NOT DESIGNATED FOR PUBLICATION

No. 125,077

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

WILLIE D. ABERCROMBIE,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; KEVIN M. SMITH, judge. Opinion filed September 8, 2023. Affirmed.

David L. Miller, of The Law Office of David L. Miller, LLC, of Wichita, for appellant.

Lance J. Gillett, assistant district attorney, *Marc Bennett*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before SCHROEDER, P.J., MALONE, J., and MARY E. CHRISTOPHER, S.J.

PER CURIAM: Willie D. Abercrombie appeals his conviction and sentence after a jury found him guilty of off-grid rape for engaging in sexual intercourse with a child under the age of 14. The district court imposed the Jessica's Law mandatory minimum sentence of 25 years to life. Abercrombie appeals the district court's denial of his durational and dispositional downward departure motion. Abercrombie also argues that the district court violated his right to a unanimous jury verdict for failing to provide a unanimity jury instruction. Upon review of the record, the district court did not abuse its discretion in denying Abercrombie's departure motion. Additionally, although the State did not elect which act it relied on for the rape charge, the district court's failure to give

an unrequested unanimity instruction does not constitute clear error because Abercrombie cannot firmly convince this court that the jury's verdict would have been different had the instruction been given. The judgment of the district court is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

In April 2018, the State charged Abercrombie with one count of off-grid rape in violation of K.S.A. 2017 Supp. 21-5503(a)(3), (b)(2), a person felony, for engaging in sexual intercourse with a child under the age of 14 when he was 18 years of age or older. Abercrombie pleaded not guilty to the charge.

In August 2021, the district court held a three-day jury trial. The State presented eight witnesses and admitted eight exhibits. Abercrombie presented no witnesses or exhibits. Sergeant Aaron Moses of the Wichita Police Department testified that on April 22, 2018, he was dispatched to the home of S.B. regarding a runaway report. S.B. told Moses that he believed his 13-year-old daughter, C.B., was spending the night with a friend, but he had discovered information that led him to believe she was not at her friend's home.

Moses explained that S.B. discovered Snapchat messages between C.B. and Abercrombie discussing a plan for C.B. to tell her father she was going to a friend's house, but she would actually spend the night with Abercrombie. This plan involved Abercrombie contacting C.B.'s father pretending to be the father of her friend. Based on the messages between C.B. and Abercrombie and phone calls to Abercrombie, Moses testified that officers managed to determine Abercrombie's location. Officers were sent to his location and located C.B. inside the residence.

Detective Troy Bussard with the Exploited and Missing Children's Unit of the Wichita Police Department testified about his interviews of C.B. and Abercrombie on

April 22, 2018, the day C.B. was discovered at Abercrombie's residence. Detective Bussard stated that he verified Abercrombie was 31 years old and C.B. was 13 years old on the date of the interviews. Abercrombie described to Detective Bussard the events that took place on the previous evening of April 21. Detective Bussard testified that Abercrombie admitted he engaged in sexual intercourse with C.B. that night. Detective Bussard also testified that C.B. confirmed that she had sexual intercourse with Abercrombie that night. The State admitted and published to the jury the videos of Detective Bussard's interviews of C.B. and Abercrombie.

C.B. testified about her relationship with Abercrombie and stated that she and Abercrombie engaged in sexual intercourse on April 21. When asked if she and Abercrombie engaged in sexual intercourse more than one time that night, C.B. testified that they engaged in sexual intercourse "maybe once or twice." The State also presented evidence that C.B. sent her middle school track schedule to Abercrombie, indicating that Abercrombie knew her age.

The State presented evidence that both Abercrombie and C.B. underwent sexual assault examinations where swabs were taken for DNA testing. The results from the subsequent DNA tests showed sperm cells collected from C.B.'s swabs consistent with Abercrombie's DNA. The results from Abercrombie's swabs showed DNA consistent with C.B.'s DNA. Tina Peck—the sexual assault nurse who examined C.B.—testified that C.B. told her during the examination that after she and Abercrombie had sex the first time, they fell asleep, woke up about one hour later, and had sex a second time.

After both parties rested, the district court provided seven instructions to the jury. The district court provided the jury with the standard burden of proof, presumption of innocence, and reasonable doubt instructions from PIK Crim. 4th 51.010 (2020 Supp.). The district court's instructions also included the standard concluding instruction from PIK Crim. 4th 68.010, which instructs the jury to base its verdict only upon the evidence

admitted and the law as given in the instructions. The concluding instruction also instructs the jury that its verdict must be unanimous. PIK Crim. 4th 68.010.

The jury ultimately found Abercrombie guilty as charged. Before the verdict was entered, Abercrombie left the courtroom to use the restroom unescorted—because he had been out of custody on bond—and law enforcement officers observed him fleeing the courthouse. After efforts to locate Abercrombie failed, the district court entered the guilty verdict in his absence. One month later, Abercrombie was arrested on new charges and returned to custody.

Prior to sentencing, Abercrombie filed a departure motion. In his departure motion, Abercrombie argued that K.S.A. 2017 Supp. 21-6627(d)(1) provides the district court with the authority to grant a dispositional and/or durational departure from the mandatory minimum prison sentence of not less than 25 years upon finding substantial and compelling reasons to depart.

Abercrombie maintained the district court should find substantial and compelling reasons to depart based on several of the statutory mitigating factors set forth in K.S.A. 2017 Supp. 21-6627(d)(2) and K.S.A. 2017 Supp. 21-6815(c). The statutory factors included Abercrombie's lack of significant criminal history, the victim's participation, and the harm being less than typical because of the consensual relationship between Abercrombie and the victim.

Additionally, Abercrombie argued that the district court should find substantial and compelling reasons to depart based on various nonstatutory factors. The nonstatutory factors Abercrombie asked the district court to consider included: (1) acceptance of responsibility; (2) family relationships; (3) no prior felony convictions; (4) the child victim was a sexual aggressor; (5) willing participation of the victim in the criminal conduct; and (6) rehabilitation efforts. Finally, Abercrombie alternatively requested that

the district court order him to serve sex offender and substance abuse treatment based on an evaluation by Dr. Jarrod Steffan.

The district court held a sentencing hearing on March 30, 2022, where it heard arguments from both parties regarding Abercrombie's departure motion. Abercrombie's counsel, Bonnie Corrado, explained she was asking the district court to make a double departure. First, Corrado asked the district court to depart to the sentencing grid from the off-grid mandatory minimum sentence of not less than 25 years. Corrado then asked the district court to further depart pursuant to K.S.A. 2017 Supp. 21-6815(a) both durationally and dispositionally from the presumptive grid box.

Corrado argued that the consensual nature of the relationship between C.B. and Abercrombie, Abercrombie's cooperation during the investigation, and Abercrombie's lack of criminal history warranted a departure. Corrado contended that Abercrombie's family relationships supported a substantial and compelling reason to depart because four of his five children were minors in need of his financial and emotional support, and he has a supportive family including his father and fiancée. Corrado also explained that Abercrombie underwent a psychological evaluation by Dr. Steffan resulting in a recommendation that he complete sexual offender and intensive alcohol treatment. Finally, Corrado emphasized Abercrombie's willingness to participate in any type of treatment ordered by the district court.

The State asked the district court to deny Abercrombie's departure motion and impose the life sentence with the possibility of parole after 25 years. The State claimed that rape is a crime of extreme sexual violence identified in K.S.A. 2017 Supp. 22-3717(d)(5)(A), thus Abercrombie was not eligible for probation. Further, the State argued that if the district court departed to a gridline sentence and departed downward from the grid number, it could result in only around a five-year sentence, which would be inappropriate here.

The State contended none of the factors cited by Abercrombie constituted substantial and compelling reasons to depart. The State argued that when the Kansas Legislature crafted the off-grid sentencing scheme for Jessica's Law offenses, it identified criminal history as not an important factor to consider because of the degree of harm these types of crimes cause. To discredit Abercrombie's argument about C.B.'s participation, the State emphasized C.B.'s inability to consent due to her age. The State also argued Abercrombie's family relationships were not a significant factor because law enforcement had located Abercrombie due to a domestic battery charge after he fled the courthouse. Based on the fleeing scenario and subsequent domestic charge, the State claimed Abercrombie was a threat to society.

The district court then provided Abercrombie his statutory right to allocution. Abercrombie stated the reason he ran from the courthouse was that he had not seen his children in four years. He also said he was not a threat to anyone, and he had been consistently working while he was out of custody.

After considering the departure motion and the parties' arguments, the district court denied Abercrombie's motion, finding he failed to establish substantial and compelling reasons to depart. The district court stated:

> "There is one big issue I have, and it seems that Dr. Steffan seems to acknowledge that in a few sections of this report. In order for me to give that report, as well as give the motion for departure merit, I have to believe that [Abercrombie's] claim in the videotaped interview that he thought that this victim was 18 years of age would have to be true.
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> . . . .
>
> ". . . [Abercrombie's] argument that he thought this victim was 18 years of age when this contact occurred just simply isn't supported by the evidence or the facts of this case.

". . . [A]s far as possible substantial and compelling reasons, although [Abercrombie] has no significant criminal history there is a statutory scheme for sentencing on these types of cases when we have an adult man involving a child victim of sex. It is classified as a rape because she is not capable of consenting.

"As far as victim participation I have already stated. Again, [Abercrombie's] argument that this victim was basically—was the prime or prime mover and shaker in getting this—ensuring that this encounter happened with her in his house is difficult for me to accept because, again, there are lots of texts. I think he called this victim baby. He used a lot of terms like that to sort of convince this young vulnerable child that he was potentially in love with her or that he potentially wanted to have a relationship with her. And all of that does appear to the Court that he was in the process of grooming her for this encounter.

"Harm less than typical. Again, we heard testimony from the victim that was very compelling as well as father dealing with some of the aftermath of this encounter with [Abercrombie].

"As far as non-statutory factors, acceptance of responsibility, I certainly don't find that that applies here. First of all, we had a jury trial. That is the first thing. Second, Mr. Abercrombie, as soon as he knew there was a verdict, before he knew what the verdict was, fled the courthouse. That doesn't appear to the Court to be acceptance of responsibility.

"Again, as far as family relationships, although I do appreciate that argument, that more than anything else, the fact that he has five children, four of which are minors and two of which are daughters, tells me he should have known better in this case that this child wasn't a child as opposed to actually being a child.

"Obviously, [Abercrombie] doesn't have prior felony convictions. It does appear in Dr. Steffan's report that there certainly has been some behavior [Abercrombie] has engaged in that is certainly not conducive to being a positive member of society. But, again, I do acknowledge that there aren't any felony convictions at least, so that certainly is a factor.

. . . .

"Also, child victim sexual aggressor. Again, I'm not giving that any merit based on the facts that came out in the jury trial. Same goes for willing participation of the victim to criminal conduct.

"Again, there may be some rehabilitation efforts available. The problem is Dr. Steffan's report states that there are possible options in the community rehabilitation. They depend in a large way on the truthfulness of [Abercrombie] saying that he believed that the victim in this case was 18 years old. Again, based on what I saw at trial and what I've seen in other pretrial issues, I just don't believe that. The facts just don't support [Abercrombie] believing that this victim was 18 years of age. So I'm certainly not giving that merit.

"As to offender not a threat to society, again, my same arguments I have already stated on the record. Again, if [Abercrombie] indeed realized that this was a child, which the facts seem to indicate he had to of, I also don't give that weight. I believe [Abercrombie] is certainly a threat to society, and [he] is the exact person the legislature was considering whenever it enacted the statutory scheme regarding rape of a child.

"So with all that said, I am denying [Abercrombie's] motion for departure both as to departing from the Jessica's Law mandatory minimum to the actual grid as well as departure to below the grid number."

The district court imposed the presumptive Jessica's Law sentence of 25 years to life, as well as lifetime parole with electronic monitoring. Abercrombie filed a timely notice of appeal.

ANALYSIS

I. *Did the district court err in denying Abercrombie's motion for durational and dispositional downward departures?*

Abercrombie maintains the district court abused its discretion in denying his departure motion, arguing it erroneously balanced the proposed mitigating circumstances against aggravating circumstances. According to Abercrombie, it was improper for the district court to weigh several mitigating factors against evidence Abercrombie knew C.B.'s age. Abercrombie also maintains this court should determine the district court abused its discretion in finding that the proposed mitigating circumstances did not amount to substantial and compelling reasons to depart.

The State argues that the district court did not engage in improper balancing of the mitigating factors against aggravating circumstances. The State contends the district court instead properly considered the evidence presented and determined Abercrombie only demonstrated the existence of one mitigating circumstance. Thus, the State maintains the district court did not err in finding no substantial and compelling reasons to depart from the Jessica's Law sentence.

Standard of Review

An appellate court reviews the district court's determination of whether substantial and compelling reasons to depart exist in a Jessica's Law case for abuse of discretion. A district court abuses its discretion when: (1) a ruling is based on an error of law; (2) a ruling is based on an error of fact; or (3) no reasonable person would take the view adopted by the judge. *State v. Powell*, 308 Kan. 895, 902-03, 425 P.3d 309 (2018).

Discussion

Sentencing under Jessica's Law, as set forth in K.S.A. 2022 Supp. 21-6627, provides for a life sentence with a mandatory minimum term of 25 years of imprisonment for a defendant who is at least 18 years old that engages in sexual intercourse with a child under the age of 14. The statute, however, expressly authorizes and provides a procedure for imposing a departure sentence from the mandatory minimum sentence. See K.S.A. 2022 Supp. 21-6627(d). If it is an offender's first Jessica's Law conviction, the district court may depart from the mandatory minimum and impose a sentence under the Kansas Sentencing Guidelines Act if, "following a review of mitigating circumstances," the court finds substantial and compelling reasons to do so. K.S.A. 2022 Supp. 21-6627(d)(1); 308 Kan. at 902.

The Kansas Supreme Court has emphasized the unique nature of K.S.A. 2022 Supp. 21-6627 which, unlike other sentencing statutes, makes no provision for considering aggravating factors. See *State v. McCormick*, 305 Kan. 43, 49, 378 P.3d 543 (2016). This is because Jessica's Law only intensifies an offender's sentence. "Simply put, there is nowhere to go but to a less-intense place." *State v. Spencer*, 291 Kan. 796, 809, 248 P.3d 256 (2011).

When considering a motion to depart in a Jessica's Law case, the district court must first review the mitigating circumstances without any attempt to weigh them against any aggravating circumstances. The district court does not need to affirmatively articulate that it refrained from weighing the circumstances. *Powell*, 308 Kan. at 908. Next the district court determines, based on all the facts of the case, whether the mitigating circumstances rise to the level of "'substantial and compelling reasons'" to depart from the mandatory minimum sentence. 308 Kan. at 913-14 (quoting *State v. Jolly*, 301 Kan. 313, 324, 342 P.3d 935 [2015]).

In determining whether substantial and compelling reasons exist to depart from a Jessica's Law's sentence, "[t]he sentencing judge is to consider information that reasonably might bear on the proper sentence for a particular defendant, given the crime committed, including the manner or way in which an offender carried out the crime." *Jolly*, 301 Kan. at 324. Importantly, the Kansas Supreme Court has stated that "a judge does not sentence in a vacuum." 301 Kan. at 324. Our Supreme Court has defined "'substantial'" as something "'real, not imagined; something with substance and not ephemeral.'" 301 Kan. at 323. Our Supreme Court found that the term "'"compelling" implies that the court is forced, *by the facts of a case*, to leave the status quo or go beyond what is ordinary.'" 301 Kan. at 323.

Whether a mitigating factor exists is a fact question. *Powell*, 308 Kan. at 917. K.S.A. 2017 Supp. 21-6627(d)(2) provides a nonexclusive list of six mitigating

factors a sentencing judge may consider when determining whether substantial and compelling reasons for departure from a Jessica's Law sentence exist:

> "As used in this subsection, 'mitigating circumstances' shall include, but are not limited to, the following:
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> "(A) The defendant has no significant history of prior criminal activity;
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> "(B) the crime was committed while the defendant was under the influence of extreme mental or emotional disturbances;
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> "(C) the victim was an accomplice in the crime committed by another person, and the defendant's participation was relatively minor;
>
> "(D) the defendant acted under extreme distress or under the substantial domination of another person;
>
> "(E) the capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law was substantially impaired; and
>
> "(F) the age of the defendant at the time of the crime."

K.S.A. 2017 Supp. 21-6815(c)(1)(A)-(F) also provides a nonexclusive list of mitigating factors for a sentencing court to consider when ruling on a departure motion:

> "(A) The victim was an aggressor or participant in the criminal conduct associated with the crime of conviction.
>
> "(B) The offender played a minor or passive role in the crime or participated under circumstances of duress or compulsion. This factor may be considered when it is not sufficient as a complete defense.
>
> "(C) The offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed. The voluntary use of intoxicants, drugs or alcohol does not fall within the purview of this factor.
>
> "(D) The defendant, or the defendant's children, suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

"(E) The degree of harm or loss attributed to the current crime of conviction was significantly less than typical for such an offense.

"(F) The offender committed such crime as a result of an injury . . . ."

In *Powell*, 308 Kan. at 906-08, the Kansas Supreme Court provided greater guidance for this court's review of a district court's decision on a departure motion in a Jessica's Law case:

> "On review, an appellate court should disregard characterizations of evidence that might reasonably bear on a defendant's sentence for a first time Jessica's Law conviction as 'aggravating.' The question is whether the evidence relates to the decision to be made, i.e., whether the mitigating circumstances advanced both exist and supply a substantial and compelling reason to depart from the hard 25 life sentence." 308 Kan. 895, Syl. ¶ 9.

In other words, the proper question for the reviewing court is "whether the district court considered improper evidence in denying the departure motion, regardless of any label or characterization one might give that evidence." 308 Kan. at 912.

Abercrombie argues that the district court abused its discretion in two ways when it denied his departure motion. First, he contends the district court made an error of law by weighing his asserted mitigating factors against aggravating factors. Second, he contends that the district court's finding that the mitigating factors did not constitute substantial and compelling reasons to depart was an abuse of discretion.

1. *The district court did not improperly weigh the proposed mitigating factors against aggravating factors.*

Abercrombie claimed several mitigating factors existed, including his lack of criminal history, C.B.'s participation in the crime, the less than typical harm to C.B., his family relationships, his acceptance of responsibility, and his lack of threat to society.

The district court asked the State to respond to Abercrombie's arguments and to provide a sentencing recommendation. In response, the State argued none of the mitigating factors proposed by Abercrombie constituted substantial and compelling reasons to depart.

After hearing both parties' arguments, the district court reviewed the mitigating factors advanced by Abercrombie. The district court's analysis began by considering whether the evidence supported Abercrombie's claim that he believed C.B. was 18 years old. The district court found that the evidence did not support this argument, which was relevant to determine the existence of several of the proposed mitigating factors. Although the district court then referenced "substantial and compelling reasons," it proceeded to go through each proposed mitigating factor and found that only Abercrombie's lack of previous felony convictions was a mitigating factor. The district court then determined there were not substantial and compelling reasons to depart based on the lack of mitigating factors and denied Abercrombie's motion. The district court did not refer to the State's rebuttal evidence at the sentencing hearing as "aggravating circumstances."

A sentencing court may consider relevant evidence when determining the existence of proposed mitigating factors. K.S.A. 2022 Supp. 21-6815(d)(1)-(4). The *Powell* court found the district court properly considered prior-sex-crime evidence in ruling on a departure motion because "it was relevant to whether Powell proved his claimed mitigating circumstances." 308 Kan. at 913. Conversely, in *State v. Abbott*, No. 120,614, 2020 WL 1329273, at *4 (Kan. App. 2020) (unpublished opinion), this court remanded a Jessica's Law case for resentencing because it found the district court improperly weighed aggravating factors against the proposed mitigating factors. The district court in *Abbott* stated that it could not even consider the alleged mitigating factors because the negative facts of the case were too substantial. The *Abbott* panel found this constituted an error of law under our Supreme Court's framework. 2020 WL 1329273, at *4.

A review of the record establishes the district court properly considered all the facts of the case to evaluate whether any of Abercrombie's claimed mitigating factors existed. As in *Powell*, the evidence that Abercrombie knew C.B.'s age and pursued a sexual relationship with her was relevant to prove whether Abercrombie's claimed mitigating factors existed, such as C.B.'s involvement in the criminal conduct and Abercrombie being a threat to society. After considering all the evidence, the district court found that only one mitigating factor existed—Abercrombie's lack of serious criminal history—without reference to any aggravating circumstances or improper evidence.

The only indication the district court gave that it was engaging in "weighing" occurred when it stated:

> "As to offender not a threat to society, again, my same arguments I have already stated on the record. Again, if [Abercrombie] indeed realized that this was a child, which the facts seem to indicate he had to [have], I also don't give that weight. I believe [Abercrombie] is certainly a threat to society, and [he] is the exact person the legislature was considering whenever it enacted the statutory scheme regarding rape of a child."

However, unlike in *Abbott*, the district court did not reference any aggravating factors and considered each proposed mitigating factor. Rather, the use of the word "weight" appeared to be used to determine whether the mitigating factor existed. The district court did not state that Abercrombie's knowledge of C.B.'s age outweighed the mitigating factors. Instead, the district court concluded that this evidence negated the existence of several mitigating factors proposed by Abercrombie. After discrediting each proposed mitigating factor—except Abercrombie's lack of serious criminal history—the district court stated that it was denying Abercrombie's motion. Thus, the district court did not improperly weigh the proposed mitigating factors against any aggravating factors.

2. *The district court did not abuse its discretion in finding that the sole mitigating factor did not create substantial and compelling reasons to depart.*

Abercrombie also argues that the district court abused its discretion by finding that his proposed mitigating factors did not amount to substantial and compelling reasons to depart from the Jessica's Law sentence. As established above, the record does not show that the district court based its ruling on an error of law by applying an incorrect legal framework or by considering improper facts. Thus, this court's remaining consideration is whether any reasonable person would deny Abercrombie's departure motion. See *Powell*, 308 Kan. at 902-03.

Based on a review of the record, substantial competent evidence supports the district court's finding that only one mitigating factor existed—Abercrombie's lack of serious criminal history. Therefore, a reasonable person could find that Abercrombie's lack of criminal history alone did not rise to the level of a substantial or compelling reason to depart.

II. *Did the district court err in failing to give a unanimity instruction?*

Abercrombie also contends that, despite neither party requesting a unanimity instruction, the district court erred by failing to give one. Abercrombie claims the State presented evidence of three separate and distinct acts of rape between Abercrombie and C.B., so the jurors might have disagreed about which act of sexual intercourse led to the rape charge. Thus, Abercrombie argues the district court violated his right to a unanimous verdict by not providing a unanimity instruction. He asks this court to reverse his conviction and remand for further proceedings.

The State contends, while it is a close call, arguably the record reflects insufficient evidence to prove multiple acts, and the evidence better supports a unitary act of sexual intercourse. Even so, if this court finds the record contains evidence of multiple acts, the

State argues that Abercrombie abandoned his burden to demonstrate clear error. The State further claims Abercrombie cannot meet his burden because he cannot show that a unanimity instruction would have changed the jury's verdict.

Standard of Review and Preservation

When a defendant challenges the district court's failure to give a unanimity instruction in a case potentially involving multiple acts, the reviewing court uses a three-step test to examine the issue. *State v. Harris*, 310 Kan. 1026, 1039, 453 P.3d 1172 (2019). First, the threshold question—over which this court exercises unlimited review—is whether the case involved multiple acts. In other words, "'whether the defendant's actions could have given rise to multiple counts of the charged crime or whether the alleged conduct was unitary.'" 310 Kan. at 1039 (quoting *State v. King*, 297 Kan. 955, 979, 305 P.3d 641 [2013]). The second step requires a determination of whether an error occurred. Error exists if the State did not inform the jury about which act to rely on during its deliberations, and the trial court did not instruct the jury that the verdict must be unanimous about the particular criminal act supporting the conviction. Finally, the third step requires a determination of whether the error was reversible. 310 Kan. at 1039.

Abercrombie did not request the district court give a unanimity instruction during trial. When a party asserts an instruction error for the first time on appeal, the failure to give a legally and factually appropriate instruction is reversible only if the failure was clearly erroneous. *State v. Butler*, 307 Kan. 831, 845, 416 P.3d 116 (2018). The "'clearly erroneous'" principle is not a standard of review. *State v. Lewis*, 299 Kan. 828, 856, 326 P.3d 387 (2014) (citing *State v. Williams*, 295 Kan. 506, 510-16, 286 P.3d 195 [2012]). Instead, it supplies a basis for determining whether an error requires reversal of a conviction. *Lewis*, 299 Kan. at 856.

Discussion

When a case involves multiple acts, the jury must unanimously agree on which specific act constitutes the crime. K.S.A. 22-3421; *King*, 297 Kan. at 977. To ensure a unanimous verdict in such cases, the district court must give the jury a unanimity instruction or the State must elect the particular act it relies on for the conviction. 297 Kan. at 978.

1. *Multiple Acts Analysis*

Under the first step of the three-step test for reviewing a unanimity instruction issue, this court determines whether the defendant's conduct involved multiple acts or whether it was unitary. The Kansas Supreme Court has defined "'multiple acts'" as "legally and factually separate incidents that independently satisfy the elements of the charged offense." *State v. De La Torre*, 300 Kan. 591, 598, 331 P.3d 815 (2014). The State charged Abercrombie with one count of rape in violation of K.S.A. 2017 Supp. 21-5503(a)(3)(b)(2), for engaging in sexual intercourse with a child under the age of 14. The relevant jury instruction defined sexual intercourse as "any penetration of the female sex organ by a finger, the male sex organ, or any object. Any penetration, however slight, is sufficient to constitute sexual intercourse."

Four factors guide the multiple acts analysis: (1) whether the acts occurred at or near the same time; (2) whether the acts occurred at the same location; (3) whether an intervening event occurred between the acts; and (4) whether a fresh impulse motivated some acts. *Harris*, 310 Kan. at 1039. Our Supreme Court has acknowledged that "a multiple acts problem may arise even when the factual details about the multiple incidents are indefinite as to precisely when each occurred or even how many acts occurred." *De La Torre*, 300 Kan. at 598.

The record does not clearly indicate whether Abercrombie's actions could have given rise to multiple counts of rape. The record contains conflicting evidence as to whether Abercrombie engaged in sexual intercourse with C.B. one time or multiple times. Abercrombie claims that the State presented evidence of three instances of sexual intercourse which could support multiple counts of rape. He bases this claim upon witness testimony from S.B., C.B., and Peck, the sexual assault nurse. S.B.'s testimony revealed his belief that Abercrombie and C.B. had been sexually active sometime before the evening of April 21, 2018. S.B. testified that when he looked through C.B.'s messages, he "learned that [Abercrombie] had not only met [C.B.] before, but by what we read in the accounts they had been sexually active before and [Abercrombie] explained that he wanted to take her to a bed and do it right, rather explicit details of what he wanted to do."

C.B. testified that she and Abercrombie engaged in sexual intercourse "maybe once or twice." When asked by the State when the second instance of sexual intercourse would have happened, C.B. testified that she did not remember but that it would have been some time later that night after they put their clothes back on, watched a movie, and possibly slept for some time. On cross-examination, Abercrombie's counsel asked C.B. if she recalled the second instance of sexual intercourse, and she replied, "I'm pretty sure we did. I don't remember. It is hard. What happened that night and what happened afterwards I kind of just put out and I don't like to think about it at all."

Additionally, Peck testified that C.B. told her during the sexual assault examination that after she and Abercrombie had sex the first time, they fell asleep, woke up about one hour later, and had sex a second time. However, both C.B. and Abercrombie described only one act of sexual intercourse during their respective video interviews with Detective Bussard, which were presented to the jury and to which the detective testified.

At most, the record contains evidence supporting the possibility of two acts of sexual intercourse between C.B. and Abercrombie. S.B.'s belief based on the sexual nature of the text conversations between Abercrombie and C.B. is not evidence of a third, separate instance of sexual intercourse. The text messages admitted into evidence did not show that there was a previous instance of sexual intercourse. Therefore, the record contains no evidence of a third act of sexual intercourse taking place before April 21, 2018. The evidence of a second act of sexual intercourse comes only from C.B. and Peck's trial testimony.

In the context of multiple acts factors, whether the two instances of sexual intercourse are part of one criminal act or multiple acts is unclear. The Kansas Supreme Court has held that separate acts of penetration may constitute separate acts of rape. *State v. Zamora*, 247 Kan. 684, 694, 803 P.2d 568 (1990). In *State v. Foster*, 290 Kan. 696, 713, 233 P.3d 265 (2010), our Supreme Court found two separate instances of rape where the victim put her clothes back on after the first penetration and the defendant murdered another victim before the second penetration. The *Foster* court noted the difficulty of determining whether the defendant was motivated by a fresh impulse, but ultimately held the second penetration was not motivated by a single criminal impulse. 290 Kan. at 715.

In *State v. Livengood*, No. 123,267, 2022 WL 1278760, at *7 (Kan. App. 2022) (unpublished opinion), another panel of this court found Livengood's actions of "closely connected components" in violation of a protective order to be unitary conduct. The panel held that Livengood was not entitled to a multiple acts instruction because his conduct was "one overall act comprised of three closely connected components: his arrival at the graduation, coupled with his personal contact with [the victim's daughter] during the ceremony, and his decision to leave his signature image on [the victim]'s car to alert the family to his presence." 2022 WL 1278760, at *7. Compare *Harris*, 310 Kan. at 1040 (finding unitary conduct for kidnapping charge when Harris confined his victim to her apartment for two hours and repeatedly forced her to move from room to room while

demanding money), with *King*, 297 Kan. at 982 (finding multiple acts when King damaged parked vehicles, left, then returned 5-10 minutes later and damaged more vehicles).

Here, the first two multiple acts factors, whether the acts occurred at or near the same time, and whether the acts occurred at the same location, support Abercrombie's conduct being unitary. The two acts of intercourse took place on the same evening at the same location, with about two hours in between at most. Whether an intervening event occurred between the acts or whether a fresh impulse motivated the second act is less clear. C.B.'s testimony indicates that she got fully dressed after the first act of sexual intercourse and Abercrombie put his shorts back on. C.B. also testified that they watched a movie and she possibly fell asleep for a short time in between instances. Her testimony does not specify whether Abercrombie fell asleep during this time.

Although there was not a clear intervening event, like the murder in the *Foster* case, the acts of getting dressed, watching a movie, and potentially sleeping could be considered intervening events. The fresh impulse analysis is even more challenging here than in *Foster*. This court could consider the two acts of sexual intercourse as part of Abercrombie's single impulse to get C.B. to stay with him overnight to engage in sexual intercourse potentially multiple times during the night. But this court could also consider the second alleged act of sexual intercourse to have been driven by a fresh impulse to have sexual intercourse with C.B. after the first instance.

The State acknowledges the issue of whether this is a multiple acts case is a close call. Ultimately, noting a multiple acts problem may arise even when the factual details about the multiple incidents are indefinite as to precisely how many acts occurred, we find consideration of the multiple acts factors weighs in favor of two separate and distinct acts of sexual intercourse, either of which could constitute the rape charge. See *Foster*, 290 Kan. at 715.

2. *Error Analysis*

In a multiple acts case, the district court must instruct the jury to agree on the specific criminal act to convict or the State must inform the jury about which act to rely on. "The failure to elect or instruct is error." 290 Kan. at 713.

In its brief, the State appears to concede that error occurred because it did not make an election by identifying which particular act of sexual intercourse the jurors must agree on and the district court did not give a unanimity instruction.

In *State v. Colston*, 290 Kan. 952, Syl. ¶ 5, 235 P.3d 1234 (2010) *overruled on other grounds by State v. Dunn*, 304 Kan. 773, 375 P.3d 332 (2016), the Kansas Supreme Court explained:

> "In a multiple acts case, the State fails to properly elect the act it is relying upon by arguing merely that only one act supports the charge. The State's argument that only one act supports the charge is not the same as informing the jury that it cannot consider evidence of other acts supporting the same charge or that it must agree on the same underlying criminal act."

The record reflects the district court did not give a unanimity instruction nor did either party request a unanimity instruction in their proposed jury instructions. Because the State did not make adequate election, the lack of a unanimity instruction constitutes error.

3. *Reversibility Analysis*

This court next considers the last step in the three-step test, which requires a determination of whether the error requires reversal. *Harris*, 310 Kan. at 1039. When, as

here, the defendant failed to request a unanimity instruction, this court applies the clearly erroneous standard provided in K.S.A. 2022 Supp. 22-3414(3) to determine whether an error requires reversal of a conviction. *De La Torre*, 300 Kan. at 596. Under the clearly erroneous standard, Abercrombie must firmly convince this court that the jury would have returned a different verdict if the unanimity instruction had been given. *King*, 297 Kan. at 279-80.

Our Supreme Court has found that "'Kansas appellate courts have held a "failure to instruct" in multiple acts cases to be reversible error except when the defendant presents a unified defense, e.g., a general denial. If there is no unified defense, we do not tolerate verdict uncertainty in these cases.'" *De La Torre*, 300 Kan. at 599 (quoting *State v. Voyles*, 284 Kan. 239, 253, 160 P.3d 794 [2007]). "[I]n one of its purest forms," a unified defense is "a mere credibility contest between the victim and the alleged perpetrator." 284 Kan. at 253.

Abercrombie argues he did not present a unified defense because he was never asked about the second alleged instance of sexual intercourse. However, Abercrombie presented no evidence at trial, so the nature of his defense is not entirely clear from the record. Abercrombie's counsel only argued that the jury should have reasonable doubts about the evidence and attempted to place blame on C.B. for the incident. Moreover, Abercrombie admitted to the act of sexual intercourse, which the State's case relied on.

Abercrombie's case is distinguishable from cases like *Voyles*, in which the Kansas Supreme Court reversed the defendant's convictions for aggravated indecent solicitation of a child and aggravated criminal sodomy based on the lack of a unanimity instruction. 284 Kan. 239. In *Voyles*, the jury heard evidence of acts involving two victims occurring in different locations on different days. The *Voyles* court found that "potentially 20 different acts or offenses could have been committed," but the State only charged the defendant with 8 counts. 284 Kan. at 254.

Cases like *Voyles* reflect the danger of a mixed verdict in which the jury convicts on a charge even though it did not unanimously agree on which underlying act supported the charge. See *State v. Rodriguez-Manjivar*, No. 120,039, 2019 WL 5089751, at *6 (Kan. App. 2019) (unpublished opinion). But a mixed verdict was unlikely here.

Here, the State's evidence focused on one instance of sexual intercourse, and there was no dispute that Abercrombie engaged in sexual intercourse with C.B. on the evening of April 21. Only C.B. and Peck briefly testified about a second instance of sexual intercourse occurring at Abercrombie's residence on April 21. C.B.'s testimony was consistent about the first instance of sexual intercourse but was ambivalent about a second instance taking place that night. All other evidence, and the State's arguments, centered around the one act of sexual intercourse that C.B. and Abercrombie described to Detective Bussard.

Although some jurors could have believed the first instance of sexual intercourse occurred but the briefly mentioned second instance did not, Abercrombie has failed to show the jury would have reached a different verdict if the district court had given a unanimity instruction. The jury saw the video of Abercrombie admitting to engaging in sexual intercourse with C.B., weighed all the evidence presented, and found Abercrombie guilty as charged. As a result, this court is firmly convinced that the result would not have been different if the jury had been instructed that it had to be unanimous as to the specific act of sexual intercourse that constituted the rape on April 21. In other words, any error created by the lack of unanimity instruction was harmless.

Affirmed.