NOT DESIGNATED FOR PUBLICATION

No. 125,175

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

CHRISTOPHER L. WAISNER,
Appellant.

MEMORANDUM OPINION

Appeal from Shawnee District Court; C. WILLIAM OSSMANN, judge. Opinion filed June 9, 2023. Affirmed.

Joseph A. Desch, of Law Office of Joseph A. Desch, of Topeka, for appellant.

Jodi Litfin, deputy district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before GREEN, P.J., GARDNER, J., and PATRICK D. MCANANY, S.J.

PER CURIAM: Christopher L. Waisner appeals his conviction for aggravated indecent liberties with a child, arguing the district court abused its discretion in admitting evidence of child pornography found on his computers under K.S.A. 2021 Supp. 60-455(d) in his third trial on this charge. Waisner also raises several claims of prosecutorial error based on statements during closing arguments. Finding no reversible error, we affirm.

Factual and Procedural Background

Because many of the details about the sexual abuse are not necessary to our resolution of the issues on appeal, we adopt this summary of the facts from our panel's opinion in Waisner's earlier direct appeal:

> "This case involves allegations of sexual abuse lodged against Waisner by his daughter, T.G. Specifically, T.G. alleged that when she lived with Waisner during a period between May 2008 and January 2009 (while she was 11 and 12 years old), she unwillingly participated in various sexual acts initiated by Waisner, including: oral sex, digital penetration, slight penile penetration, penetration with a dildo, and various manners of lewd fondling or touching. T.G. eventually reported the allegations of abuse to her mother, and an investigation ensued." *State v. Waisner*, No. 107,728, 2013 WL 3970177, at *1 (Kan. App. 2013) (unpublished opinion).

Trial, Appeal, K.S.A. 60-1507 Motion, and Retrial Proceedings

This case began in 2009 when the State charged Waisner with rape, two counts of aggravated criminal sodomy, aggravated indecent liberties, and lewd fondling of a child under 14 years old, and sexual exploitation of a child. The State later amended its complaint to remove one aggravated criminal sodomy charge and add a charge for attempted rape of a child under 14 years old.

The State would eventually try Waisner for these crimes in three different jury trials. The first resulted in a hung jury. But the second trial resulted in Waisner's conviction of rape, attempted rape, criminal sodomy, and aggravated indecent liberties with a child. The district court sentenced Waisner to three consecutive life sentences for the rape, aggravated criminal sodomy, and aggravated indecent liberties with a child convictions, and 155 months imprisonment for the attempted rape. Waisner appealed, but this court affirmed his convictions and sentence. *Waisner*, 2013 WL 3970177.

Still, Waisner was later granted relief from his sentence and conviction after filing a successful K.S.A. 60-1507 motion showing he had received ineffective assistance of counsel. The district court thus ordered another new trial. The State appealed the district court's decision, but this court affirmed. *Waisner v. State*, No. 116,799, 2018 WL 671175 (Kan. App. 2018) (unpublished opinion).

Waisner's defense at his third trial, which gives rise to this appeal, was that T.G. made up the allegations against him and that she was driven by at least one of these reasons: (1) She wanted to live with Mother to get away from his strict parenting; (2) she disliked Stepmother and living with Stepmother; and (3) she enjoyed being, or at least playing, a victim. Waisner called several witnesses in support of his defense, including Stepmother, his stepfather, Stepmother's daughter (C.K.), one of T.G.'s childhood friends (A.R.), and one of his friends (Jennifer Stallbaumer).

The jury found Waisner guilty on only one charge—aggravated indecent liberties with a child. The jury reached no conclusion on the remaining charges, so the district court dismissed them without prejudice. The district court later sentenced Waisner to a hard 25 life sentence.

Waisner timely appeals.

Did the District Court Err in Admitting Images of Child Pornography as Evidence of Other Crimes Under K.S.A. 2021 Supp. 60-455?

Waisner first argues that the district court committed reversible error by admitting under K.S.A. 2021 Supp. 60-455(d) two images of child pornography taken from his computers during a search pursuant to a warrant. Waisner concedes that the images were relevant but maintains that they were overly prejudicial and thus inadmissible.

The State contends that the images and the website name strictdad.com tended to prove Waisner was interested in prepubescent females and "some sort of familial or father/daughter relationship" and was thus highly probative in proving Waisner committed sexual offenses against his 12-year-old daughter. The State notes that the district court admitted only 2 of over 60 images found on Waisner's computers, and argues that even if error occurred, it was harmless.

Basic Legal Principles

Before admitting evidence, trial courts make several determinations, including whether the evidence is relevant. See *State v. Jones*, 313 Kan. 917, 923, 492 P.3d 433 (2021). Evidence is relevant if it is material and probative: it has "any tendency in reason to prove any material fact." K.S.A. 60-401(b). All relevant evidence is admissible unless prohibited by statute, constitutional provision, or judicial precedent. But the district court may preclude the admission of evidence if it determines that the probative value of the evidence is substantially outweighed by the risk that the evidence will "unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered." K.S.A. 60-445.

The admissibility of evidence of "other crimes or civil wrongs" is, however, governed by the rules set out in K.S.A. 2022 Supp. 60-455. Its general rule states that this type of evidence cannot be used "to prove such person's disposition to commit crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion." K.S.A. 2022 Supp. 60-455(a). This type of evidence may be admissible only when used to prove other material facts. See K.S.A. 2022 Supp. 60-455(b) (allowing evidence of other crimes when relevant to prove "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident").

Those general rules do not apply here though because in 2009, our Legislature created an exception to K.S.A. 60-455(a)'s general rule precluding use of other crimes evidence to prove propensity. See L. 2009, ch. 103, § 12, eff. April 30, 2009. This provision, K.S.A. 2022 Supp. 60-455(d), allows the State to use evidence of a person's acts or offenses of sexual misconduct as propensity evidence when the person is charged with certain sex offenses, provided the evidence is relevant and not unduly prejudicial:

> "Except as provided in K.S.A. 60-445, [permitting exclusion of relevant evidence when the probative value is substantially outweighed by the risk of unfair and harmful surprise,] and amendments thereto, in a criminal action in which the defendant is accused of a sex offense under articles 34, 35 or 36 of chapter 21 of the Kansas Statutes Annotated, prior to their repeal, or articles 54, 55 or 56 of chapter 21 of the Kansas Statutes Annotated, or K.S.A. 2022 Supp. 21-6104, 21-6325, 21-6326 or 21-6419 through 21-6422, and amendments thereto, evidence of the defendant's commission of another act or offense of sexual misconduct is admissible, and may be considered for its bearing on any matter to which it is relevant and probative."

This statute applies here. See also K.S.A. 2022 Supp. 60-455 (g) (listing conduct that constitutes an "act or offense of sexual misconduct" as used in K.S.A. 2022 Supp. 60-455[d]).

"The plain statutory language of K.S.A. 2018 Supp. 60-455(d) appears to allow such evidence without requiring a weighing of probity versus prejudice." *State v. Boysaw*, 309 Kan. 526, 540, 439 P.3d 909 (2019). Still, our Supreme Court requires the analysis. Thus, before admitting evidence under K.S.A. 60-455(d), Kansas courts must "find the probative value of K.S.A. 60-455(d) evidence outweighs its potential for producing undue prejudice." *State v. White*, 60 Kan. App. 2d 458, 481-82, 494 P.3d 248 (2021), *aff'd* 316 Kan. 208, 514 P.3d 368 (2022).

This court reviews a district court's admission or exclusion of evidence and balancing of probative value against prejudicial effect for an abuse of discretion. See K.S.A. 60-445; *State v. Meggerson*, 312 Kan. 238, 253, 474 P.3d 761 (2020); see also *Jones*, 313 Kan. at 923 (materiality reviewed de novo; probity reviewed for abuse of discretion). A judicial action constitutes an abuse of discretion if (1) no reasonable person would take the view adopted by the trial court; (2) it is based on an error of law; or (3) it is based on an error of fact. *Meggerson*, 312 Kan. at 253.

Pretrial Hearings About K.S.A. 60-455 Evidence

The district court held several hearings spanning several years about the admissibility of the K.S.A. 60-455 evidence. Before Waisner's second jury trial in 2018, the State moved to admit evidence of child pornography found on Waisner's computers as evidence of other crimes under K.S.A. 2018 Supp. 60-455(d). The State later withdrew its motion but filed a renewed motion before the third trial. The State argued that the evidence was relevant because the pornography showed that Waisner had an attraction to young girls and a willingness to act on that attraction. The State also maintained that Waisner's propensity to commit sexual offenses against a child was a disputed, material fact.

Waisner's response argued that the potential for prejudice outweighed any probative value the images had, and that

- the State's claim that possession of child pornography tended to show a propensity to commit similar sexual offenses was unsupported and contrary to scientific studies;
- the State's motion failed to establish that he was the owner of the pornography, as others had access to his computers; and

- the State needed to show that the pornography was on his computer when T.G. lived with him.

The district court considered these arguments at several hearings. The parties' arguments at the first of these hearings, in January 2020, revealed that the State had not yet specified which of the images it wanted admitted. The district court had not yet reviewed the images and thus could not rule on their admissibility. The district court explained that it was having a difficult time finding factually similar cases. Still, the district court referred to this court's opinion in *State v. Hailey*, No. 119,261, 2019 WL 4555986, at *7-8 (Kan. App. 2019) (unpublished opinion) and found that it would need to perform a balancing test, weighing probity against prejudice for each image to determine their admissibility. And the court wanted some context before making a ruling. The court then ordered the State to narrow its request for admission of the child pornography evidence to specific images, and it continued the matter.

At the second hearing, the district court notified the parties that after conducting a balancing test on one of two groups of images that the State had submitted for review, it would admit only a few of those pictures at trial. Although it had not yet performed a balancing test to decide the admissibility of the images in the second group of images, the district court predicted that it would likewise limit the number it would allow from the second group too, rather than admit all 67 images for the jury to see. The district court implicitly held that the images it selected were not overly prejudicial.

At yet another hearing—about a year before Waisner's third trial—the parties asked the district court to clarify which, if any, images it had identified as admissible. The district court explained only that it had reviewed the two sets of pictures and had identified specific images that it would allow, yet it did not specify which ones.

Finally, at a hearing a couple of weeks before this third trial, defense counsel made one last attempt to clarify the district court's rulings on the admissibility of the child pornography and to challenge the evidence as unduly prejudicial. Defense counsel stated that "[i]f the images . . . that the Court . . . identified [were] coming in, [he] wanted to . . . make an argument about probative versus prejudicial." But the district court denied counsel's request to address the matter again, agreeing with defense counsel that after identifying which images were admissible, the matter was "on the right track" to proceed to trial. Another attorney representing Waisner asked whether the court would simply state which images it had determined were admissible, but the district court declined that request and directed the parties to reach an agreement after the hearing and to raise any unresolved issues at a later hearing.

At trial, the State moved to admit only two of the images from Waisner's computer—State's Exhibits 45 and 50. Waisner objected, again arguing the images' prejudicial effect outweighed their probative value. The district court noted Waisner's objection and his previous arguments but granted the State's motion and permitted the State to publish the images.

Analysis

Waisner concedes that the two photographs he challenges are relevant. Thad Winkleman, a forensic examiner for the Heart of America Regional Computer Forensics Lab, laid the foundation for the photos' admissibility. He worked as a team leader on this case. The first photo, discovered on a space on Waisner's computer that someone had deleted, showed a split view of a young girl's naked body. Winkelman explained that he believed the girl in the picture was a "prepubescent female" because he had seen the image before when working on similar cases. Winkelman described the second image as "a male grabbing the pubic region of, what appears to be, a female." He also explained

that according to a watermark on the image, the image was taken from a website called "strictdad.com."

Waisner claims the district court improperly balanced the images' probative value and prejudicial effect, but he does not explain what the district court's findings were. He instead reviews the evidence and argues what he believes the State proved and failed to prove. He then argues that the record shows that the evidence was more prejudicial than probative, asking us to reweigh the evidence ourselves. But this court cannot make factual findings or reweigh evidence under our abuse of discretion standard. See *State v. Newman*, 311 Kan. 155, 159, 457 P.3d 923 (2020). Waisner thus fails to present an argument or reference any specific findings that this court can properly review. Waisner does not allege any errors of law or fact, nor does he challenge the district court's decision as unreasonable. So he cannot meet his burden of proving an abuse of discretion. *State v. Tafolla*, 315 Kan. 324, 328, 508 P.3d 351 (2022) (party asserting error has burden of showing abuse of discretion).

Still, our review of the district court's statements during the motion hearing in January 2020 shows that the court correctly found that it needed to weigh the probative value against prejudice to determine the admissibility of the images under K.S.A. 60-455(d). See *Boysaw*, 309 Kan. at 539 (requiring balancing of probity against prejudice despite no such directive in K.S.A. 60-455). And although the district court did not explain what it considered when it conducted the balancing test that it referenced at the next hearing, the court stated that it had applied the proper balancing test to determine the admissibility of the images. The district court thus gave due consideration to the admissibility of each image and relied generally on an appropriate legal standard. *State v.*

Gunby, 282 Kan. 39, 63, 144 P.3d 647 (2006); see also *Boysaw*, 209 Kan. at 541 (recognizing "no set test exists for weighing probative value against prejudicial effect," but Kansas courts often consider factors outlined in *United States v. Benally*, 500 F.3d 1085, 1090-91 [10th Cir. 2007]).

True, the district court could have been more specific. Yet the lack of specificity in the district court's findings does not justify reversal of the district court's decision. Waisner does not challenge the district court's decision on this basis on appeal. Cf. *State v. Gutierrez-Fuentes*, 315 Kan. 341, 364, 508 P.3d 378 (2022) (Luckert, C.J., concurring) (noting this court's decision to address issue not properly raised on appeal or briefed constituted abuse of this court's discretion). And because Waisner did not object to the adequacy of the findings in the district court, we presume that the district court made all factual findings necessary to support its judgment. See *State v. Razzaq*, 309 Kan. 544, 548-49, 439 P.3d 903 (2019) (district court's implicit findings that probative value outweighed potential for prejudice are sufficient).

The district court adequately conducted the necessary balancing test, and correctly gave a limiting instruction to the jury about the propensity evidence. We find no error in the district court's decision to admit the two photographs as K.S.A. 2021 Supp. 60-455(d) evidence.

Did the State Commit Prosecutorial Error During Closing Arguments?

Waisner next raises five claims of prosecutorial error. He argues that the prosecutor violated his right to a fair trial by commenting on facts not in evidence, improperly vouching for T.G.'s credibility, and misstating the law during closing arguments. But as explained below, we find no prosecutorial error.

Basic Legal Principles

This court reviews Waisner's claim of prosecutorial error by first determining whether error occurred: whether the acts complained of fall outside the wide latitude afforded to prosecutors to conduct the State's case. When a misstatement of controlling law is deliberately made, it is outside the considerable latitude given to prosecutors during their arguments and thus constitutes error. *Gunby*, 282 Kan. at 63; see also *State v. Magallanez*, 290 Kan. 906, 915, 235 P.3d 460 (2010) (misrepresentation of burden of proof in closing argument). Prosecutors' comments also fall outside this wide latitude if they misstate the applicable law, misstate the facts in evidence, inflame the prejudices of the jury, or improperly divert the jury's attention. See *State v. Lowery*, 308 Kan. 1183, 1208-09, 427 P.3d 865 (2018) ("'A prosecutor should not make statements intended to inflame the passions or prejudices of the jury or to divert the jury from its duty to decide the case based on the evidence and the controlling law.'"); *State v. Davis*, 306 Kan. 400, 413-14, 394 P.3d 817 (2017) ("A prosecutor 'cross[es] the line by misstating the law,'" and "'a prosecutor's arguments must remain consistent with the evidence.'"). "'In determining whether a particular statement falls outside of the wide latitude given to prosecutors, the court considers the context in which the statement was made, rather than analyzing the statement in isolation.' [Citation omitted.]" *State v. Bodine*, 313 Kan. 378, 406-07, 486 P.3d 551 (2021).

If we find error, we then determine whether the error prejudiced Waisner's due process rights to a fair trial. To show harmless error, the State must show no reasonable possibility that the error contributed to the verdict. *State v. Frantz*, 316 Kan. 708, 745, 521 P.3d 1113 (2022).

The prosecutor did not comment on facts not in evidence while reviewing the swimming incident.

Waisner first contends that in the State's closing argument, the prosecutor asked the jury to speculate on facts not in evidence when talking about the trip to Oklahoma in January 2009, where T.G. and Waisner shared a hotel room. Waisner objects to the italicized statements below:

> "In January of 2009, the defendant and [T.G.] go down to the Chili Bowl in Oklahoma. Now, keep in mind, [Stepmother] has been back part of his life at the time and, like I just said, the abuse has somewhat subsided or maybe even stopped all completely, until they get to the Chili Bowl.
>
> "[T.G.] is so excited to see her cousins, she wants to go swimming, it's [in] the middle of winter, who gets to go swimming in the middle of the winter? This is something very exciting for a 12 year old. She's changing into her swimsuit and as she's changing, her dad starts it again, "Come here," tries to pull her onto the bed. [T.G.] tells you that he was trying to take her swimsuit off and she was able to wrangle away, get away, and go swimming with her cousins.
>
> *"Use your common sense here. What is [T.G.] thinking at that time? That the abuse is going to start up again? Is that the last straw for her? All she wanted to do was go swimming with her cousins and here's her dad, we don't know what he was going to do at that point. Was he going to penetrate her with his fingers? His penis? His mouth? She just wanted to go swimming with her cousins.*
>
> "They get home, [T.G.] decides this is enough, I'm tired of being treated like your wife. . . . [T]hey go to dinner in Lawrence, as they always did, they have an argument, a fight, they end up not eating dinner, they leave and go home.
>
> "After they spend a period of time [at] home, they go to El Mezcal, [T.G.] goes into the bathroom and calls her mom." (Emphasis added.)

Waisner admits that T.G. testified that she wanted to go swimming with her cousins but asserts that she did not testify to her thoughts at that time, so the prosecutor's statements about her thoughts are improper speculation, citing *State v. Kleypas*, 272 Kan.

894, Syl. ¶ 83, 40 P.3d 139 (2001). The *Kleypas* court explained that "[p]rosecutorial comments referring to what the victim was thinking are improper because they ask the jury to speculate on facts not in evidence. It is improper for a prosecutor to create an 'imaginary script' in order to create and arouse the prejudice and passion of the sentencing jury." 272 Kan. at 287. But *Kleypas* is distinguishable; the prosecutor's statements here did not create an "imaginary script" of what happened during the incident. Unlike in *Kleypas*, T.G. testified to the event, so the prosecutor's "script" here was not imaginary. Cf. *State v. Travelbee*, No. 110,348, 2014 WL 5312939, at *6 (Kan. App. 2014) (unpublished opinion) (finding the same).

T.G.'s testimony about her interaction with Waisner in the hotel room was:

> "I . . . had time before any of the events were starting. My cousins and I were wanting to go swim in the pool that was downstairs, it was indoor. Even though it was wintertime you could still go swimming. And I was going to change into my swimsuit and he had me change there in front of him. I had just wanted to get it done as quickly as possible and he kept trying to grab me, reach out for me, and pull me onto the bed, and I kept pulling back. I told him I just wanted to go swimming. From my memory on that, he just seemed very frustrated, and I did what I had set out to do, and went downstairs to go be with my cousins."

The State concedes that the prosecutor asked the jury to consider what T.G. was thinking when Waisner pulled her onto the bed.

But T.G.'s testimony provided an evidentiary basis for the prosecutor to reasonably infer the information she stated during closing argument. T.G. testified that she wanted to go swimming and did not want to deal with Waisner's physical conduct. Throughout her testimony, T.G. also revealed that she feared revictimization. Stepfather's testimony about T.G.'s fear to enter her house when she lived with Waisner also supports that this fear existed. T.G.'s testimony established that by the time the hotel incident

happened, Waisner had already raped and otherwise sexually abused her. Waisner had also previously forced T.G. to remove her clothing before committing other forced sexual acts against her. Thus, T.G.'s fear that Waisner would do something like that again was legitimate and consistent with his actions of pulling her onto a hotel room bed after forcing her to change in front of him.

A prosecutor can draw reasonable inferences from the evidence and is given latitude in drawing those inferences. *State v. Lowrance*, 298 Kan. 274, Syl. ¶ 2, 312 P.3d 328 (2013). Because the prosecutor's statements were based on reasonable inferences from other evidence that establishes T.G.'s fear and Waisner's past conduct, we find no prosecutorial error.

The prosecutor did not comment on facts not in evidence when discussing the search warrant and items discovered in the trunks.

Second, Waisner raises a similar claim that the prosecutor asked the jury to consider facts not in evidence when discussing the search warrant and the items found inside his trunks.

Four days after T.G. first reported the abuse, Detective Ludolph executed a search warrant of Waisner's house. Frank L. Suggs, III, a member of the police department's crime scene investigation unit, helped Ludolph search and photograph Waisner's home and the evidence seized. After entering the house, Suggs took pictures of T.G.'s belongings, which had been packed up and placed on the dining room table. Among her things was a black trunk with a lock on it. The trunk did not have explicit sexual materials in it that T.G. had said would be in there; it instead held some of T.G.'s shoes and books. Ludolph and Suggs also located a similar blue trunk in Waisner's room. This trunk contained pornographic magazines and videos, and other sexually explicit materials. They also found a tin of condoms in Waisner's nightstand drawer. Ludolph,

however testified that he did not locate some items listed in his search warrant, including a purple vibrator and sexual lubricant.

Waisner challenges these statements by the prosecutor:

> "[Stepmother] testified that on the 27th or the 28th, she packed up [T.G.'s] belongings. And then on the 30th is when the search warrant was executed on the defendant's home.
>
> "Now, why are these dates important? There's plenty of time for items of evidence to be hidden. Think about this. If you know that items are being packed up, why would you want the vibrator/dildo or the pornographic materials, why would you want to send those with you to your daughter's - or with your daughter to her mom's house? That's like taking a selfie of yourself committing the crime. So of course, the defendant has plenty of time to hide this evidence and gets rid of it.
>
> "But what other evidence or what other things were hidden? [Stepmother] testified to you that in the trunk that was stored in the defendant's bedroom, that that's where she also kept her dildos and vibrators, and that she kept pornographic materials - or they kept pornographic materials in there, and the defendant testified [Stepmother] kept lingerie in there. The only items that were found were the pornographic magazines. If this is something that didn't happen, why did the defendant take the time to hide the vibrators, supposedly the ones that he and his wife used?
>
> "Same with the lingerie. If [Stepmother] is moving out, why would she need to take her lingerie or why would the defendant need to hide the lingerie? Because he knows the police are coming, he knows a search warrant is going to be executed, and he knows [T.G.] is going to tell them, 'My dad used vibrators on me.'"

Waisner argues that the prosecutor accused him of hiding evidence of his crimes, but she had no basis in the record for this allegation. He maintains that the prosecutor could not accuse him of hiding evidence simply because Ludolph and Suggs did not find the items listed in their search warrant.

Although no testimony established that Waisner hid evidence of his crimes, that conclusion was a reasonable inference the jury could have drawn from other evidence. T.G. testified that when she lived with Waisner, she had in her room a black trunk which contained the sexual items Waisner gave her. She acknowledged that when the trunk was returned to her, it had books and shoes in it but she denied that those were the items generally kept in there. T.G.'s friend, A.R., also testified that she saw T.G. take a pornographic magazine out of the trunk when they were young, corroborating T.G.'s testimony that the trunk had contained sexually explicit materials.

The evidence also established that before Ludolph and Suggs executed their initial search warrant, Waisner knew that T.G. and Mother had accused him of some sort of criminal conduct because he saw that Mother had filed a motion for a protection from abuse order. And Waisner's cross-examination showed that Waisner knew of T.G.'s allegations against him before Ludolph and Suggs searched his home, so he had the opportunity to hide incriminating items.

Additionally, when Ludolph and Suggs arrived at Waisner's house, Waisner had already packed T.G.'s things, and the black trunk was among her belongings. Also relevant was Ludolph's discovery of the blue trunk in Waisner's room. T.G. described this trunk as being almost identical to hers and when police searched it, they found similar types of sexual items as T.G. said were stored in hers.

This was sufficient evidence to support the prosecutor's suggestion that Waisner had hidden evidence of his crimes against T.G. before Ludolph and Suggs executed the search warrant. Compare *State v. Burris*, No. 118,053 2019 WL 1976426, at *3 (Kan. App. 2019) (unpublished opinion) with *State v. Fisher*, 304 Kan. 242, 252, 373 P.3d 781 (2016). Because the prosecutor is an advocate and has a right to draw reasonable inferences from the evidence, we find no prosecutorial error.

The prosecutor did not comment on facts not in evidence when discussing the consistency of T.G.'s testimony.

Third, Waisner argues that the prosecutor commented on facts not in the evidence by saying that T.G.'s testimony during Waisner's three trials was consistent on the main events. Waisner provides no record cite for the comments that he challenges, but the State provides this excerpt from the prosecutor's rebuttal which aligns with Waisner's arguments:

> "Think about all the times she had to come in and tell her story. The Safetalk in 2009. You were able to hear excerpts from [the] transcripts. She's testified . . . three other times and then the fourth time in front of you. And each time she testified, she has been consistent on the main events. She's been consistent that her dad [committed specific illegal sexual acts with her.]"

The jury knew that Waisner had been through several trials and that the parties had testified on multiple other occasions, in part because Waisner's counsel brought that out during cross-examination of T.G. Defense counsel asked T.G., "You've testified three times before today, correct?" Defense counsel then asked T.G. about reading transcripts of her prior testimony before each of the trials. And defense counsel referenced T.G.'s testimony from a preliminary hearing in 2009. So the prosecutor was not telling the jury anything new.

And defense counsel used T.G.'s prior testimony to try to show inconsistencies in her testimony here. Defense counsel had T.G. read specific portions of transcripts from those earlier proceedings and discuss differences in details: the dates Waisner sexually abused her, the number of times she alleged Waisner raped her, details about her conversations with Mother, and the children she identified as her childhood best friends. Yet any discrepancy in these details, as the prosecutor suggested, did not impeach T.G.'s

consistency in her testimony about the "main events"—the sexual acts that Waisner committed against her that formed the basis of the criminal charges against him.

True, the jury did not otherwise review transcripts or other evidence from T.G.'s prior trials and thus could not independently determine the consistency between her testimony in those cases and her testimony in this case. But the jury was able to listen to the testimony summarized above, to view the video of T.G.'s Safetalk interview, and to determine whether T.G.'s trial testimony was consistent with her statements then. And the jury also heard testimony from T.G.'s therapist, which also showed T.G.'s generally consistent account of the sexual abuse that Waisner committed. "A prosecutor does not err by accurately summarizing the testimony of a witness." *State v. Shields*, 315 Kan. 814, 837, 511 P.3d 931 (2022), *cert. denied* 143 S. Ct. 616 (2023). The prosecutor's comment accurately summarized the testimony, was made in response to defense counsel's characterization of T.G.'s testimony and does not show any intent or ill will from the prosecutor. We find no prosecutorial error.

The prosecutor did not improperly vouch for T.G.'s credibility.

Waisner's fourth claim of error is that the prosecutor improperly vouched for T.G.'s credibility. He focuses on the language bolded below:

> "Now let's talk about [T.G.'s] story. There's two reasons [why T.G.] may be saying the things she did. The first one, she's making it all up. Let's explore that. Why would [T.G.] make up these allegations?
>
> "Well, at the time she was in a custody battle. Okay. That doesn't give you reasonable doubt. She doesn't want to live with her mom. The only reason she wanted to live with her mom was because her dad was sexually abusing her. She didn't want to go to her mom's house, it was chaotic. For lack of a better word, she was spoiled at her dad's house. So that makes no sense.

"And plus now she's 25 years old. She's not in the middle of a custody battle now, so why is she still coming to court to tell you what happened? Not for a custody battle.

"Another reason why she's making these allegations up, from the defendant's own mouth, 'Well, she didn't like [Stepmother] and she didn't like that [Stepmother] was coming back into the house.' What? So she makes up sexual allegations against you because she didn't like that [Stepmother] was coming back in the house? If she was upset about [Stepmother] coming back in the house and not getting as much attention, wouldn't she make up sexual allegations about [Stepmother]? That makes no sense. Plus, read the letter that they admitted into evidence. Does that look like somebody that's mad or upset with [Stepmother]? 'I love you. Please don't leave.' That's what she's saying in that letter. That makes no sense.

"The next reason the defendant gives, out of his own mouth, is that [T.G.] enjoys being a victim. When she testified on the stand she was crying. You were able to observe her demeanor. She was uncomfortable. She was crying. Does that look like somebody that enjoyed being a victim? She testified that she doesn't want to remember this. She wanted to forget. If she was happy being the victim, wouldn't she come in and say, oh, yeah, let me tell you, 09/01, he did this, 09/02 he did that, 09/03 that happened.

"That's not somebody that enjoyed being the victim. You got to see her demeanor. Does that look like somebody who really enjoys being a victim?

"In her Safetalk, in the very beginning, Ann Goodall said, 'Why are you here?' 'I'm embarrassed to say this, but my dad touches me.' If you enjoy being a victim, what are you embarrassed about? This should be like prime stage for you. This is it. This is the epitome of being a victim. Why are you embarrassed? Because she doesn't enjoy being a victim.

"She tells Ann during the Safetalk, 'I really don't think I can talk about this anymore. Can I go see my mom now?' Why, if you enjoy being the victim? Again, you should be wanting to continue to talk about this, you should want to give every single detail, you should be really excited, this should be the best day of your life.

"She told you that now, as an adult, looking back, during this period of time after she disclosed, she self harmed, she said that she has anxiety and PTSD, and that she even has trouble being intimate in her adult relationships. If she enjoys being the victim, why would she self harm? For more attention? She's already got it. We've been in the court system. She's already got the attention.

"This is not someone that enjoys being a victim.

"**So if she's not making up the allegations then why is she saying these things? Because that's what really happened to her. [T.G.] came in here and told you what her father did to her in 2008 and 2009, and that's what really happened to her**.

"Think about all the times she had to come in and tell her story. The Safetalk in 2009. You were able to hear excerpts from transcripts. She's testified four other times—or three other times and then the fourth time in front of you. And each time she testified, she has been consistent on the main events. She's been consistent that her dad [committed specific illegal sexual acts with her.]

"[**T.G.] is saying these things to you because that is really what happened to her and you should find the defendant guilty of all the crimes charged."** (Emphases added).

Waisner claims that by these comments, the prosecutor essentially told the jury that T.G.'s allegations were true.

Prosecutors are not permitted to offer personal opinions about the credibility of witnesses that would constitute """unsworn, unchecked testimony.""" *State v. Pribble*, 304 Kan. 824, 835, 375 P.3d 966 (2016). But we find no such vouching here. The prosecutor's statement was based on admitted evidence and did not ask the jury to convict based on her personal assessment of T.G.'s credibility. Prosecutors are advocates and it is their duty "'to determine the weight and credit to be given the testimony of each witness.' [Citations omitted.]" *State v. Brown*, 316 Kan. 154, 170, 513 P.3d 1207 (2022). The prosecutor's acts did not fall outside the wide latitude afforded to conduct the State's case. We find the prosecutor's comments were appropriate and do not constitute an improper attempt to bolster T.G.'s credibility.

Still, in an abundance of caution, we reach the State's assertion that any error was harmless.

> "When determining if prosecutorial error causes prejudice, '[a]ppellate courts must simply consider any and all alleged indicators of prejudice, as argued by the parties, and then determine whether the State has met its burden—i.e., shown that there is no reasonable possibility that the error contributed to the verdict.' The strength of the evidence may inform this inquiry, but it is not our primary focus, for prejudice may be found even in strong cases. [Citations omitted.]" *Brown*, 316 Kan. at 169.

In arguing harmless error, the State first relies on the jury instructions. The district court's first instruction explained that "[s]tatements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are not evidence. If any statements are made that are not supported by evidence, they should be disregarded." The prosecutor specifically mentioned this instruction in her closing argument: "As the Court read in the instructions, the statements and arguments of counsel are not evidence. So if I say anything or if [defense counsel] says anything that does not comply with the evidence, you must disregard it."

The district court also properly instructed the jury on the State's burden of proof:

> "The State has the burden of proof to prove the defendant is guilty. The defendant is not required to prove he is not guilty. You must presume he is not guilty unless you are convinced from the evidence that he is guilty.
>
> "The test you must use in determining whether the defendant is guilty or not guilty is this: If you have a reasonable doubt as to the truth of any of the claims required to be proved by the State, you must find the defendant not guilty. If you have no reasonable doubt as to the truth of each of the claims required to be proved by the State, you should find the defendant guilty."

Our appellate courts often weigh jury instructions when considering whether any prosecutorial error is harmless. This court presumes the jurors follow the instructions. And our appellate courts generally recognize that the first instruction outlined above notifies jurors that "prosecutors are advocates" and that it is their duty as jurors "'to

determine the weight and credit to be given the testimony of each witness.' [Citations omitted.]" *Brown*, 316 Kan. at 170.

The State secondarily relies on the strength of the evidence to show harmlessness. The State provides the following summary as support:

> **"[T]here was strong evidence presented to find Waisner guilty beyond a reasonable doubt. T.G. testified that [her dad committed specific illegal sexual acts with her.]** T.G. eventually disclosed this abuse to Mother, Goodall during her Safetalk interview, and Petersen during her therapy sessions.
>
> "During the execution of the search warrant, Waisner told Detective Ludolph that he was 'an honest man and a good man" and that he "did not do what he was accused of.' Waisner made these statements before Detective Ludolph informed him of what the allegations against him were.
>
> "Black and blue trunks were found in the house as well as a tin of condoms in Waisner's nightstand. This corroborated T.G.'s testimony that Waisner bought her a black trunk to keep sex toys and magazines in, that he had a blue trunk with magazines and sex toys, and that when he had sexual intercourse with her he had grabbed a condom from a tin in his nightstand. Child pornography was found on Waisner's password protected profile on his computer as well as internet searches for 'young nudes' and 'girls.' Also, Waisner's computer had programs that could be used to wipe internet searches and hide child pornography. "

The State also correctly notes that the jury convicted Waisner of only one of four charges. Had the jury been swayed by any statement that T.G.'s allegations were true, their verdict should have been guilty as charged. The verdict instead shows that the jury did not credit only T.G.'s testimony and discount Waisner's contrary evidence. We find any error harmless.

The prosecutor did not misstate the law.

Waisner's fifth claim of prosecutorial error is that the prosecutor misstated the law by telling the jury that "[p]ropensity evidence . . . means that you have an inclination to act in a certain way or a certain preference." Waisner argues that the prosecutor "craft[ed] her own legal definition for 'propensity.'"

The prosecutor made this statement while explaining why it had introduced the child pornography found on Waisner's computers:

> "Now, the State's not trying to make him look like anything. During voir dire I told you that. I'm not here to prove whether he's a good or bad person. So why are we bringing up that he had a bunch of child porn on his computer? It's what we call, in the law, propensity evidence. What does that mean? Propensity evidence, it means that you have an inclination to act in a certain way or a certain preference. This is a snap shot or a look into the defendant's sexual preference; young girls. Child pornography and his 12 year old daughter, that's what he was wanting back in 2008 and 2009. That's why we brought in the porno, to give you a snap shot. What['s] his preference? What was the propensity? Young girls."

Waisner notes that the limiting instruction given about other crimes evidence did not include a definition for propensity. The instruction states:

> "Evidence has been admitted alleging the defendant committed an offense other than the present crimes charged. You may only consider it as evidence that could tend to demonstrate the defendant's propensity to commit crimes of sexual misconduct. You must give this evidence the weight, if any, you believe it should receive."

Waisner argues that the prosecutor's own definition of "propensity" improperly affected the jury's consideration of this instruction. Yet he does not show that the definition was inaccurate or how that inaccuracy swayed the jury.

Waisner correctly notes that "propensity" is not a statutorily defined term, yet our Supreme Court has likened the term to "inclination." See *State v. Hart*, 297 Kan. 494, Syl. ¶ 5, 301 P.3d 1279 (2013); see also *State v. Young*, No. 102,121, 2013 WL 6839328, at *16 (Kan. App. 2013) (unpublished opinion) (using "propensity" interchangeably with "disposition" and defining "disposition" as "'the tendency . . . to act in a certain manner under given circumstances,'" and "propensity" as "'an often intense natural inclination or preference.'").

Just as our appellate courts have done, the State used the terms inclination and preference when describing the meaning of propensity to the jury. Its explanation thus follows our caselaw definitions of that term, and it is consistent with Waisner's characterization of propensity on appeal. Contrary to Waisner's argument, nothing shows that the State's definition conflicts with the jury instructions. Instead, the prosecutor's comments simply explained to the jury how the images should be used during deliberations. We find no misstatement of the law. So this claim of prosecutorial error fails.

Conclusion

The district court did not err in admitting the images of child pornography found on Waisner's computers as evidence of other crimes under K.S.A. 2022 Supp. 60-455(d). And Waisner's claims of prosecutorial error do not warrant reversal.

Affirmed.