it makes an error of law, an error of fact, or an otherwise unreasonable decision. *State v. Ingham*, 308 Kan. 1466, 1469, 430 P.3d 931 (2018).

Recently, our Supreme Court recognized that "Kansas caselaw provides little guidance for the appointment of standby counsel other than it being a matter of complete discretion." *Breitenbach*, 313 Kan. at 94. Even so, our Supreme Court continues to define and apply the trial court's discretion to deny a defendant's request for standby counsel broadly. 313 Kan. at 94-96. For example, in *Breitenbach*, our Supreme Court determined that the trial court's discretion was broad enough to affirm its denial of Breitenbach's pro se motion for standby counsel (1) because appointing standby counsel would place standby counsel in an awkward position and (2) because Breitenbach really wanted cocounsel instead of standby counsel. 313 Kan. at 95-96.

On appeal, Dempsey argues that the trial court acted unreasonably when it denied his pro se motions for standby counsel because "it is clear throughout the proceedings that standby counsel would have been beneficial." To support his argument, Dempsey points out that he requested standby counsel before his jury trial multiple times. He points out that he specifically asked for standby counsel to help him understand basic procedural

and evidentiary requirements. He also argues that the trial court's denial of his motions harmed him because he made errors at his jury trial. In response, the State argues that "[t]he fact that [Dempsey] believes that it would have been beneficial to have standby counsel available to help with technical legal matters in no way suffices to carry his burden of showing an abuse of discretion."

Simply put, the State's argument is persuasive. Once again, when the trial court denied Dempsey's pro se motions for standby counsel, it explained that it was using its discretion to do so (1) because Dempsey had not proven that he needed standby counsel and (2) because acting as standby counsel placed the appointed attorney in a difficult position. As to this second point about putting an appointed attorney in a difficult position, the trial court specifically explained that appointing an attorney as standby counsel would create professional liability insurance issues for the appointed attorney. Because the *Breitenbach* court affirmed the trial court's denial of Breitenbach's motion for standby counsel based on the awkward position it would place standby counsel in, it stands to reason that in this case, the trial court acted reasonably when it denied Dempsey's pro se motions for standby counsel based on the awkward position it would place the appointed attorney to act as standby counsel in for professional liability insurance purposes. 313 Kan. at 95-96; see also *State v. Rodriguez*, 305 Kan. 1139, 1144, 390 P.3d 903 (2017) (holding that this court is duty-bound to follow our Supreme Court precedent absent some indication that our Supreme Court is moving away from that precedent).

Next, although the trial court never expressly found that Dempsey really wanted cocounsel, it found that Dempsey never proved that he needed standby counsel. Here, it is readily apparent that Dempsey never legally proved that he needed standby counsel because Dempsey really wanted an attorney to serve as his cocounsel.

For example, before the trial court, Dempsey would often use the terms cocounsel and standby counsel interchangeably. But in his initial pro se motion, he explicitly asked for "standby co-counsel" to advise him on "'procedural and evidentuary [*sic*] requirements'" throughout his case. Now, on appeal, he suggests that if he had such an appointed attorney, this attorney would have stopped him from making mistakes during his narrative direct examination of himself. That is to say, he argues that if he had this appointed attorney, this attorney would have coached him before he gave his narrative testimony, working with him on avoiding statements that opened the door for the State to admit evidence of his prior crimes.

Also, he contends that if he had such an appointed attorney, this attorney "would have been able to assist [him] through the proceedings and helped to ensure a fair trial." So, both before the trial court and on appeal, Dempsey has argued that he needed an appointed attorney to actively help him with his defense. And so, Dempsey clearly wanted an appointed attorney to serve as cocounsel, not standby counsel. See Black's Law Dictionary 440 (11th ed. 2019) (defining "standby counsel" as an attorney that is prepared to represent a pro se defendant if that "pro se defendant's self-representation ends"); Black's Law Dictionary 1557 (defining "hybrid representation" as an attorney that acts as "cocounsel alongside a defendant"). Thus, under *Breitenbach*'s precedent, the fact that Dempsey wanted the trial court to appoint cocounsel rather than standby counsel supports the reasonableness of the trial court's decision. 313 Kan. at 95-96.

Finally, Dempsey's argument about the trial court appointing him standby counsel to help him understand basic procedural and evidentiary requirements hinges on misinterpreting caselaw. In his brief, Dempsey complains that if he had standby counsel, standby counsel could have helped him "throughout the proceedings" with basic procedural and evidentiary requirements. And before the trial court, Dempsey suggested that this court's *Warren* decision, which relied on the United States Supreme Court's

McKaskle decision and this court's *Rassel* decision established that standby counsel *should* be appointed to pro se defendants for this purpose.

In *McKaskle*, the United States Supreme Court held that the trial court *may* appoint standby counsel, even over a defendant's objection "to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals." 465 U.S. at 184. In *Rassel*, when discussing whether standby counsel was a constitutionally sufficient substitute for the type of legal representation that the Sixth Amendment requires, this court relied on *McKaskle*'s precedent to hold the following:

> "The common charge to lawyers serving as standby counsel is to assist defendants representing themselves to the extent they ask for help and to provide input in complying with basic procedural and evidentiary requirements. Their role is not to manage the proceedings or make unsolicited substantive contributions, something that would be inconsistent with the defendant's election of self-representation. [Citation omitted.]" 2013 WL 1688930, at *2.

Then, in *Warren*, this court relied on the preceding holding from *Rassel* to reject Warren's argument that the trial court erred by allowing him to act pro se at trial. *Warren*, 2015 WL 4879034, at *5-7.

Although Dempsey has cited some caselaw for the proposition that the trial court should have appointed him standby counsel to help him understand basic procedural and evidentiary requirements, this caselaw does not support his proposition. The *McKaskle* court clearly held that standby counsel's role is to help with "basic rules of courtroom protocol" and overcome "obstacles" hindering the defendant from presenting his or her defense. 465 U.S. at 184. Meanwhile, this court's interpretation of *McKaskle*'s precedent in *Rassel* and *Warren* establish that standby counsel "is not to manage the proceedings or

make unsolicited substantive contributions." *Rassel*, 2013 WL 1688930, at *2; see *Warren*, 2015 WL 4879034, at *5-7. But as just considered, Dempsey wanted someone who would actively help him prepare and present his defense, that is, help manage the proceedings. What is more, none of the preceding decisions held that the appointment of standby counsel for this purpose was mandatory when requested by a pro se defendant. Thus, the caselaw Dempsey relies on to support his argument about being entitled to standby counsel for procedural and evidentiary advice throughout the proceedings undermines his argument about being entitled to standby counsel for this purpose.

In summary, Kansas caselaw gives the trial court broad discretion whether to deny a pro se defendant's motion for standby counsel. Here, the trial court denied Dempsey's pro se motions for standby counsel because Dempsey had not established that he needed standby counsel and because any attorney it appointed would face professional liability insurance difficulties. Under *Breitenbach*'s precedent and the facts of this case, the trial court did not abuse its discretion for denying Dempsey's motions for those reasons. See 313 Kan. at 95. Consequently, we affirm the trial court's denial of Dempsey's pro se motions for the appointment of standby counsel.

Did the trial court err when it admitted evidence of Dempsey's prior crimes?

K.S.A. 2022 Supp. 60-455 concerns the admission of other crimes and civil wrongs evidence. In part, it provides:

> "(a) *Subject to K.S.A. 60-447*, and amendments thereto, evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove such person's disposition to commit crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion.
>
> "(b) Subject to K.S.A. 60-445 and 60-448, and amendments thereto, such evidence is admissible when relevant to prove some other material fact including motive,

opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." (Emphasis added.) K.S.A. 2022 Supp. 60-455(a)-(b).

When considering a challenge to the trial court's decision to admit evidence under K.S.A. 2022 Supp. 60-455, this court must comply with the following standard of review:

> "When the State seeks to introduce evidence of prior bad conduct under K.S.A. 60-455, that evidence must be material, and its probative value must outweigh its potential for producing undue prejudice. *State v. Gunby*, 282 Kan. 39, 48, 144 P.3d 647 (2006). Whether such evidence is material—meaning that the evidence has some real bearing on the decision in the case—is reviewed independently, without deference to the district court. Whether the evidence is relevant to prove a disputed material fact is reviewed only for abuse of discretion. Whether the probative value of the evidence outweighs the potential for undue prejudice against the defendant is also reviewed only for abuse of discretion. *State v. Haygood*, 308 Kan. 1387, 1392-93, 430 P.3d 11 (2018)." *State v. Claerhout*, 310 Kan. 924, 927-28, 453 P.3d 855 (2019).

Nevertheless, as emphasized in the quoted portion of K.S.A. 60-455(a), K.S.A. 60-455's application is "[s]ubject to K.S.A. 60-447." K.S.A. 60-447 concerns the admission of character evidence to prove that a person acted a certain way on a specified occasion. It states:

> "Subject to K.S.A. 60-448 when a trait of a person's character is relevant as tending to prove conduct on a specified occasion, such trait may be proved in the same manner as provided by K.S.A. 60-446, except that (a) evidence of specific instances of conduct other than evidence of conviction of a crime which tends to prove the trait to be bad shall be inadmissible, and (b) in a criminal action evidence of a trait of an accused's character as tending to prove guilt or innocence of the offense charged, (i) may not be excluded by the judge *under K.S.A. 60-445* if offered by the accused to prove innocence, and (ii) if offered by the prosecution to prove guilt, may be admitted only after the accused has introduced evidence of his or her good character." (Emphasis added.) K.S.A. 60-447.

Of note, K.S.A. 60-445 is the statute allowing the trial court to exclude evidence if the prejudicial effect of that evidence substantially outweighs the probative value of that evidence. Thus, read together, K.S.A. 60-447(b)(i)-(ii) provides that if a criminal defendant presents character evidence to prove his or her innocence, the trial court must allow that defendant to present this evidence. And it provides that once the defendant presents such character evidence, the State may present evidence supporting that the defendant has a bad character trait.

Further, whether a party admits evidence under K.S.A. 60-447 or K.S.A. 2022 Supp. 60-455, the party challenging the admission of evidence under either statute must lodge a timely and specific objection to its admission. K.S.A. 60-404 states:

> "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless there appears of record objection to the evidence timely interposed and so stated as to make clear the specific ground of objection."

When considering whether a party preserved an evidentiary challenge as required under K.S.A. 60-404, this court exercises unlimited review. *State v. Campbell*, 308 Kan. 763, 770, 423 P.3d 539 (2018).

On appeal, Dempsey's primary argument is that the trial court erred when it admitted evidence of his two robbery convictions from 2008, his theft conviction from 2008, his criminal restraint conviction from 2008, his aggravated burglary conviction from 2001, his aggravated assault conviction from 2001, and his domestic violence conviction from 2000 under K.S.A. 60-455. In making his argument, Dempsey does not challenge the trial court's ruling that he opened the door for the admission of this prior crimes evidence by testifying that he "carr[ied] [him]self with a sense of respect" to reject A.M.'s alleged sexual advance. Rather, his entire argument is that the trial court erred by

admitting the prior crimes evidence under K.S.A. 60-455 because the prejudicial effect of this evidence greatly outweighed its probative value. In particular, he contends that the admission of this evidence prejudiced the jury against him as described in *State v. Gunby*, 282 Kan. 39, 48-49, 144 P.3d 647 (2006).

In response, the State argues that Dempsey's argument is unpreserved. It simply contends that because Dempsey never objected to the admission of the prior crimes evidence at his jury trial, he violated K.S.A. 60-404's specific and contemporaneous objection requirement. In his appellant's brief, Dempsey concedes that he never expressly objected to the trial court's admission of the prior crimes evidence. Even so, he argues that this court should consider his argument preserved. He argues that given his pro se status, the trial court had a duty to inquire whether he had an objection to the admission of the prior crimes evidence. Yet, Dempsey's preservation argument has two problems.

First, although Dempsey argues otherwise, the trial court had no duty to ask Dempsey whether he had an objection to the admission of the prior crimes evidence because he was acting pro se. Indeed, in reviewing the *Lowe* factors with Dempsey, the trial court explicitly warned Dempsey of the following: (1) that it would not act on his behalf in asserting objections or making appropriate motions that are ordinarily made by counsel, (2) that the rules of law are highly technical and will not be set aside based on his pro se status, and (3) that he may waive constitutional, statutory, and common-law rights unknowingly. *Lowe*, 18 Kan. App. 2d at 77.

Nevertheless, during his trial, we note that Dempsey seemed not to be desirous of any special treatment after the trial judge announced his ruling to admit the prior crimes evidence under K.S.A. 60-447. Indeed, Dempsey replied to the trial judge's ruling by stating that he was ready for the trial to resume, and he then stated: "I ain't worried about it. Come on." Moreover, because he failed to lodge a timely and specific objection to the admission of the prior crimes evidence as required under K.S.A. 60-404, he has not

preserved his arguments against the admission of the prior crimes evidence for this court to review.

Second, and more importantly, *the trial court admitted the prior crimes evidence under K.S.A. 60-447, not K.S.A. 60-455*. When the prosecutor asked the trial judge whether Dempsey opened the door to admit the prior crimes evidence by saying that he carried himself with a sense of respect, she never cited a statute. The trial judge was the first person to mention a statute, which was K.S.A. 60-447. The trial judge's entire analysis about whether to admit the prior crimes evidence concerned (1) whether the statement constituted character evidence and (2) whether Dempsey's past crimes constituted conduct of someone who carries himself with respect. Although the trial judge cited K.S.A. 60-445, the judge never cited or applied K.S.A. 60-455 when deciding whether to admit the disputed prior crimes evidence.

To that end, although Dempsey's and the State's analysis focused entirely on K.S.A. 60-455, implying that the trial court admitted the prior crimes evidence under K.S.A. 60-455, this was incorrect. It is a well-known rule that an issue not briefed by an appellant is deemed waived and abandoned by this court. *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021). Here, Dempsey has not challenged the trial court's admission of the prior crimes evidence under the statute that the trial court admitted the prior crimes evidence under. Put another way, by making no arguments about the trial court's admission of the prior crimes evidence under K.S.A. 60-447, Dempsey has abandoned any argument that he may have had about the admission of the prior crimes evidence at his jury trial. So, notwithstanding the fact that Dempsey failed to preserve his argument by lodging a specific and timely objection as required by K.S.A. 60-404, Dempsey failed to preserve his argument that the trial court wrongly admitted the disputed prior crimes evidence under K.S.A. 60-455 because the trial court admitted this evidence under K.S.A. 60-447.

Affirmed.