

NOT DESIGNATED FOR PUBLICATION

No. 125,777

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,  
*Appellee,*

v.

VICTOR J. CARDONA-RIVERA,  
*Appellant.*

MEMORANDUM OPINION

Appeal from Lyon District Court; W. LEE FOWLER, judge. Oral argument held on November 14, 2023. Opinion filed December 1, 2023. Affirmed.

*Patrick H. Dunn*, of Kansas Appellate Defender Office, for appellant.

*Carissa Brinker*, assistant county attorney, *Marc Goodman*, county attorney, and *Kris W. Kobach*, attorney general, for appellee.

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

PER CURIAM: Victor Joel Cardona-Rivera appeals his convictions of two counts of rape and one count each of aggravated burglary, aggravated criminal sodomy, criminal threat, and aggravated battery, following two trials. Cardona-Rivera claims: (1) his rape convictions are multiplicitous, and (2) the district court erred when it admitted evidence, without giving a limiting instruction, that Cardona-Rivera held a knife to the daughter of his victim after he was found not guilty of this crime at his first trial. For the reasons stated below, we find no reversible error and affirm the district court's judgment.

## FACTS

We will review the relevant facts in explicit detail as is necessary to address the issues raised in this appeal. In the early morning of September 4, 2021, Y.M. and her infant daughter, Y.A., were at home sleeping when a man in a ski mask barged into her bedroom. The man, who was kneeling on Y.M.'s leg, pushed her down as she tried to sit up and told her to be quiet or he would kill her and her daughter. The man then turned Y.M.'s head towards her daughter's crib and began to choke her with his left hand as he rubbed the dull side of a knife against her neck with his right hand. As he choked her, Y.M. could feel that the man was wearing a big chain around his neck.

When he eventually released his chokehold, the man moved Y.M. to the edge of the bed, positioned her on her knees, and told her to take off her underwear. She refused, but he pulled them down anyway and began to rub his flaccid penis on her anus and vagina. The man told Y.M. that he could not concentrate because she was crying, and because he did not have an erection, he began to aggressively put his fingers inside her vagina. Around that time, Y.A. woke up and began crying. Y.M. moved to comfort her but the man quickly pulled her back onto her knees. Y.M. pleaded with the man to stop but he would not. While she and her daughter were both crying, Y.M. saw the man push his knife against the infant's back as a threat.

The man then ordered Y.M. to engage in fellatio with him, i.e., he tried to force his penis into her mouth. Although she refused at first, he grabbed her by the hair and threw her on the ground. At that point she noticed that he was wearing flip-flops. He proceeded to pull her back up on the bed, put his knife to her neck, and forced her to engage in the oral sex. Y.M. complied because she feared for her own life as well as her daughter's. Eventually, the man ejaculated on the side of the bed.

After ejaculating, the man turned Y.M. back around onto her hands and knees, and he painfully reinserted his fingers into her vagina. Y.M. told him that he was hurting her and asked him to stop, but the man replied, "Oh, are you very brave? Do you think I'm playing again?" and cut her left hand with his knife and began choking her again. The man threatened her, telling her that if she contacted the police he would kill her, Y.A., and her family in El Salvador. He then instructed Y.M. to lie on her stomach and to hold her daughter for the last time. She tried to catch a glimpse of his face, but he pushed her away. The man then got up, briefly rummaged around her bedroom, and left.

Once she was sure the man had gone, Y.M. called her boyfriend, her aunt, and her uncle to tell them that a man had broken into her home, raped her, and threatened to kill her. Based on the man's distinctive chain, his flip-flops and socks, and most importantly his voice and accent, Y.M. believed her attacker was Cardona-Rivera, who worked at the same company as her. Y.M.'s aunt told her to stay put and called the police, who soon showed up at her house to investigate. Y.M. spoke with one of the officers in his patrol car but was unable to fully explain what had happened because English is her second language. An officer who spoke Spanish was later able to speak to Y.M. and record more details of her account. After the interview, Y.M. went to the hospital to have a sexual assault nurse examination (SANE) performed.

Several days later, Y.M. returned to the police station for another interview with another officer and an interpreter. She gave another, similarly detailed account of the ordeal—the police recorded this interview. That same day, Cardona-Rivera was at work, when his supervisor confronted him with Y.M.'s allegation that he had raped her over the weekend. Cardona-Rivera left work to go to the police station, but he was pulled over and arrested on his way. Cardona-Rivera was taken to the station and interviewed, which was also recorded. During the interview, Cardona-Rivera at first claimed he had never been to Y.M.'s home and denied that any of his DNA would be found inside her bedroom. Later,

he stated that Y.M. had invited him over and claimed that they had consensual sexual relations. He denied that he had forced her to do anything or that he had a knife with him.

The State at first charged Cardona-Rivera with aggravated burglary, rape, aggravated criminal sodomy, aggravated assault, criminal threat, two counts of aggravated battery (one against Y.M. and the other against Y.A.), and aggravated intimidation of a witness or victim. Three months later, at the preliminary hearing, the State moved to amend the complaint to add a second count of rape. The district court granted the State's motion and bound Cardona-Rivera over on all counts.

The district court held a jury trial, and the State presented the testimony of Y.M., her boyfriend, her aunt and uncle, the law enforcement officers who had investigated the incident and interviewed Y.M. and Cardona-Rivera, the SANE nurse who examined Y.M., and two DNA analysts from the Kansas Bureau of Investigation. Cardona-Rivera's DNA was found on the labia minora swab taken during the SANE exam. Cardona-Rivera testified in his own defense. In his testimony, Cardona-Rivera asserted that he had driven to Y.M.'s house with his son, who waited and watched cartoons while he and Y.M. engaged in consensual sexual relations. He claimed that he returned home with his son after he and Y.M. engaged in mutual masturbation and he ejaculated. Cardona-Rivera addressed his prior statements to police, asserting that he hesitated to tell police his story because he did not want to harm his wife or their marriage. The jury found Cardona-Rivera not guilty on the count of aggravated battery against Y.A. but failed to reach a unanimous verdict on the other charges. The district court declared a mistrial on the remaining eight counts and set the matter for a pretrial conference.

Before the second trial, the State filed two motions. The first sought to admit Cardona-Rivera's testimony at the first trial and the second sought to introduce certain evidence about Cardona-Rivera poking Y.A. with a knife, which had been the basis for the aggravated battery charge for which the jury had acquitted Cardona-Rivera. The

district court ruled that Cardona-Rivera's prior trial testimony was admissible as "a prior, sworn statement of the defendant" and noted that it would permit the State to present his prior testimony by reading a transcript into the record. On the second motion concerning the admission of Y.M.'s testimony that Cardona-Rivera allegedly held a knife to her infant daughter, Y.A., Cardona-Rivera's counsel argued the acquittal foreclosed its admission because the prior jury had determined that he did not commit an aggravated battery by these acts. Cardona-Rivera's counsel also argued that if such evidence were permitted, a limiting instruction should be given, informing the jury that Cardona-Rivera had been acquitted of the charge relating to those actions. The district court ultimately granted the State's motion to admit this evidence at the second trial.

Three months after the first trial, the district court held a second jury trial on the remaining charges. At the end of the second trial, the jury found Cardona-Rivera guilty of aggravated burglary, two counts of rape, aggravated criminal sodomy, criminal threat, and aggravated battery, and the jury acquitted him of aggravated assault and aggravated intimidation of a witness or victim. The district court sentenced him to a controlling term of 310 months' imprisonment, ordering the two rape convictions to be served consecutively. Cardona-Rivera timely appealed his convictions.

#### ARE THE RAPE CONVICTIONS MULTIPLICITOUS?

Cardona-Rivera claims his two rape convictions are multiplicitous because the State merely split a single, unbroken course of conduct into two charges. He asserts that the conduct supporting the rape convictions occurred at or near the same time, in the same location, and without any intervening events or fresh motivating impulse. The State counters that Cardona-Rivera's rape convictions are not multiplicitous because there was an intervening event that broke any connection between the conduct supporting the two convictions—his commission of a different sexual offense, aggravated criminal sodomy.

While Cardona-Rivera did not raise this multiplicity issue to the district court, exceptions to the rule which preclude appellate rule have often been applied to consider multiplicity issues for the first time on appeal to serve the ends of justice and to prevent the denial of a fundamental right. See, e.g., *State v. Nguyen*, 285 Kan. 418, 433, 172 P.3d 1165 (2007). We will address Cardona-Rivera's claim for these reasons.

Multiplicity is the charging of a single offense in multiple counts of an information. *State v. Pribble*, 304 Kan. 824, 826, 375 P.3d 966 (2016). The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution and the Kansas Constitution Bill of Rights prohibit the State from securing multiple convictions on multiplicitous charges. *State v. Sprung*, 294 Kan. 300, 306, 277 P.3d 1100 (2012). The Double Jeopardy Clause "protects against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) *multiple punishments for the same offense*." (Emphasis added.) *State v. Schoonover*, 281 Kan. 453, 463, 133 P.3d 48 (2006). Appellate courts exercise unlimited review when determining whether convictions are multiplicitous. *State v. Davis*, 306 Kan. 400, 419, 394 P.3d 817 (2017).

The foundational question to be addressed when examining an alleged multiplicity issue is whether the two challenged charges arise from "discrete and separate acts or courses of conduct" or unitary conduct arising from "the same act or transaction" or a "single course of conduct." *Schoonover*, 281 Kan. at 464. Double jeopardy concerns only arise if the charged conduct at issue is unitary—that is, no double jeopardy problem occurs where a defendant is charged, tried, and convicted for separate and discrete acts or courses of conduct. 281 Kan. at 464. When determining whether conduct is unitary, Kansas courts look towards four factors: (1) Did the acts occur at or near the same time? (2) Did the acts occur at the same location? (3) Is there a causal relationship between the acts or was there an intervening event? and (4) Did a fresh impulse motivate some of the conduct? *State v. Weber*, 297 Kan. 805, 809, 304 P.3d 1262 (2013). Only if this court

determines that Cardona-Rivera's actions constituted unitary conduct will it proceed to consider whether, by statutory definition, his conduct constituted one offense or two. See *Sprung*, 294 Kan. at 306-08.

To review the pertinent facts, when Cardona-Rivera broke into Y.M.'s bedroom, he moved her to the edge of the bed, positioned her on her knees, and told her to take off her underwear. She refused, but he pulled them down anyway and began to rub his flaccid penis on her anus and vagina. Frustrated that he did not have an erection, Cardona-Rivera began to aggressively put his fingers inside Y.M.'s vagina. These acts resulted in the first count of rape. Y.A. woke up crying and, when Y.M. tried to comfort her, Cardona-Rivera allegedly placed a knife against the infant's back as a threat. He then ordered Y.M. to engage in fellatio with him. Y.M. complied because she feared for her own life as well as her daughter's. Eventually, Cardona-Rivera ejaculated on the side of the bed. After ejaculating, Cardona-Rivera turned Y.M. back around onto her hands and knees, and he reinserted his fingers into her vagina. Y.M. told him that he was hurting her and asked him to stop, but he replied, "Oh, are you very brave? Do you think I'm playing again?" and cut her left hand with his knife and began choking her again. The second act of digital penetration resulted in the second charge of rape against Cardona-Rivera.

Turning to the four factors used for determining whether conduct is unitary, the first two factors favor a finding here of unitary conduct. The parties agree that the acts occurred at or near the same time—within an approximately 20-minute time frame on the morning of September 4, 2021—and in the same location—Y.M.'s bedroom. As a result, the parties focus on the final two factors.

Cardona-Rivera asserts that the totality of his actions—digitally penetrating Y.M. before and after he forced her to engage in fellatio—was a single course of conduct, with no intervening event or fresh impulse, that the State improperly split into three counts. The State counters that the acts supporting Cardona-Rivera's two rape convictions were

separated by an intervening event—his commission of a different sex crime, aggravated criminal sodomy—and that the second act of rape was motivated by a fresh impulse. Kansas courts have often considered the question of multiplicity in sexual assault cases. And while both parties cite many cases to support their respective positions, analysis of the issue remains highly dependent on the particular facts of the case.

Cardona-Rivera points to the Kansas Supreme Court's 45-year-old decision in *State v. Dorsey*, 224 Kan. 152, 156, 578 P.2d 261 (1978), where the court found multiple counts of rape and sodomy committed over the course of one hour to be unitary conduct. *Dorsey*, a six-page opinion, contains very little analysis and does not address the four-factor test used to determine unitary conduct that the court has used post-*Schoonover*. In finding insufficient evidence to support two rape convictions, the court simply noted that "[t]he only difference in the three allegations of rape and the facts necessary to prove the acts, was a lapse of a few minutes between each alleged offense." 224 Kan. at 156. As Justice McFarland succinctly stated in her dissent: "The majority opinion, in effect, says that if a man rapes a woman once, he can repeat the crime as many times as he likes with no additional criminal liability therefor. This result is against public policy and is a further insult to the victims of such crimes." 224 Kan. at 157.

Cardona-Rivera also relies on *State v. Aguilera*, No. 103,575, 2011 WL 2555423, at \*7 (Kan. App. 2011) (unpublished opinion), a case in which this court found that the defendant's actions of vaginal and then digital penetration of his victim constituted unitary conduct, not multiple acts. The *Aguilera* panel found that the defendant's action of orally penetrating his victim, in between his acts of digital and penile penetration "so he could 'finish,'" was not an intervening event because the acts occurred immediately one after the other. 2011 WL 2555423, at \*7. Of importance, the *Aguilera* panel noted that all the defendant's actions were to advance "his stated goal of having sexual intercourse with [the victim] and were taken within only a few minutes in order to accomplish his intended purpose." 2011 WL 2555423, at \*7.



For its part, the State cites cases in which acts were committed close in time and location but were found to be distinct enough to support multiple convictions due to intervening acts. See *State v. Sellers*, 292 Kan. 346, 359-60, 253 P.3d 20 (2011) (finding an intervening event that broke the chain of causality where the defendant left the room for one minute to check on barking dog between acts of touching his victim), *overruled on other grounds by State v. Dunn*, 304 Kan. 773, 375 P.3d 332 (2016); *State v. Richmond*, 250 Kan. 375, 378-79, 827 P.2d 743 (1992) (finding a clear and substantial break in events, despite acts being close in time and in a single location, where victim was raped and then tied up before the defendant raped her again); *State v. Butler*, No. 123,742, 2022 WL 3692866, \*14 (Kan. App. 2022) (unpublished opinion) (finding three counts of rape not multiplicitous because each of the counts was factually separated by the defendant's commission of an intervening act of criminal sodomy), *rev'd on other grounds* 317 Kan. 605, 533 P.3d 1022 (2023).

The facts here largely mirror those addressed in *Butler*, 2022 WL 3692866, at \*13-15, and lead us to reach a similar result. Cardona-Rivera's crimes were not multiplicitous as the two acts of digital penetration were separated by his commission of another sex crime. Here, the evidence established that after breaking into Y.M.'s house, Cardona-Rivera forced Y.M. onto to her knees and digitally penetrated her because he could not achieve an erection. He then forced her to engage in fellatio with him—a separate and distinct sex act that was completed when he ejaculated on the side of the bed. Cardona-Rivera then returned Y.M. to her knees and again digitally penetrated her, an act that he continued even when Y.M. expressed pain. As the *Butler* panel reasoned, "[c]onduct is not unitary when sex acts are 'separated from each other by other sexual acts.'" 2022 WL 3692866, at \*14 (quoting *State v. Howard*, 243 Kan. 699, 703, 763 P.2d 607 [1988]).

We also find that Cardona-Rivera's second rape was motivated by a fresh impulse. The first rape was motivated by sexual gratification. Cardona-Rivera could not achieve an erection so he digitally penetrated Y.M.'s vagina. This act was followed by the oral

sodomy which resulted in the sexual gratification Cardona-Rivera was seeking when he ejaculated on the side of the bed. After ejaculating, Cardona-Rivera raped Y.M. a second time by digital penetration of her vagina. The second rape appeared to be motivated by empowerment and an intent to cause bodily harm rather than being motivated by sexual gratification. When Y.M. expressed pain, Cardona-Rivera replied by taunting her and then choking her and cutting her hand with his knife.

Although all of Cardona-Rivera's conduct occurred in the same room and over a brief time, his acts of digitally penetrating Y.M. were separated by his commission of aggravated criminal sodomy—and his digital penetration does not merge with his act of forcing Y.M. to have oral sex with him. In other words, the rape charges (counts 2 and 9) were broken up by the intervening event of the aggravated criminal sodomy (count 3). Moreover, his motivation for committing the second rape was distinct from the first. Considering the four-part test used by Kansas courts today in determining whether conduct is unitary, we conclude that Cardona-Rivera's separate convictions for rape were based on distinct multiple acts supporting separate convictions for each act. Thus, we reject Cardona-Rivera's claim that his rape convictions are multiplicitous.

DID THE DISTRICT COURT ABUSE ITS DISCRETION BY  
ADMITTING EVIDENCE THAT CARDONA-RIVERA HELD A KNIFE TO Y.A.?

Next, Cardona-Rivera claims the district court committed reversible error by admitting Y.M.'s testimony in the second trial that Cardona-Rivera used a knife against Y.A.—the underlying conduct for the aggravated assault charge that he was acquitted of in his first trial. He makes several arguments under this umbrella, including: (1) that the district court's admission of the evidence as *res gestae* evidence was erroneous because it was not relevant and more prejudicial than probative; (2) that the evidence should have been barred under the doctrines of collateral estoppel and double jeopardy; (3) that the district court should have issued a limiting instruction with the evidence; and (4) that the

district court's errors were not harmless. The State contends the district court did not abuse its discretion in admitting the evidence because it was relevant to prove that Y.M. was overcome by threat or fear during Cardona-Rivera's attack—an essential element of several of the charged offenses in the second trial. The State also argues that no limiting instruction was required, that the evidence was not barred by collateral estoppel or double jeopardy, and that any potential error was harmless.

To review the pertinent facts, before the second trial, the State moved to admit certain evidence about Cardona-Rivera poking Y.A. with a knife, which had been the basis for the aggravated battery charge for which the jury had acquitted Cardona-Rivera in the first trial. The State argued that (1) the evidence was intrinsic to several of the crimes Cardona-Rivera was still facing in the second trial and (2) the evidence was admissible under K.S.A. 2022 Supp. 60-455 as evidence of other crimes, bad acts, or civil wrongs. Cardona-Rivera argued that the acquittal foreclosed the admission of the evidence because the prior jury had determined that he did not commit an aggravated battery by those acts. He also argued that if the evidence was admitted, an instruction should be given informing the jury of the limited purpose for admitting the evidence and telling the jury that Cardona-Rivera had been acquitted of the charge relating to those actions.

After listening to the parties' arguments, the district court ruled that it would permit the State to introduce the evidence "relating to what the victim in this case saw and observed, because there are elements of crimes that they occurred by force or fear." The district judge also stated that "as I view the evidence from the State's viewpoint, threats were made against the child to get the mother to comply with certain acts that the defendant wanted to do. I think it's relevant."

During the trial, Cardona-Rivera's counsel again objected prior to Y.M. testifying about his threatening Y.A. with the knife, and the district court overruled his objection.

Y.M. proceeded to describe the sequence of events, explaining that while Cardona-Rivera was initially raping her, he told her to keep her daughter quiet, or else. But Y.A. began to cry and Y.M. tried to comfort her. Then, just before he forced Y.M. to engage in oral sex with him, he took his knife and pushed it into Y.A.'s back, presumably to ensure Y.M.'s compliance with his demands.

*Res gestae, relevance, and prejudice*

Appellate courts employ a multistep analysis to issues about the admission of evidence, and separate standards of review apply depending on the legal challenge being raised. *State v. Levy*, 313 Kan. 232, 237, 485 P.3d 605 (2021). Initially, a court must determine whether the evidence is relevant—that is, whether it has "any tendency in reason to prove any material fact." K.S.A. 60-401(b). All relevant evidence is admissible unless otherwise prohibited by statute, constitutional provision, or caselaw. 313 Kan. at 237. Determining relevance requires two inquiries: First, the court looks to whether the evidence is material, i.e., if it has some real bearing on the decision in the case—a question of law reviewed de novo. *State v. Alfaro-Valleda*, 314 Kan. 526, 533, 502 P.3d 66 (2022). Second, the court looks to whether the evidence is probative, i.e., if it tends to prove a material fact—a conclusion reviewed for an abuse of discretion. 314 Kan. at 533. "A district court abuses its discretion if its decision is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact." *State v. Brune*, 307 Kan. 370, 372, 409 P.3d 862 (2018). Even when evidence is relevant, a court has discretion to exclude it if its probative value is outweighed by its potential to produce undue prejudice. See K.S.A. 2022 Supp. 60-445. When, as here, an appellant challenges the district court's weighing of evidence's probative value against its potential for prejudice, this court reviews the ruling for an abuse of discretion. *Alfaro-Valleda*, 314 Kan. at 535.

Cardona-Rivera first argues that the district court improperly permitted the State to present Y.M.'s testimony as *res gestae* evidence without properly determining whether the evidence was relevant, or assessing whether its probative value was outweighed by the danger of prejudice. "Res gestae evidence is that evidence which does not constitute a portion of crimes charged but has a natural, necessary, or logical connection to the crime." *State v. Gunby*, 282 Kan. 39, 61, 144 P.3d 647 (2006), *holding limited by State v. Campbell*, 308 Kan. 763, 423 P.3d 539 (2018). Previously, Kansas courts allowed *res gestae* to independently justify the admission of hearsay and evidence of other crimes. See, e.g., *State v. Gadelkarim*, 256 Kan. 671, 887 P.2d 88 (1994). But in *Gunby*, the Kansas Supreme court eliminated *res gestae* as an *independent basis* for the admission of evidence. 282 Kan. at 63. That said, the decision in *Gunby* "did not eliminate the admission of evidence of events surrounding a commission of the crime under the applicable rules of evidence." *State v. Peppers*, 294 Kan. 377, 389, 276 P.3d 148 (2012). In other words, while the district court could not allow the testimony about Cardona-Rivera poking Y.A. with a knife only because it was *res gestae* evidence, it could do so under the applicable rules of evidence.

Whether or not the district court categorized the challenged evidence as *res gestae*, this court's primary inquiry when addressing the admissibility of evidence is whether it is relevant—that is, both material and probative. As Cardona-Rivera concedes, neither the district court nor the State used the phrase *res gestae* when discussing the disputed evidence. But contrary to Cardona-Rivera's contentions, the district court did examine whether the evidence was relevant, and ultimately found that it was. The evidence was material because it directly affected elements of several of the charged offenses. The charges of aggravated criminal sodomy, criminal threat, aggravated intimidation of a witness, and rape all required variations of showing that Cardona-Rivera had used force or fear to get Y.M. to comply with his demands.

The evidence was probative because it tended to prove that Cardona-Rivera used a threat of violence against Y.A. during his attack—a material fact in the trial. The alleged act of poking Y.A. with the knife occurred alongside the various offenses Cardona-Rivera was charged with and illustrated those crimes. It cannot be said that the district court's conclusion that Y.M.'s testimony about Cardona-Rivera's use of the knife was based on an error of fact or law, or that it was otherwise unreasonable. Cardona-Rivera's assertion that the district court found the evidence was admissible simply because it was part of the *res gestae* of the other offenses is not supported by the record. Because the evidence Cardona-Rivera challenges on appeal has a reasonable tendency to prove a material fact, it was relevant and therefore admissible.

Even if the evidence were relevant, Cardona-Rivera contends the district court abused its discretion by failing to find its probative value was outweighed by its potential to prejudice the jury against him. Although Y.M.'s statements that Cardona-Rivera put a knife to her daughter's back are inflammatory, so was the entirety of Y.M.'s testimony about his actions during the attack. In light of the extensive evidence of Cardona-Rivera threatening Y.M. with the knife and violently sexually assaulting her, the potential prejudicial effect of the challenged evidence was not overwhelming. And as the district court noted, the evidence was probative of several of the State's charges dealing with Cardona-Rivera using threats to overcome Y.M. with force or fear. While the evidence was prejudicial, it was not unduly so. Cardona-Rivera cannot meet his burden to show that the district court abused its discretion in weighing of probative value and prejudice.

Cardona-Rivera next argues that the evidence was not admissible under K.S.A. 2022 Supp. 60-455 because his act of using the knife on Y.A. occurred at the same general time as the other charged crimes. But the district court did not admit the evidence under that statute. And although the State at first argued that the evidence was admissible as evidence of other crimes or civil wrongs, it now concedes that the evidence of Cardona-Rivera poking Y.A. with a knife was not admissible under K.S.A. 2022 Supp.

60-455 because it occurred throughout the conduct that was the basis for the charges in the second trial. See *State v. King*, 297 Kan. 955, 964, 305 P.3d 641 (2013) ("K.S.A. 60-455 does not apply if the evidence relates to crimes or civil wrongs committed as part of the events surrounding the crimes for which [a defendant is] on trial—that is, the *res gestae* of the crime."). Because the district court did not admit the evidence under K.S.A. 2022 Supp. 60-455, no such error occurred.

*Failure to give a limiting instruction*

Cardona-Rivera asserts that the district court erred by failing to give a limiting instruction informing the jury of the limited purpose for admitting the evidence and advising the jury that he had been acquitted of aggravated battery against Y.A. But the authority he relies on for the district court's duty to give such a limiting instruction concerns situations in which a court admits evidence of crimes or civil wrongs under K.S.A. 2022 Supp. 60-455, which, as discussed above, is not applicable here. Because K.S.A. 2022 Supp. 60-455 was not implicated by the State's admission of Y.M.'s statement that Cardona-Rivera held a knife to her daughter, the district court did not err by not giving a limiting instruction. See *State v. Sieg*, 315 Kan. 526, 533-34, 509 P.3d 535 (2022) (holding that K.S.A. 2020 Supp. 60-455 does not prohibit the admission of evidence of other crimes and civil wrongs if the evidence relates to acts committed as part of the events surrounding the crimes or civil wrongs at issue in the trial, and in this situation, a limiting instruction is unwarranted).

Cardona-Rivera urges this court to create a new rule, extending the holding of *Gunby* to a mandate that any time the State introduces evidence of a crime for which the defendant has been acquitted "the district court must issue a limiting instruction advising the jury of the reasons they may consider the evidence and advise them that the defendant has been found not guilty of that offense." But he provides no authority to support his argument, and we decline his invitation to create such a bright-line rule. Here, it was

readily apparent that the State introduced the evidence of Cardona-Rivera holding a knife to Y.A.'s back to show that he was threatening Y.M. to submit to his demands. We have already discussed that the probative value of this evidence outweighed any prejudicial effect. And to instruct the jury that Cardona-Rivera had been found not guilty of aggravated battery for this act would only cause the jury to speculate about what evidence may have been presented in the first trial and why the court was holding a second trial. We conclude the district court did not err by failing to give a limiting instruction.

### *Collateral estoppel and double jeopardy*

Cardona-Rivera next contends that the district court violated the constitutional prohibition on double jeopardy or collateral estoppel by admitting Y.M.'s testimony about his use of the knife against Y.A. because that evidence was the underlying evidence for the aggravated battery charge that he was acquitted of in his first trial. Whether double jeopardy has been violated is a question of law subject to unlimited review. *Schoonover*, 281 Kan. 453, Syl. ¶ 1. This court also exercises unlimited review over the application of collateral estoppel. *Rhoten v. Dickson*, 290 Kan. 92, 113, 223 P.3d 786 (2010).

The Fifth Amendment to the United States Constitution, which prohibits double jeopardy, incorporates the doctrine of collateral estoppel. *Ashe v. Swenson*, 397 U.S. 436, 442-46, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). Collateral estoppel means that "[w]hen an issue of ultimate fact has once been determined by a valid and final verdict or judgment that issue cannot again be litigated between the same parties in any future lawsuit." *State v. Irons*, 230 Kan. 138, 143, 630 P.2d 1116 (1981) (citing *Ashe*, 397 U.S. at 443). The *Irons* court addressed whether an acquittal precludes the State from introducing evidence of the charged conduct in a subsequent proceeding:

"The rule of collateral estoppel in criminal cases is not to be applied with a hypertechnical approach, but with realism and rationality. Where a previous judgment of



acquittal is based upon a general verdict this approach requires a court to examine the record of the prior proceeding, taking into account the pleadings, evidence, charge and other relevant matter, and if the court concludes a rational jury would have had to base its verdict of acquittal on the same issue which the State seeks to prove by introducing evidence of a prior offense then collateral estoppel applies. [Citations omitted.]" 230 Kan. at 143-44.

Here, the jury in the first trial acquitted Cardona-Rivera of the aggravated battery charge against Y.A.—that charge required to the State to prove that he "knowingly caused physical contact with [Y.A.] in a rude insulting or angry manner with a deadly weapon . . . or in any manner whereby great bodily harm, disfigurement or death [could have been] inflicted." In the second trial, the State sought to introduce Y.M.'s testimony not to prove that Cardona-Rivera had knowingly caused physical contact with a deadly weapon, but to prove (1) that Y.M. was overcome by force or fear for the charge of rape and (2) that Cardona-Rivera made a threat in order to place Y.M. in fear for the charges of criminal threat and aggravated intimidation of a witness that remained pending in the second trial. These findings are not inconsistent with the jury's prior acquittal on the aggravated battery of Y.A. That is, the jury's finding of guilt in the second trial did not require a finding that Cardona-Rivera knowingly contacted Y.A. with a deadly weapon, but that he used the knife to threaten, intimidate, and frighten Y.M.

In *Irons*, the Kansas Supreme Court explained that collateral estoppel in the criminal context should be applied realistically and rationally. 230 Kan. 143. So long as "a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration," an acquittal will not preclude the State from introducing evidence of the previously charged conduct. 230 Kan. at 141. Because the State presented the evidence to address a different issue in the second case, the evidence was admissible. And it cannot be said that the finding of guilt in the second trial contradicts Cardona-Rivera's prior acquittal. As such, we conclude that neither double jeopardy nor collateral estoppel barred the admission of Y.M.'s testimony.

*Harmless error*

Even if we found that the district court erred by admitting the evidence about Cardona-Rivera holding a knife to Y.A.'s back, we agree with the State that the error would have been harmless. Because the error implicates Cardona-Rivera's constitutional double jeopardy rights, we apply the federal constitutional harmless error standard. See *State v. Ward*, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 (2011). Under that standard, an error may be declared harmless where the party benefitting from the error proves beyond a reasonable doubt that the error did not affect the outcome of the trial in light of the entire record, i.e., where there is no reasonable possibility that the error contributed to the verdict. 292 Kan. 541, Syl. ¶ 6.

Cardona-Rivera's DNA was found on a swab taken during Y.M.'s SANE exam, and he gave inconsistent stories to the police about how that could have happened. Y.M. provided consistent statements to her family and to the police about what happened. The evidence Cardona-Rivera challenges about holding a knife to Y.A.'s back was only mentioned during Y.M.'s testimony and during the video of her interview with the police. And the State did not mention this evidence in either its opening or closing arguments. It is unreasonable to conclude that the jury found Cardona-Rivera guilty of his sex crimes against Y.M. simply because it heard her testimony that he held a knife to Y.A.'s back. Even if the district court erred by admitting this evidence, we find there is no reasonable possibility that the error contributed to the verdict in light of the entire record.

Affirmed.