No. 124,775

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

BRIAN A. SPILMAN JR.,
Appellant.

SYLLABUS BY THE COURT

1.

When reviewing a challenge to jury instructions, appellate courts generally apply a multi-step analysis. First, the court decides whether the issue was properly preserved in the trial court. Second, the court considers whether the instruction was legally and factually appropriate. Third, if the court finds error, the court determines whether the error requires reversal. The standard applied to this last inquiry depends on preservation.

2.

A litigant's failure to object to a jury instruction on the specific grounds raised on appeal does not preclude appellate review, but the litigant must show that the instruction is clearly erroneous.

3.

An instruction on aiding and abetting is factually appropriate if, from the totality of the evidence, the jury could reasonably conclude that the defendant aided and abetted another in the commission of a crime.

4.

Under K.S.A. 2022 Supp. 21-5210, an aider or abettor must intend to assist the commission of a crime and must act with the same mental culpability as the principal. An aider or abettor may intend to assist the commission of a reckless act.

5.

When a criminal defendant challenges the evidence supporting a conviction, an appellate court examines all the evidence in a light most favorable to the prevailing party—the State—to determine whether a rational fact-finder could have found each required element of the crime beyond a reasonable doubt. An appellate court does not reweigh evidence, resolve evidentiary conflicts, or make credibility determinations.

6.

Causation in a criminal case has two core elements: cause-in-fact and legal causation. Cause-in-fact requires proof that but for the defendant's conduct, the result would not have occurred. Legal causation limits a defendant's liability to the reasonably foreseeable consequences of his or her conduct. There may be more than one proximate cause of a death. When the conduct of two or more persons contributes concurrently as proximate causes of a death, the conduct of each of said persons is a proximate cause of the death regardless of the extent to which each contributes to the death. A cause is concurrent if it was operative at the moment of death and acted with another cause to produce the death.

7.

Prosecutorial error in closing arguments occurs when the prosecutor's actions or statements fall outside the wide latitude afforded prosecutors to conduct the State's case. If an appellate court concludes the prosecutor committed error, then it determines whether the error affected the substantial rights of the defendant. The court may deem the error harmless only if the State can establish beyond a reasonable doubt that the error did

not affect the outcome of the trial. In other words, the State must show that no reasonable possibility exists that the error contributed to the verdict.

8.

The law charges a prosecutor to restrict comments in argument to a reasoned discussion of the evidence presented at trial as it applies to the law, synthesizing facts and articulating reasonable inferences but not diverting the jury's attention from admissible evidence in deciding the case. Accordingly, a prosecutor may not mischaracterize the evidence during argument. He or she may not properly refer to information outside the admitted evidence. A prosecutor must not offer personal opinions about the significance of specific evidence or what witnesses are credible. A prosecutor must not misstate the law or invite the jurors to disregard the law. A prosecutor must not attempt to enflame the passions or prejudices of the jurors. When a prosecutor engages in these behaviors, he or she steps outside the wide latitude afforded prosecutors to argue a case.

9.

To warrant reversal of a criminal conviction for cumulative trial error, the combined effect of the trial errors must convince the reviewing court that the defendant's trial was so prejudiced that the court may not declare the errors harmless. If any of the errors involved constitutional rights, the court must be willing to declare the cumulative error harmless beyond a reasonable doubt.

10.

An appellate court generally does not review constitutional issues raised for the first time, though the courts have recognized three exceptions to this rule. Even when a litigant demonstrates the applicability of an exception, an appellate court is not bound to consider an unpreserved issue for the first time on appeal.

11.

The amount of restitution and the manner in which restitution is paid are decisions left to the discretion of the trial court. An appellate court reviews that decision for abuse of that discretion. Absent demonstration of some error of fact or law, an appellate court will find an abuse of discretion only when the trial court's decision is shown to be arbitrary, fanciful, or unreasonable.

Appeal from Doniphan District Court; JOHN L. WEINGART, judge. Opinion filed July 7, 2023. Affirmed.

Kai Tate Mann, of Kansas Appellate Defender Office, for appellant.

Charles D. Baskins, county attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before MALONE, P.J., GREEN and ISHERWOOD, JJ.

GREEN, J.: Brian A. Spilman Jr. was convicted by a jury in Doniphan County District Court of involuntary manslaughter for participating in beating Jason Pantle, who later died from his injuries. Spilman challenges his conviction on several grounds: He contends (1) that the trial court erred in instructing the jury on liability as an aider or abettor; (2) that his conviction is not supported by the evidence; and (3) that the prosecutor committed error in closing argument. He further contends that these errors, if not individually prejudicial, combined to deprive him of a fair trial. We disagree and affirm.

Because of the offense of conviction, the court also required Spilman to register as a violent offender under the Kansas Offender Registration Act (KORA). For the first time on appeal, Spilman challenges KORA as unconstitutional because it compels speech in violation of the First Amendment to the United States Constitution and treats similarly situated offenders differently in violation of the Equal Protection Clause of the

Fourteenth Amendment to the United States Constitution. Because consideration of this issue would require the development of facts outside our appellate record, we refrain from considering this issue for the first time on appeal.

Finally, he challenges the trial court's restitution award because the court did not order restitution to be paid jointly and severally with Spilman's codefendants. Spilman has not demonstrated that the trial court's restitution award was arbitrary, fanciful, or unreasonable. Thus, he has not established a basis for vacating the restitution award. We affirm.

FACTS

In September 2019, Gracie Seager planned a surprise birthday party for her mother, Sarah Amelia Seager (a/k/a Amy Seager or Amy Scherer), at her grandfather's shop in the town of Doniphan in Doniphan County. The shop had a garage door that was left open for the party. Outside the garage door, a concrete slab covered the drive for a few feet before running to gravel.

The party was held on Saturday, September 22, starting at about 8 p.m., but it extended into the early morning hours of Sunday, September 23. In preparation for the party, Gracie had issued invitations, but the number of people who attended the party exceeded the number of invitees as word of the party spread among acquaintances. Guests came and went throughout the evening. Estimates of the number of party guests ranged from 20 to 45.

Alcohol was served at the party, which may have contributed to the inconsistent reports about the altercations that led to the death of Pantle. No two witness accounts agree to the details of the altercations. Most witnesses, however, agree on the general story arc.

Though she could not specify the time, Gracie testified that she approached Pantle to ask him to leave because he was being boisterous and confrontational. Pantle responded rudely, asking her what she was going to do about it and calling her a "bitch." Pantle then shoved Gracie, and she lost her balance, tripping over a cooler on the floor behind her. Scott Vandeloo, who was standing near Gracie, told Pantle that he should not talk to Gracie that way and that he should respect the party. Pantle shoved Scott, and Scott pushed him back; Pantle fell to the ground. Gracie's mother essentially substantiated Gracie's testimony. Neither Gracie nor her mother mentioned any punching or wrestling between Scott and Pantle, and they did not mention any altercation between Pantle and Spilman at all. Nevertheless, Gracie and her mother left the party shortly after this altercation.

About 10 minutes before Gracie and her mother left—around 2 a.m.—Morgan Hull arrived at the party. Unlike most of the other witnesses in the case, Morgan was not related to anyone at the party, but she was friends with Shelby Seager and Gracie. After arriving at the party, Morgan found Shelby and joined her in conversation near the refrigerator, just inside the garage door of the shop. Although Morgan mentioned the departure of Gracie and her mother, she did not describe the confrontation between Gracie and Pantle that had prompted their departure, except to say that several people were arguing.

Just after Gracie and her mother left the party, Spilman engaged in a fight with Pantle. Morgan did not describe how the altercation began. Shelby, who was standing next to Morgan, testified that the altercation occurred when Spilman asked Pantle to leave the party, and he refused. David Underwood, who was dating Shelby but also unrelated to any of the combatants, stated that the fight began when Pantle ran at a group of people, and Spilman, in response, "went at" Pantle.

Morgan testified that Spilman shoved Pantle and then hit him. Pantle fell, and Spilman straddled Pantle, punching him with both fists. While Shelby and David agreed that Spilman shoved Pantle, they both testified that they did not see Spilman throw any punches. Shelby also testified that she did not witness Spilman straddling or sitting on top of Pantle. But Shelby had previously told a KBI agent that Pantle "was getting the shit beat out of him" and that Pantle was at a disadvantage to Spilman. Though Spilman testified that Pantle sucker-punched him, Morgan and David both testified that they did not see it. And Shelby did not mention it.

All three witnesses indicated that the fight did not last long. Though Morgan testified that Spilman punched Pantle for about five minutes, she also testified that the fight did not last long; that if she had walked outside, inside, and then immediately returned, the fight would have been over. She admitted that she was not good with time estimates. Shelby testified the fight lasted only a couple minutes. None of the witnesses provided details about the resolution of the fight, but none confirmed Spilman's account, which was that he threw wild punches at Pantle, blindly and in self-defense.

Spilman and his father (Brian Sr.) testified that, after Spilman had wrestled Pantle into a hold, Brian Sr. told him to stop. Spilman reportedly complied, releasing Pantle and moving away to avoid further confrontation. Morgan and David testified that they did not hear anyone telling the participants to stop fighting.

The testimony regarding Pantle's condition after his fight with Spilman is also inconsistent. Morgan testified that Pantle remained on the ground after the fight, rolling around and trying to get up. Shelby and David testified that Pantle got to his feet, suggesting that he stood up as soon as the fight had ended.

But shortly after the fight between Spilman and Pantle ended, Scott Vandeloo began to fight with Pantle. Brian Sr. testified that Pantle initiated this fight. Morgan

testified that Scott knocked Pantle to the ground, straddled him, and punched him in the head. Shelby testified that Scott and Pantle were both swinging their arms. This fight lasted about the same amount of time as the fight between Spilman and Pantle.

During this fight, David Underwood attempted to intervene, but Spilman pulled him back and threw him to the ground. Spilman claimed that he believed David was attempting to enter the fight or, in his words, "jump" someone. When asked about this intervention, Morgan stated she did not see anyone attempt to intervene in the fight. Brian Sr. also did not testify about David's intervention. David stated that Spilman apologized days later; Spilman testified he apologized immediately.

After the fight ended, Scott stood up and began looking for his phone, believed to have been lost during the fight. Spilman picked it up and later returned it to Scott. Meanwhile, Pantle remained on the ground, trying to get up. He eventually regained his feet and moved toward the shop. As he did so, Spilman ran at Pantle, hit him, and knocked him to the ground. Spilman and Pantle then rolled around on the ground. David and Shelby, who remained in the area, did not witness this incident. Brian Sr. also did not testify about this event. Spilman testified that after the fight between Pantle and Scott, he went to the bathroom. He denied he had a second altercation with Pantle.

Morgan reportedly walked over to the group surrounding the fight and told them, "'Enough's enough.'" Brian Sr. pulled her back, telling her, "'It's not your fucking fight. Don't fucking worry about it.'" Matthew Cole Scherer also prevented Morgan from intervening. Not able to do anything to stop the fight, Morgan returned to her group of friends just inside the shop door.

Later, Morgan saw Spilman get up and return to the shop. Pantle did not get up quickly. Each time Pantle was knocked down, it took him longer to get back up. At the end of the fight, Matthew stood over Pantle, saying, "'You're good, bro. You're fine. Get

up. You're fine.'" Pantle eventually got up and walked toward the shop. Morgan said that Pantle had his arms out to the side, perhaps for balance. As he entered the shop, Pantle said something, and Matthew hit Pantle in the jaw, knocking him unconscious. Brian Sr. confirmed that Pantle initiated this confrontation and leaned into Matthew. When Matthew hit him, Pantle fell straight backward, hitting his head on the concrete slab with a "'sick[ening]'" sound.

Pantle lay on the concrete with his feet inside the shop but his head and torso outside in the rain. According to Morgan, no one did anything for Pantle until she began walking toward him, telling the other guys that Pantle needed to be brought in out of the rain. Then Matthew and Spilman dragged or carried Pantle into the shop, leaning him against the couch.

Austin Spilman, the first cousin of the defendant, had just returned to the party to see Matthew hit Pantle. Austin and John Pantle, the victim's son, tried to get to Pantle, but Matthew prevented them from reaching him. After Pantle was moved into the shop, however, Austin and John were permitted to check on him.

Morgan continued to watch Pantle because she did not think he looked well. Austin also testified that Pantle was visibly unwell. His belly was jerking, and his chest caved in when he tried to breathe. He had foam and blood coming out of his mouth. Somebody picked Pantle up off the floor and lay him on the couch, which seemed to help his breathing. Morgan checked Pantle's pulse and found it erratic. The area around Pantle's eyebrows was swollen, the left side more than the right side. One eye was completely swollen shut; the swelling was the size of a softball. Scott took a picture of Pantle lying on the couch and sent it to a Facebook Messenger group. Pantle lay on the couch anywhere from 20 to 60 minutes. Spilman did not think Pantle's condition appeared alarming, but he also testified that Pantle was unconscious after he helped move him from the concrete to the couch.

Morgan stated she wanted to call 911, but Matthew told her not to call because they did not want the "law" out there. Matthew told her that, if she wanted to get him help, she could take him. Austin agreed that the group expressed fear about involving the police and that Matthew would not let anyone take Pantle from the shop, but he testified that he heard no discussion about removing Pantle. Morgan said that she did not call 911 because she was frightened about what the guys might do if she called; if she called from her car, everyone would know she had called when the ambulance arrived because she had suggested it. She could not have taken Pantle to her car by herself, and no one offered to assist her. She went out to her car and called a friend, Kailen Kurtz, at about 2:30 a.m. She called from her car because she did not want the others to hear what she said.

Nearly an hour later, Kailen arrived at the shop. Just before Kailen arrived, Austin was permitted to take Pantle home in his truck. Several people helped to carry Pantle to the truck. Some testimony reports that Spilman helped. Other testimony suggests that he did not. As they were carrying him out to the truck, Scott reportedly said, '"The same motherfuckers you thought that you could fight are the same ones carrying you to the vehicle."'

They placed Pantle onto the back seat of the truck, but they did not get him completely into the vehicle. His legs dangled out the door. Nevertheless, most of the men returned to the shop and continued socializing. John, Morgan, and Kailen pulled Pantle up into the seat so the door would close. While they were moving him, Pantle may have regained consciousness. Kailen and Morgan stated that he mumbled but did not regain consciousness. Austin and John testified that Pantle regained consciousness and freaked out, agitated that they were leaving the party. Pantle then became combative with his son, who was trying to get him into the truck.

Because Pantle was freaking out, Austin returned to the shop to request help from Brian Sr. Brian Sr. testified that Austin reported that John was beating up Pantle. Austin contradicted this report, denying that he told them that John and Pantle were fighting each other. Austin claimed that Brian Sr. simply came out to the truck and talked with Pantle, trying to get him to calm down.

It is unclear whether Pantle remained conscious. Eventually, John and Austin were able to drive Pantle to Atchison. Shelby and David followed them to Atchison, before taking a different road to home. Austin did not stop along the way to Atchison.

Austin drove to his house, instead of taking Pantle to the hospital. Morgan testified that, before she left the party, she encouraged Austin to take Pantle to the hospital. She assumed that Austin and John would take him to the hospital. Austin said he thought Pantle just needed rest. John did not recall that Morgan urged him to take his father to the hospital or that she offered to take him. John stated that his father did not have health insurance, and he did not want to incur medical costs of a hospital visit if it was unnecessary. He wanted to assess his father's condition at Austin's house. John also admitted that he did not want to involve law enforcement because his father was on bond and heavily intoxicated.

When they stopped at Austin's house, Austin placed his keys in the center console and got out to help Pantle out of the truck. Pantle had regained consciousness. He picked up Austin's keys from the console and got out of the truck with Austin's and John's assistance. Austin intended to go open the house for Pantle but could not find his keys. While Austin searched for his keys, Pantle stood, leaning against the back of the truck. He was asking to go back to the party. As he was talking, his knees buckled, and he slid to the ground like an "accordion." His head hit the pavement.

After his father fell, John began freaking out, yelling at Pantle and trying to revive him by slapping him. Pantle was unresponsive, lying on the driveway with his head toward the gutter, which was filled with water because of the rain.

Meanwhile, Austin received a text message from Brian Sr. and Blake Camp, who was in a band with Pantle, asking how Pantle was doing. Austin took a picture of Pantle and sent it to them.

John's efforts to revive his father wakened a woman staying the night nearby with a friend. She looked outside and decided to call the non-emergency dispatch number. The police arrived at Austin's house shortly thereafter. Although John told the police that they could transport Pantle to the hospital to avoid the ambulance charges, the police called an ambulance, which took Pantle to the hospital.

Pantle died. A later autopsy by Dr. Altaf Hossain revealed fractures to the right side of Pantle's maxilla, frontal bone, and nose. He had several blood clots between the skin and skull. Dr. Hossain discovered several more blood clots within the skull and contusions on the underside of the brain. The blood clotting was not limited to a single area; it occurred in the front area, right side, top area, and back. With a single blow to the jaw followed by a fall onto the back of the head, Dr. Hossain would have expected to see a small amount of bleeding in the face area and an injury to the back of the head, not the global injuries found on Pantle's head. Even two falls onto the head did not account for Pantle's injuries. Therefore, Dr. Hossain concluded the injuries were the result of multiple blows to the head. The facial injuries were also consistent with punches to the right side of the face. The severity of the injuries was equivalent to injuries inflicted by multiple blows to the head with a baseball bat. Significant blood clotting at the base of the skull indicated profuse bleeding. Blood clotting covered the right hemisphere of the brain. The back of the skull had been fractured in two places. Dr. Hossain stated the cause of death to be subdural hematoma with multiple skull fractures. He explained that hemorrhaging

within the skull increased pressure. If the pressure went unrelieved by medical intervention, the pressure results in herniation of the brain and death. As the pressure built, the individual likely would lose consciousness before death. Dr. Hossain opined that the multiple injuries compounded one another. Although the chances of survival are greater the earlier treatment is received, Pantle's injuries were significant enough that his chance of survival would have been low even with immediate medical intervention. Dr. Hossain determined the manner of death was homicide.

The State originally charged Spilman with aggravated battery. The State later amended the charge to second-degree, reckless (depraved heart) murder. After a preliminary examination hearing, the trial court found probable cause to believe Spilman was guilty of the charge.

The case was presented to a jury over two days. After the jury began its deliberations, it returned four questions to the court. The court consulted with the attorneys and returned answers. The jury returned a verdict convicting Spilman of the lesser included offense of involuntary manslaughter. Defense counsel requested the jury to be polled. The court advised Spilman of his duty to register as a violent offender under KORA.

At sentencing, the parties agreed that Spilman had no significant criminal history, and the court classified his criminal history score as I. Because his conviction fell within a border box, Spilman argued for probation. The court denied Spilman's request for probation, imposing the standard presumptive prison term of 32 months, followed by 24 months of postrelease supervision. The court imposed $19,335.72 in restitution against Spilman. The court awarded Spilman 168 days of jail-time credit.

Spilman timely appeals.

ANALYSIS

Did the trial court err in providing the jury with an instruction on aiding and abetting?

Spilman's first appellate issue challenges the trial court's decision to provide the jury with an aiding and abetting instruction. He contends the instruction was neither legally nor factually appropriate.

When reviewing a challenge to jury instructions, appellate courts generally apply a multi-step analysis. First, the court decides whether the issue was properly preserved in the trial court. Second, the court considers whether the instruction was legally and factually appropriate. Third, if the court finds error, the court determines whether the error requires reversal. The standard applied to this last inquiry depends on preservation. *State v. Carter*, 316 Kan. 427, 430, 516 P.3d 608 (2022).

Preservation

As Spilman contends, he objected to the instruction at trial. From an examination of the portion of the record cited by Spilman, however, the objection related to the factual inappropriateness of the instruction under the facts of this case, not its legal inappropriateness because Spilman had been charged with an unintentional crime.

K.S.A. 2022 Supp. 22-3414(3) provides, in part, that a party must "stat[e] distinctly the matter to which the party objects and the grounds of the objection." In addition to the argument Spilman's attorney made during the jury instructions conference, Spilman's attorney sent a text message to the court (and presumably the prosecutor), objecting to the aiding and abetting instruction. Unfortunately, Spilman's brief does not have a pin cite where in the record the text message may be reviewed. Independent review of the record failed to discover the text message. Without the contents of the text message, we cannot determine the basis for Spilman's objection. Accordingly, our record

supports only an objection to the aiding and abetting instruction based on factual appropriateness.

Factual appropriateness

> "An instruction on aiding and abetting is factually appropriate if, from the totality of the evidence, the jury could reasonably conclude that the defendant aided and abetted another in the commission of the crime. To aid or abet, a person 'must willfully and knowingly associate himself with the unlawful venture and willfully participate in it as he would in something he wishes to bring about or to make succeed.' [Citation omitted.]" *State v. Shields*, 315 Kan. 814, 835, 511 P.3d 931 (2022) (quoting *State v. Llamas*, 298 Kan. 246, 253, 311 P.3d 399 [2013]).

Spilman contends that the evidence presented at trial did not support an aiding and abetting instruction because the evidence demonstrated only that Spilman was attempting to break up a fight after his initial altercation with Pantle. This argument paints the facts rose-colored from Spilman's perspective. Spilman admitted to pulling David away from the fight between Pantle and Scott, but he claimed he thought David intended to join the fight. A jury, however, was not required to accept Spilman's explanation for his actions. See *State v. Young*, 203 Kan. 296, 302, 454 P.2d 724 (1969) (jury justified in rejecting defendant's explanation for possession of check in concluding defendant forged the check); *State v. Wood*, 197 Kan. 241, 249, 416 P.2d 729 (1966). Indeed, when considering the factual appropriateness of a challenged jury instruction given by the court, an appellate court examines the evidence in a light most favorable to the party requesting the instruction, in this case, the State. *Carter*, 316 Kan. at 430.

On appeal, Spilman attributes an altruistic motive to his interference with David's actions, suggesting that he wanted to prevent someone from jumping into the fight against Pantle. The trial evidence does not invariably support this interpretation. Spilman testified that he wanted to prevent "someone getting jumped"—meaning two people

attacking one person. He did not testify that he wanted to prevent Pantle from being jumped. So Spilman's altruistic motive is supported only if one interprets his testimony this way: that Spilman was interested in the welfare of Pantle—not in his own welfare.

Circumstantial evidence does not support this interpretation. There is some evidence that Scott was sitting on top of Pantle, pummeling him. If the jury adopted this version of events as true, then Spilman's prevention of David's attempts to intervene in the fight suggests that Spilman did not want David to assist Pantle, the more helpless of the two combatants. This interpretation of the facts is further supported by evidence that, once the fight between Pantle and Scott ended, Spilman took another run at Pantle, hit him, and knocked him to the ground. This is not the conduct of a person interested in protecting Pantle from unfair fighting.

Spilman also testified he immediately apologized to David after realizing that David had not intended to enter the fight. David disputed this testimony, indicating that Spilman apologized days after the fight. But why would Spilman realize that David was trying to stop the fight immediately after pulling him away but not before he pulled him away? He knew David. Spilman's after-the-fact apology suggests an attempt to mitigate the culpability David's testimony cast on his actions in preventing David from stopping the fight.

Viewed in a light most favorable to the State, the evidence supports a jury finding that Spilman prevented David from intervening in the fight between Scott and Pantle because Spilman wanted Scott to continue to beat up Pantle. Accordingly, we conclude that the instruction was factually appropriate.

Legal appropriateness

Although Spilman failed to object to the legal appropriateness, it does not preclude us from considering his argument, but it requires Spilman to show clear error to obtain a new trial based on the instruction's legal inappropriateness. K.S.A. 2022 Supp. 22-3414(3); *State v. Hilyard*, 316 Kan. 326, 333, 515 P.3d 267 (2022). We will consider the legal appropriateness of the aiding and abetting instruction.

Spilman contends that the aiding and abetting instruction was legally inappropriate because one cannot intend an unintentional act. Spilman recognizes that Kansas caselaw holds a contrary position but ineffectively tries to distinguish that caselaw.

In Kansas, criminal liability for aiding and abetting a principal to commit a crime is governed by K.S.A. 2022 Supp. 21-5210, which provides:

> "(a) A person is criminally responsible for a crime committed by another if such person, acting with the mental culpability required for the commission thereof, advises, hires, counsels or procures the other to commit the crime or intentionally aids the other in committing the conduct constituting the crime.
>
> "(b) A person liable under subsection (a) is also liable for any other crime committed in pursuance of the intended crime if reasonably foreseeable by such person as a probable consequence of committing or attempting to commit the crime intended.
>
> "(c) A person liable under this section may be charged with and convicted of the crime although the person alleged to have directly committed the act constituting the crime:
>
> (1) Lacked criminal or legal capacity;
>
> (2) has not been convicted;
>
> (3) has been acquitted; or
>
> (4) has been convicted of some other degree of the crime or of some other crime based on the same act."

Spilman contends that the requisite mens rea for reckless second-degree murder, as charged, or the lesser included offense of involuntary manslaughter, the offense of conviction, is recklessness. He reasons that a person may not intentionally act to aid someone acting recklessly.

In *State v. Bodine*, 313 Kan. 378, 486 P.3d 551 (2021), our Supreme Court considered and rejected the same argument Spilman makes here. Although the underlying crimes at issue in *Bodine* did not involve involuntary manslaughter, the mental culpability of aggravated endangerment of a child, as charged in that case, required proof of recklessness. Spilman's conviction of involuntary manslaughter also required proof of recklessness. See K.S.A. 2022 Supp. 21-5405(a)(1). Rejecting Bodine's argument, our Supreme Court held:

> "Bodine's reading of the statute is unreasonable. Under K.S.A. 2020 Supp. 21-5210(a), the aider must intentionally assist the principal. In doing so, the aider must possess the mental culpability required for the commission of the crime for which the aider is assisting. Aggravated child endangerment requires a reckless mental culpability. K.S.A. 2020 Supp. 21-5601(b)(1). And 'individuals may act together in the commission of a crime based upon their depraved, indifferent, or reckless conduct.' [*State v.*] *Garza*, 259 Kan. [826,] 834[, 916 P.2d 9 (1996)]. Thus, it was logically possible for the jury to find that Bodine advised, counseled, or intentionally aided M.M. in recklessly causing or permitting E.B. to be placed in a situation in which his life, body, or health was endangered. See K.S.A. 2020 Supp. 21-5601(b)(1). Bodine's argument fails. See *State v. Keel*, 302 Kan. 560, 574, 357 P.3d 251 (2015) (we must construe statutes to avoid unreasonable or absurd results)." *Bodine*, 313 Kan. at 401.

Spilman argues that *Bodine* is distinguishable because aggravated endangerment of a child permits criminal liability through omitting to act, whereas reckless second-degree murder and involuntary manslaughter require an affirmative act. This argument is unpersuasive. *Bodine* does not draw a distinction between affirmative acts and omissions in discussing aiding and abetting liability. Perhaps more importantly, the facts of *Bodine*

did not support an argument that aiding and abetting was appropriate because Bodine and M.M. neglected E.B. The horrific facts of that case demonstrated affirmative acts of child abuse and child endangerment.

Also, in reaching its conclusion, the *Bodine* court favorably cited *State v. Garza*, 259 Kan. 826, 916 P.2d 9 (1996), and *State v. Friday*, 297 Kan. 1023, 1041-42, 306 P.3d 265 (2013). *Friday* involved a theory of aiding and abetting reckless second-degree murder, the crime Spilman was charged with aiding and abetting. Our Supreme Court recognized that *Garza* and *Friday* had interpreted and applied the former aiding-and-abetting statute. Nevertheless, the *Bodine* court found the cases persuasive.

Logic dictates the *Bodine* court's interpretation of K.S.A. 2022 Supp. 21-5210(a). Let us assume the same fact scenario presented by this case with a few minor alterations. The fight was between only Scott and Pantle. But, during that fight, Spilman did not merely prevent David from breaking up the fight, but he was holding Pantle's arms while Scott pummeled him. Under this fact scenario, Spilman did not actively contribute to Pantle's death by punching him and, arguably, neither Scott nor Spilman intended Pantle's death. Yet, Spilman intentionally acted to further Scott's beating of Pantle. But under Spilman's interpretation of K.S.A. 2022 Supp. 21-5210(a), he would have no criminal liability as an aider or abettor because Scott was convicted of an unintentional crime. These slight changes of the facts of this case vividly show the absurdity of Spilman's argument.

Thus, Spilman's argument lacks logical persuasive force, even if our Supreme Court had not decided *Bodine* and *Friday*. Since we have the authority of *Bodine* and *Friday*, we are bound by those decisions. *State v. Rodriguez*, 305 Kan. 1139, 1144, 390 P.3d 903 (2017); *Garcia v. Tyson Fresh Meats, Inc.*, 61 Kan. App. 2d 520, 524, 506 P.3d 283 (2022).

Finally, even if we were to adopt Spilman's argument and had the authority to do so, we would still be required to address the issue of prejudice—because Spilman did not raise his legal objection to the trial court. As a result, Spilman would need to establish that the aiding and abetting instruction constituted clear error. To establish clear error, the reviewing court must affirm the conviction unless it is firmly convinced the jury would have reached a different verdict if the instructional error had not occurred. *State v. Berkstresser*, 316 Kan. 597, 605-06, 520 P.3d 718 (2022). Spilman cannot establish that burden in this case.

Substantial evidence presented at the trial showed that Spilman participated in the beating of Pantle. Even if Spilman had not inflicted the blow that caused Pantle to hit his head on the concrete, Dr. Hossain's testimony provided evidence that the multiple blows inflicted on Pantle by Spilman contributed to his death. Though Dr. Hossain surmised that one of the falls alone may have ultimately led to Pantle's death, this opinion was based on conjecture. The circumstances under which he rendered his medical opinion as to causation involved multiple blows to the head. The multiple injuries to the head caused swelling in Pantle's brain, which, in turn, caused increasing amounts of pressure in the brain. When that pressure became too great, lack of consciousness and death ensued. Under these circumstances, Dr. Hossain was unwilling to speculate which blow resulted in Pantle's death; he concluded it was the combination of blows to Pantle's head. Under the circumstances presented by this case, we cannot be firmly convinced that the jury would have returned a different verdict had they not been instructed on aiding and abetting.

Did the State present sufficient evidence to support each element of Spilman's conviction for involuntary manslaughter?

Spilman also challenges the sufficiency of the State's evidence supporting his conviction for involuntary manslaughter. The standard of appellate review is well

established. The appellate court examines all the evidence in a light most favorable to the prevailing party—the State—to determine whether a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. Because an appellate court does not reweigh evidence, resolve evidentiary conflicts, or make credibility determinations, a reviewing court need only look at the evidence in favor of the verdict to determine whether the essential elements of a charge are sustained. *State v. Zeiner*, 316 Kan. 346, 350, 515 P.3d 736 (2022). The State must provide evidence sufficient to support each element of a charged offense. *Hilyard*, 316 Kan. at 330.

To convict Spilman of the lesser included offense of involuntary manslaughter, the jury had to find beyond a reasonable doubt that Spilman recklessly killed Pantle. See K.S.A. 2022 Supp. 21-5405(a)(1). Spilman contends that the evidence did not show he killed Pantle, characterizing his altercation with Pantle as "a minor scrape" and noting that Pantle had walked away from it. This argument interprets the evidence in a light favorable to him, contrary to this court's standard of review.

Also, the argument contains a flawed unstated premise regarding causation. Spilman reasons that, since Pantle got up and walked away from his fight with Spilman, Spilman's conduct did not cause Pantle's death. He does not support this argument with any authority. By Pantle's failure to support this argument, he renders us helpless to judge the argument. So, we may presume the argument waived or abandoned. See *State v. Meggerson*, 312 Kan. 238, 246, 474 P.3d 761 (2020) ("Failure to support a point with pertinent authority or show why it is sound despite a lack of supporting authority or in the face of contrary authority is akin to failing to brief the issue."). But even if we were to consider this argument, it would fail:

> "Causation in a criminal case has two core elements: cause-in-fact and legal causation. Cause-in-fact requires proof that but for the defendant's conduct, the result would not have occurred. Legal causation limits a defendant's liability to the reasonably

> foreseeable consequences of his or her conduct. *State v. Arnett*, 307 Kan. 648, 655, 413 P.3d 787 (2018); see *State v. Anderson*, 270 Kan. 68, 77, 12 P.3d 883 (2000) ('Our test for foreseeability . . . is, whether the harm that occurred was a reasonably foreseeable consequence of the defendant's conduct at the time he or she acted or failed to act.'); see also 1 LaFave, Subst. Crim. L. § 6.4, Causation (3d ed. 2017). We commonly refer to these elements together as 'proximate cause.' *Arnett*, 307 Kan. at 655." *State v. Wilson*, 308 Kan. 516, 522, 421 P.3d 742 (2018).

Spilman cannot escape liability for his criminal conduct simply because he was not the last person to pummel Pantle before he died. When two or more persons contribute concurrently to a cause of death, the law holds them both liable for that death:

> "'There may be more than one proximate cause of a death. When the conduct of two or more persons contributes concurrently as proximate causes of a death, the conduct of each of said persons is a proximate cause of the death regardless of the extent to which each contributes to the death. A cause is concurrent if it was operative at the moment of death and acted with another cause to produce the death.'" *State v. Rueckert*, 221 Kan. 727, 736-37, 561 P.2d 850 (1977) (citing jury instructions provided by district court with approval), *disapproved of on other grounds by State v. Berry*, 292 Kan. 493, 510-11, 254 P.3d 1276 (2011).

While Dr. Hossain admitted the possibility that one of the head injuries sustained in the fall might have eventually killed Pantle, he stated that the mechanism of death was swelling from bleeding within the brain, exerting pressure on the brain. Dr. Hossain stated that the multiple injuries compounded on one another. Dr. Hossain rejected the theory that Pantle's two falls accounted for his brain injuries. Highly simplified, Dr. Hossain's medical explanation foreclosed the possibility that the brain damage to Pantle's frontal brain was caused by impact to the back of Pantle's head. Dr. Hossain described the injury to Pantle's brain as global.

Pantle died from trauma to the brain caused by beatings to the head and by his falls. Since there is evidence that Spilman beat Pantle on the head, his conduct is a concurrent cause of death regardless of the extent to which his conduct contributed to Pantle's death. To the extent Spilman contends that the evidence was insufficient to establish causation, his contention fails.

Thus, the evidence was sufficient to permit a reasonable jury to conclude beyond a reasonable doubt that Spilman's conduct was a contributing proximate cause of Pantle's death.

Did prosecutorial error in closing arguments undermine Spilman's ability to obtain a fair trial?

Spilman next contends that the State committed prosecutorial misconduct in closing arguments by bolstering the credibility of its witnesses and by misstating the law on aiding and abetting criminal liability. Spilman did not object to the argument, but appellate review of an alleged error in closing arguments is not foreclosed by lack of a contemporaneous objection. See *State v. McBride*, 307 Kan. 60, 65, 405 P.3d 1196 (2017).

In considering a claim of prosecutorial error, an appellate court first determines whether an error occurred. Prosecutorial error in closing arguments occurs when the prosecutor's actions or statements "fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial." *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016). If the court finds error, then it determines whether the error affected the substantial rights of the defendant. The court may deem the error harmless only if the State can establish beyond a reasonable doubt that the error did not affect the

outcome of the trial. In other words, the State must show that no reasonable possibility exists that the error contributed to the verdict. 305 Kan. at 111.

The law charges a prosecutor to restrict comments in argument to a reasoned discussion of the evidence presented at trial as it applies to the law, synthesizing facts and articulating reasonable inferences but not diverting the jury's attention from admissible evidence in deciding the case. Accordingly, a prosecutor may not mischaracterize the evidence during argument. See *State v. Anderson*, 294 Kan. 450, 463, 276 P.3d 200 (2012). He or she may not properly refer to information outside the admitted evidence. *State v. Thurber*, 308 Kan. 140, 162, 420 P.3d 389 (2018). A prosecutor must not offer personal opinions about the significance of specific evidence or what witnesses are credible. *State v. Peppers*, 294 Kan. 377, 396-97, 276 P.3d 148 (2012). A prosecutor must not misstate the law or invite the jurors to disregard the law. See *State v. Tahah*, 302 Kan. 783, 791, 358 P.3d 819 (2015). A prosecutor must not attempt to enflame the passions or prejudices of the jurors. *Thurber*, 308 Kan. at 162; *Anderson*, 294 Kan. at 463. When a prosecutor engages in these behaviors, he or she steps outside the wide latitude afforded prosecutors to argue a case.

As stated, Spilman argues that the prosecutor exceeded the permissible bounds of argument by bolstering the credibility of prosecution witnesses and by misstating the law of aiding and abetting liability.

Bolstering prosecution witnesses

In his initial closing arguments, the prosecutor began his discussion of the evidence with the accounts presented by Gracie and Morgan. He then talked about how the other witnesses, whose testimony differed from Morgan's, fit into Morgan's more complete account. He then discussed the accounts presented by Spilman and his father, which are relevant to this issue:

> "You, the jury, are the final judge of the credibility of these two witnesses. And I'm referring to the defendant and the defendant's father.
>
> "Consider the eight or nine witnesses the State called. If you think about it, Morgan Hull told us the complete story of what happened that night. The additional witnesses told us a piece of the same story. If you consider the evidence, you'll be able to match up the other witnesses to the story line that was told by Morgan Hull.
>
> "Compare that to what you heard from Mr. Spilman Sr. and Mr. Spilman Jr. You have to decide whether you find the testimony of those two persons credible or not. And when you're doing that, don't forget to consider what their motivations may be.
>
> "You heard from a witness who's not related to either of these families, Morgan Hull. And you heard corroboration of her testimony from several witnesses whose last names are Seager. Whose last names have been Scherer, married now, Seager. Those people are on the other side of this question. They're the family members of the three defendants. Even if they're only related shirttail by marriage, they still have a connection to that family. Think about that motivation, think about the testimony, and *those people testified honestly*. And they corroborated in part or parts of what Morgan Hull told us happened on that night." (Emphasis added.)

Spilman highlights the italicized portion of the argument as improper vouching for the credibility of prosecution witnesses. He is correct: "It is improper for a prosecutor to offer his or her personal opinion as to the credibility of a witness, including the defendant." *State v. Pribble*, 304 Kan. 824, 835, 375 P.3d 966 (2016). But a prosecutor may legitimately discuss the circumstances tending to demonstrate a witness' reliability or lack thereof. See 304 Kan. at 835 (citing *State v. Scaife*, 286 Kan. 614, Syl. ¶ 5, 186 P.3d 755 [2008]). Most of the quoted portion of the prosecutor's argument is permissible. The prosecutor emphasized that the jury had the responsibility to make credibility determinations and discussed circumstances that tended to support or detract from the credibility of certain witnesses. The comment that "those people testified honestly," however, exceeded the scope of permissible argument. In the context of the argument, the prosecutor may have intended to say that the jury should conclude that certain witnesses testified honestly. The comment may even have been the way the jury heard it. But

whether the statement was intended as such, it may also have been interpreted by the jury as the prosecutor's personal belief that certain witnesses were testifying honestly. This was error.

We do not condone the prosecutor inappropriately referring, in the context of this case, that certain witnesses had "testified honestly." Indeed, our Supreme Court has condemned the practice of inappropriately bolstering the credibility of a witness. Thus, a prosecutor may not bolster the credibility of a witness. *State v. Sprague*, 303 Kan. 418, 428, 362 P.3d 828 (2015) (Prosecutor's comments in closing argument bolstering the credibility of witnesses are improper.). Nevertheless, the prosecutor's improper comment was a fleeting remark made in the midst of a 20-minute closing argument. The record does not show that the prosecutor repeated the improper comment. To the contrary, the improper comment was isolated and short. Even if the jury perceived the comment as the prosecutor's personal opinion, the comment would have had no reasonable probability of affecting the course of the jury's deliberations. We confidently maintain that, if the passing comment of the prosecutor about the honesty of the prosecution witnesses had not been made, the jury still would have convicted Spilman. Thus, this error did not prejudice Spilman's ability to obtain a fair trial.

Misstatement of law

Spilman also contends that the prosecutor misstated the law of aiding and abetting by suggesting that Spilman aided the crime simply by doing nothing to prevent others from beating Pantle. Spilman's argument mischaracterizes the prosecutor's comments, which is more nuanced than stating Spilman aided Pantle's beating by failing to call the police. The State's theory was that Spilman acted in concert with Scott and Matthew to beat Pantle so severely that he ultimately died. The State's comments about each participant failing to do anything to end the violence when they were not participating in

a fight went to demonstrate each participant's intent—to show that they wanted Pantle to get pummeled. The prosecutor made comments of the following:

> "I would point you to that evidence [evidence regarding the intervals between fights] and ask you to consider that when you start to deliberate on whether the actions of the three codefendants together amounted to extreme indifference to the value of human life.
>
> "Now, the question may come, when you're back there, were they really working together? And I want you to think about this. Going back to the original interaction, the testimony was [Scott] pushed Mr. Pantle. This defendant then was on top of him. At that point in time, [Scott] could have left that interaction. Did he walk away? Did he call the Sheriff's department to come help? Did he leave the party? No. No.
>
> "Again, Morgan Hull's testimony is, once this defendant was done, got off of Mr. Pantle, [Scott] got on. Now, think about this. When that happened and this defendant was not on Mr. Pantle, but [Scott] was, this defendant had the opportunity to walk away from that interaction, totally.
>
> "Now, he testified he walked to the trees for a couple minutes and then came back. He could have left the party. He could have called the Sheriff's department to help with Mr. Pantle being unruly. Did he do either of those things? No.
>
> "The testimony of David Underwood and Shelby Seager was that he was there when [Scott] was on top of Mr. Pantle. We know that because the action that he took where he admitted to taking, was grabbing Mr. Underwood from behind and slamming him back down onto the ground.
>
> "Now, his testimony is that he thought somebody was jumping into the fight. He also testified that he apologized to Mr. Underwood. You listened to Mr. Underwood testify yesterday just like I did. I still don't know whether Mr. Underwood thinks this defendant apologized to him in person, or he heard that apology from multiple other people. I don't know. But you use that type of testimony to determine the credibility of this defendant when he testified to that.
>
> "The thing that I think is important—Let me back up. The third codefendant. Ask yourself during the first part of this altercation, did Matthew Cole Scherer have an opportunity to call the Sheriff's department when the altercation began? When Mr. Spilman was on top of [Scott]? Or on top of Mr. Pantle, excuse me. When [Scott] was on

top of Mr. Pantle? Third time when Mr. Spilman comes back? Did he have an opportunity to call the Sheriff's department? Did he have the opportunity to take other action to stop an errant partygoer so it didn't reach this level of altercation? Of course he did.

"Don't forget that he is the son of the owner of the property the party was at. Through the testimony, you heard at least eight names of grown men who were at the party and related to Mr. Scherer [the property owner], or dating a relative, or a shirttail relative of Mr. Scherer. Could those eight men have corralled one errant partygoer while the Sheriff's department was on the way to avoid this type of altercation, and the damage that you heard testified to by the coroner that Mr. Pantle sustained? He was involved, as well.

"These men were not acting in an isolated vacuum. The evidence shows they were all right there. Two witnesses testified that there was a couple of minutes between the altercation with Mr. Pantle and Mr. Spilman and the altercation between Mr. Pantle and [Scott]. One witness testified the short period of time between the altercation, between [Scott] and the second altercation between Mr. Spilman.

"Three witnesses testified to you that Matthew Cole Scherer either threatened them or prevented them from getting help for Jason Pantle."

Contrary to Spilman's appellate argument, the prosecutor did not discuss these facts as evidence of aiding and abetting but as evidence of a concerted effort by these three men to beat up Pantle. He draws a reasonable inference from their actions that, if they had merely wanted to subdue a wild party guest, there were other ways to do it. He argued that the evidence shows a systematic and coordinated effort to beat Pantle without regard to the consequences. This evidence is supported by Dr. Hossain's testimony about Pantle's cause of death because of global brain injuries.

The prosecutor then shifted to a discussion of each individual's culpability, referencing the aiding and abetting instruction:

"Now, when you're back in the jury room, if you're, if you're tempted to consider the individual actions of these three, to try to determine who was more or most

> responsible for the death of Jason Pantle, I would point you back to jury instruction No. 6. And the Court read it to you, and I heard him read it to you, but I want you to look at it when you're back there.
>
> "It says, again, 'A person is criminally responsible for a crime if the person, either before or during its commission, and with the mental culpability required to commit the crime intentionally aids another to commit the crime.'
>
> "The next sentence is what I want you to heed. 'All participants in a crime are equally responsible without regard to the extent of their participation.'"

As discussed, Spilman does not contend that the jury instruction misstated the applicable law. Contrary to Spilman's appellate argument, the prosecutor does not point to Spilman's omitted conduct as evidence that he aided and abetted in someone else's criminal conduct. The prosecutor merely pointed out that, even if the jury believed Scott or Matthew was more culpable for Pantle's injuries, the law held Spilman equally liable if he participated in the crime. This is not a misstatement of the law, and Spilman's attempt to frame it as such is a mischaracterization of the prosecutor's argument.

So, the State did not commit prosecutorial error by misrepresenting the law of aiding and abetting to the jury during its closing arguments.

Did cumulative trial error deprive Spilman of a fair trial?

Spilman also argues that, if the errors he separately raised on appeal were alone insufficient to demand reversal, the cumulative effect of the errors deprived him of a fair trial.

To warrant reversal of a criminal conviction for cumulative trial error, the combined effect of the trial errors must convince the reviewing court that the defendant's trial was so prejudiced that the court may not declare the errors harmless. If any of the errors involved constitutional rights, the court must be willing to declare the cumulative

error harmless beyond a reasonable doubt. *State v. Seba*, 305 Kan. 185, 215, 380 P.3d 209 (2016) (quoting *United States v. Toles*, 297 F.3d 959, 972 [10th Cir. 2002]).

Spilman's argument relies heavily on the alleged error in instructing the jury on an aiding and abetting theory of criminal culpability. If the instruction had not been appropriate either because the facts did not support it or because it was inappropriate in the context of a reckless crime, the error would have been compounded by the State's discussion of the theory in closing, even though the discussion of the theory, itself, was not improper. Likewise, the jury's assessment of the evidence might have been influenced by an improper aiding and abetting instruction. In other words, the jury might have relied on the aiding and abetting instruction to convict Spilman rather than convicting him as a principal. If providing the jury with the instruction was error, the cumulative effect of the error would demand reversal of Spilman's conviction and remand for a new trial.

As discussed earlier, however, we concluded that the instruction was both factually and legally appropriate in the context of this case. Also, although we concluded that the prosecutor erred when he commented about the honesty of the prosecution witnesses, this error did not prejudice Spilman's ability to obtain a fair trial. And the cumulative error rule does not apply if there are no errors or only a single error. *State v. Gallegos*, 313 Kan. 262, 277, 485 P.3d 622 (2021).

Accordingly, we find no cumulative trial error undermined Spilman's ability to obtain a fair trial.

Is KORA unconstitutional as a violation of the First Amendment's protection against compelled speech or as a violation of equal protection?

As his fifth issue in this appeal, Spilman contends that the obligation to register as a violent offender under KORA violates his First Amendment right to be free from

compulsion to speak at the government's behest. In his sixth issue, Spilman argues that the registration scheme of KORA violates equal protection because it provides a mechanism for some offenders to end registration but not offenders like him. Spilman did not raise either of these constitutional issues in the district court.

Preservation

An appellate court generally does not review constitutional issues raised for the first time, though the courts have recognized three exceptions to this rule. *State v. Allen*, 314 Kan. 280, 283, 497 P.3d 566 (2021). Spilman argues that two of those exceptions apply: (1) that the issue involves solely a question of law on proved or admitted facts and the issue is determinative of the case; and (2) that consideration of the issue is necessary to prevent the denial of his fundamental rights. Free speech and equal protection under the law are both fundamental rights. *State v. Jones*, 313 Kan. 917, 933, 492 P.3d 433 (2021) (recognizing freedom of speech as fundamental right and liberty); *State v. Limon*, 280 Kan. 275, 283, 122 P.3d 22 (2005) (right recognized by Fourteenth Amendment to the United States Constitution and sections 1 and 2 of the Kansas Constitution Bill of Rights). And a facial challenge to the constitutionality of a statute is generally a pure question of law. *State v. Hinnenkamp*, 57 Kan. App. 2d 1, 4-6, 446 P.3d 1103 (2019) (explaining that a facial attack on a statute is a pure question of law). These exceptions cited by Spilman would seem to permit appellate review of the issue for the first time on appeal.

But even when a litigant demonstrates the applicability of an exception, an appellate court is not bound to consider an unpreserved issue for the first time on appeal. *State v. Genson*, 316 Kan. 130, 135-36, 513 P.3d 1192 (2022) ("[I]f the issues were *not* being raised for the first time on appeal, the panel would not have had discretion to refuse to consider them. But since these arguments *were* newly raised before the panel, the panel could exercise its discretion to consider whether to apply a prudential exception to the

general rule that issues not raised before the district court cannot be raised for the first time on appeal."). Several panels of this court who have considered a similar First Amendment challenge to KORA have elected not to review the issue for the first time on appeal. See *State v. Ontiberos*, No. 124,623, 2023 WL 3032204, at *2 (Kan. App. 2023) (unpublished opinion), *petition for rev. filed* May 22, 2023; *State v. McDaniel*, No. 124,459, 2023 WL 2940490, at *6 (Kan. App. 2023) (unpublished opinion), *petition for rev. filed* May 15, 2023; *State v. Pearson*, No. 125,033, 2023 WL 2194306, at *1 (Kan. App. 2023) (unpublished opinion), *petition for rev. filed* March 20, 2023; *State v. Ford*, No. 124,236, 2023 WL 1878583, at *19 (Kan. App. 2023) (unpublished opinion), *rev. granted* June 23, 2023; *State v. Jones*, No. 124,174, 2023 WL 119911, at *5 (Kan. App. 2023) (unpublished opinion), *petition for rev. filed* February 6, 2023.

The *Pearson* court articulated a compelling reason for refraining to address this complex constitutional argument for the first time on appeal:

> "Identifying the compelling governmental interests KORA is meant to protect and then determining whether it is sufficiently narrowly tailored to serve those interests involves examining a host of issues best explored first at the district court level. Analyzing the proportionality of KORA requires an in-depth balancing of its benefits and costs, along with exploring potential alternatives to achieving those benefits and the accompanying costs and anticipated effectiveness of those alternatives. It may even involve evaluating KORA's effectiveness in protecting the compelling governmental interests it is meant to serve, which could involve the presentation of evidence and fact-finding. And '[f]act-finding is simply not the role of appellate courts.' *State v. Nelson*, 291 Kan. 475, 488, 243 P.3d 343 (2010) (citing *State v. Thomas*, 288 Kan. 157, 161, 199 P.3d 1265 [2009])." *Pearson*, 2023 WL 2194306, at *1.

Even if we were to agree with Spilman that KORA registration constitutes compelled speech within the meaning of the First Amendment to the United States Constitution, the restrictions on Spilman's First Amendment rights are unconstitutional

only if those restrictions cannot survive strict scrutiny. See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994) ("Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as laws that "suppress, disadvantage, or impose differential burdens upon speech because of its content."); *U.S.D. No. 503 v. McKinney*, 236 Kan. 224, 235, 689 P.2d 860 (1984). Strict scrutiny requires the State to demonstrate a compelling government interest justifying the restriction on the fundament right in a way that is narrowly tailored to achieve that interest. See *Hodes & Nauser, MDs v. Schmidt*, 309 Kan. 610, 680, 440 P.3d 461 (2019). Those considerations require the development of facts outside our appellate record. Thus, we decline from Spilman's invitation to consider this issue for the first time on appeal.

Similarly, Spilman's equal protection claim requires additional fact development. Assuming Spilman can establish standing and can articulate a valid claim for disparate treatment of similarly situated individuals, judicial review of his claim invokes rational basis scrutiny. See *State v. Huerta*, 291 Kan. 831, 834, 247 P.3d 1043 (2011) (rational basis test applied in equal protection challenge to a criminal statute). Under the rational basis test, similarly situated individuals may be treated differently without violating equal protection so long as the classification used to distinguish them bears a rational relationship to a legitimate governmental objective. "[A] classification will survive a challenge based on equal protection 'if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Crawford v. Kansas Dept. of Revenue*, 46 Kan. App. 2d 464, 471, 263 P.3d 828 (2011) (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313, 113 S. Ct. 2096, 124 L. Ed. 2d 211 [1993]). It is not sufficient to point to one set of facts in which the classification does not advance the government interest. The party challenging the classification bears the onerous burden of negating every reasonable basis that might support the classification. *Crawford*, 46 Kan. App. at 471-72.

The record before us does not permit us to conduct an adequate rational basis analysis of K.S.A. 2022 Supp. 22-4908(a) and (b). Accordingly, we decline to consider Spilman's equal protection challenge to KORA when the argument is raised for the first time on appeal.

Did the trial court abuse its discretion in setting Spilman's restitution?

Finally, Spilman challenges the trial court's restitution award. Again, Spilman did not challenge the restitution award at sentencing. Thus, this issue is not properly preserved for appellate review. *State v. King*, 288 Kan. 333, 353, 204 P.3d 585 (2009) (noting that restitution challenge was not properly preserved in trial court but addressing the issue anyway).

Spilman again contends that consideration of the issue is a question of law on proved or admitted facts. Ironically, he then states the applicable standard of review as an abuse of discretion, rather than as a question of law. Spilman states the exception but does not really argue its application to the restitution issue. A brief examination of the substantive issue makes Spilman's assertion questionable.

Spilman does not challenge the amount of restitution calculated by the court. He argues the trial court abused its discretion imposing payment of the full amount of restitution on Spilman when he was less culpable than his codefendants. Because nothing in the record suggests Spilman's codefendants have been convicted, Spilman's argument relies on facts unsupported in the record.

The amount of restitution and the manner in which restitution is paid are decisions left to the discretion of the trial court. An appellate court reviews that decision for abuse of that discretion. See *State v. Alcala*, 301 Kan. 832, 836, 348 P.3d 570 (2015). Absent demonstration of some error of fact or law, an appellate court will find an abuse of

discretion only when the trial court's decision is shown to be arbitrary, fanciful, or unreasonable. *State v. Thomas*, 307 Kan. 733, 739, 415 P.3d 430 (2018) (party claiming abuse bears burden of establishing abuse); see *State v. Coleman*, 311 Kan. 332, 334, 460 P.3d 828 (2020) (abuse of discretion standard).

Spilman does not argue the trial court violated some principle of law. In fact, the trial court was obligated to award restitution unless the court found a plan for restitution was unworkable. See K.S.A. 2022 Supp. 21-6604(b)(1). And if none of Spilman's codefendants had been convicted by the time Spilman was sentenced, the trial court would not have had a basis to order joint-and-several restitution. Accordingly, Spilman has not demonstrated that the trial court's restitution award was arbitrary, fanciful, or unreasonable.

Finally, any abuse of discretion in assigning restitution is harmless. See K.S.A. 2022 Supp. 60-261; see also *State v. Cummings*, 45 Kan. App. 2d 510, 513, 247 P.3d 220 (2011) (applying harmless error to restitution challenge but finding prejudice). Spilman cannot demonstrate prejudice arising from the court's failure to award restitution jointly and severally. A person subject to joint and several liability is obligated to pay the entire debt, which may be enforced against any or all of the obligors at the creditor's option. See *In re Morgan*, 24 Kan. App. 2d 324, 325, 943 P.2d 77 (1997) (defining joint and several liability). Then, whether Spilman's codefendants are found guilty or acquitted, Spilman's victims may seek payment from Spilman exclusively, even if we were to remand this case for resentencing, requiring the trial court to award restitution jointly and severally with other codefendants.

Spilman has not established a basis for vacating the restitution award and remanding for sentencing.

Affirmed.