OFFICIALLY SELECTED
CASES ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF THE

STATE OF KANSAS

Reporter:
SARA R. STRATTON

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JUDGES AND OFFICERS OF THE KANSAS
COURT OF APPEALS

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(547 P.3d 588)

No. 126,391

JORDAN M. DAVIS, *Appellant*, v. KANSAS DEPARTMENT OF REVENUE, *Appellee*.

SYLLABUS BY THE COURT

MOTOR VEHICLES—*Reasonable Grounds Required of Law Enforcement to Request Breath Test—Proof Shown by Using DC-27 Form or Through Competent Testimony.* Law enforcement officers must have reasonable grounds to request a breath test. In later administrative driving license proceedings considering the reasonableness of making this request, or in subsequent judicial review of such requests, the State can prove reasonable grounds by using a completed DC-27 form, or through competent testimony, or both. Technical errors like checking or not checking a particular box on the form do not bar the form's use as evidence.

Appeal from Douglas District Court; MARK A. SIMPSON, judge. Submitted without oral argument. Opinion filed April 5, 2024. Affirmed.

Adam M. Hall, of Thompson-Hall P.A., of Lawrence, for appellant.

Donald J. Cooper, of Legal Services Bureau, Kansas Department of Revenue, for appellee.

Before GREEN, P.J., HILL and CLINE, JJ.

HILL, J.: This is an appeal by Jordan M. Davis from a district court judgment approving the suspension of his driving license by the Kansas Department of Revenue. First, Davis argues that substantial competent evidence does not support the district court's finding that law enforcement officers had lawful grounds to approach his truck that was pulled over on the shoulder of the highway. Second, Davis argues that substantial competent evidence does not support the district court's finding that the certifying officer had reasonable grounds to believe Davis operated his truck while under the influence of alcohol. Our review of the record leaves us unconvinced by Davis' arguments and we affirm the suspension of his driving license.

Late at night, an officer investigates a truck with flashing lights parked at the edge of the road.

In the early morning hours of mid-June 2021, Sergeant Joey Frost of the Douglas County Sheriff's Office saw a pickup truck with its hazard lights flashing on the shoulder of Kansas Highway 10. Frost turned both his front and back emergency lights on, pulled in behind the truck, and notified his dispatcher that he was starting a motorist assist stop. Frost approached the truck and saw that the driver appeared to be asleep or otherwise unconscious and disheveled—reclined in the driver's seat with his belt undone, pants unzipped, and wearing only one boot. Frost observed the driver breathing but could not determine whether he required assistance.

Frost then made several unsuccessful attempts to rouse the driver by knocking on the window and shining his flashlight through the windows of the truck. While doing so, Frost noticed a wallet on the ground, which he later discovered belonged to Jordan Davis, the driver. Frost returned to his car and checked the validity of the license plate and driving license found in the wallet—both returned as valid. After making one more attempt to wake Davis, Frost called for assistance and waited for deputies to arrive. Deputies Richard Whitis and Chris Chavez arrived about seven minutes later.

Frost and the deputies approached the truck together, with Deputy Chavez at the driver's side window. Chavez knocked on the window, but that still did not wake Davis. Davis finally responded after the officers knocked several times on the window. The deputies identified themselves and requested Davis roll down his window. After fumbling with the buttons and accidentally rolling down the back windows repeatedly, Davis got his window down. With the window down, Chavez immediately smelled alcohol on Davis' breath and noticed Davis slurred his speech and had watery, bloodshot eyes.

Davis admitted to the deputies that he drank alcohol at a bar about an hour and a half before driving to the present location on K-10. Davis mistakenly told deputies that he thought it was 10 p.m., when it was closer to 1 a.m. Deputies had Davis perform standard field sobriety tests. They noted two clues of impairment on the walk-and-turn test

and no clues of impairment on the one-leg stand test. Davis agreed to take a preliminary breath test which resulted in a blood alcohol content of 0.143. Chavez arrested Davis for driving under the influence.

Chavez completed the Officer's Certification and Notice of Suspension DC-27 form, marking the vehicle was already stopped and checking the box next to "saw person operate" a vehicle on the form.

His license is administratively suspended, and that order is judicially reviewed.

The Department of Revenue held a hearing to determine whether the decision to suspend and restrict Davis' driving privileges should be affirmed. In the administrative order, the hearing officer noted that the totality of circumstances justified extension of stop and request for breath test. In the hearing notes, the hearing officer noted the preliminary breath test failure, Davis' slurred speech, and failure of the sobriety tests.

Davis sought judicial review of the agency's decision. The district court took testimony from Sergeant Frost and Deputy Chavez and in a "Journal Entry and Memorandum Decision Affirming the Agency Action" set out its findings of fact and conclusions of law.

The district court began its analysis by noting the governing statutory framework for review of the restriction and suspension of driving privileges. Under K.S.A. 8-1020(p), a district court reviews the agency action in a trial de novo. During such a trial, "the licensee shall have the burden to show that the decision of the agency should be set aside." K.S.A. 8-1020(q). But on the other hand, if the court finds the licensee does not carry that burden, and "the court finds that the grounds for action by the agency have been met, the court shall affirm." K.S.A. 8-1020(p).

The district court then found that the officers had objective, specific, and articulable facts that required them to contact Davis to determine whether he needed assistance. The court also found that the officers acted reasonably when they proceeded to try to rouse Davis and that when he did wake up, the immediate smell of alcohol on his breath transformed the stop into a lawful investigative detention. The district court also held that even if Chavez made a technical error on the certification on the DC-27 form, it

"does not negate the existing reasonable grounds for requesting the breath test." The district court accordingly affirmed the agency's suspension of Davis' driving privileges.

In this appeal, Davis makes two claims:

- The district court erred when it "determined that an experienced officer would suspect that [Davis] needed help, and that it was appropriate for law enforcement to continue to seize [Davis] even after waking him."
- The district court erred "when it assumed the officer was incorrect," in their certification attesting that he saw Davis operate the truck, "but nonetheless determined that this was a technical error that cannot justify relief."

The rules that guide us are clear and logical.

When an individual appeals a district court's decision to affirm the suspension of their driving license, the reviewing court must determine whether the district court's factual findings derive support from substantial competent evidence. *Martin v. Kansas Dept. of Revenue*, 285 Kan. 625, 629, 176 P.3d 938 (2008)*, overruled on other grounds by City of Atwood v. Pianalto*, 301 Kan. 1008, 350 P.3d 1048 (2015). Substantial competent evidence is "'that which possesses both relevance and substance and which furnishes a substantial basis in fact from which the issues can reasonably be resolved.' [Citation omitted.]" *State v. Sanders*, 310 Kan. 279, 294, 445 P.3d 1144 (2019); see *Hodges v. Johnson*, 288 Kan. 56, 65, 199 P.3d 1251 (2009) (substantial competent evidence is such legal and relevant evidence as a reasonable person might regard as sufficient to support a conclusion). Appellate courts must not reweigh evidence but must determine whether the record supports the district court's findings. See *Jarvis v. Kansas Dept. of Revenue*, 312 Kan. 156, 171-72, 473 P.3d 869 (2020).

Next, appellate courts exercise unlimited review of the district court's conclusions of law. *State v. Dooley*, 313 Kan. 815, 819, 491 P.3d 1250 (2021). Without any objection to those factual findings or conclusions of law on the basis of inadequacy, the court presumes that the district court found all facts necessary to support its judgment. *State v. Jones*, 306 Kan. 948, 959, 398 P.3d 856

(2017). If the reviewing court determines that the district court's decision lacks specific factual findings, then meaningful review is impossible, and remand may be necessary. See *State v. Thurber*, 308 Kan. 140, 232, 420 P.3d 389 (2018).

Sergeant Frost had objective, specific, and articulable facts to suspect Davis needed help.

Davis argues that after Frost examined his truck and saw him reclined in the driver's seat asleep, it was apparent that Davis was not in distress. As a result, Davis argues there were no facts that could have led Frost to continue to believe Davis was in peril. Davis emphasizes that Frost did not try to wake Davis upon his initial interaction with his truck. In Davis' view, "Frost should have terminated the encounter and left the scene. Or, at least, he should have de-activated his forward-facing emergency lights to make possible a voluntary encounter (as opposed to a seizure)."

After reviewing the record, we agree with the district court's findings. In its analysis, the district court noted that Sergeant Frost testified that he first stopped to see if the driver of the truck needed help. Frost "saw a truck on the shoulder of the highway outside of town around 1 am with its hazard lights on. These facts would indicate to an experienced officer that the motorist might need assistance."

Similar to the facts here, in *Nickelson*, 33 Kan. App. 2d 359, 102 P.3d 490 (2004), an individual had pulled his truck off the highway at 1 a.m. on a cold night, where there were no farm buildings, outbuildings, businesses, or residences in the area. The Kansas Highway Patrol trooper testified that he was concerned for the driver's welfare, and he followed Patrol policy to always check the welfare of any car pulled off the highway. The court found that the trooper expressed specific and articulable facts for approaching Nickelson's truck for public safety concerns. 33 Kan. App. 2d at 365.

Here, like in *Nickelson*, the Douglas County Sheriff's Office policy requires deputies to stop and check to see if they can provide any assistance to the motorist. Therefore, when Frost saw the hazard lights flashing, he stopped to check that the occupants of the truck did not need assistance. Further, when Frost approached

the truck, he observed the sole occupant reclined in the driver's seat, apparently asleep. The individual was nonresponsive and appeared disheveled—his pants were undone, his belt was off, he had one boot on, and one boot was in the back seat. And Frost found a wallet on the fog line of the highway—the license matching the driver of the truck.

Because the facts available to Frost justified a lawful public safety stop, substantial competent evidence supported the district court's findings.

Frost acted to determine whether Davis needed assistance.

Davis next argues that public safety reasons did not justify further action. Because Frost lacked reasonable suspicion for a crime, his further investigation was unlawful. To support this claim, Davis points to actions taken by Frost:

- Used his flashlight to inspect the interior of the truck cabin, searching for clues;
- Checked the validity of the truck's registration tag;
- Found a wallet on the ground outside the truck and checked the validity of the driving license inside the wallet;
- Knocked on the driver's window about four minutes after arriving at the scene; and
- Waited a few moments before calling for additional law enforcement officers but not an ambulance or any medical providers.

The facts here do not suggest a nap by the side of the road. The first was Davis' appearance: he was asleep or unconscious, his pants were undone, and he had one boot on with the other in the back seat. (We can think of no explanation for that!) His wallet was on the ground *outside* his door. And despite repeated knocking and shining a flashlight inside the truck, Davis did not awaken.

Substantial competent evidence supports the district court's findings.

Once the windows came down and the officers smelled alcohol, the stop changed from a safety stop to an investigation.

We agree with the district court when it concluded that "[t]he officers did not unlawfully extend the public safety stop beyond what was required to check [Davis'] welfare." The facts presented to the court establish a lawful public safety stop.

Once Davis rolled down his window, Deputy Chavez immediately smelled the faint odor of alcohol, observed Davis' speech was slurred, and noticed his eyes were watery and bloodshot. Chavez also observed that Davis did not immediately wake up to the repeated knocking and bright flashlights, and Davis was in the driver's seat of his truck while it was running. Additionally, Davis' wallet was found outside on the ground and Davis admitted to officers that he had been drinking at a bar and then drove to his current location on the shoulder of K-10.

Again, substantial competent evidence supports the district court's findings of fact and conclusion that officers did not unlawfully extend the stop, and once they had probable cause that Davis drove under the influence of drugs or alcohol, the encounter transformed into a lawful investigative detention.

Should we reverse the license suspension because the officer checked the wrong box?

Davis argues that Deputy Chavez' certification on the DC-27 form was materially false because on line 6: "Reasonable grounds/probable cause for my belief that the person was operating or attempting to operate a vehicle," Chavez checked the box next to "saw person operate." He contends that he was not operating the truck by being in the driver's seat with the engine on or by operating the windows when awakened because to "'operate'" means to drive.

No Kansas appellate court has held that failure to properly check the boxes on the DC-27 form, which certify that the notice requirements have been given, mandates suppression. *State v. Baker*, 269 Kan. 383, 386, 2 P.3d 786 (2000).

We adopt the reasoning from an unpublished opinion from the panel in *Lane v. Kansas Dept. of Revenue*, No. 117,366, 2018 WL 2170209, at *4 (Kan. App. 2018) (unpublished opinion). In that case, the officer checked only the box on the DC-27 form that stated that Lane operated a vehicle while drunk, so, on appeal, Lane argued KDOR was precluded from arguing he tried to operate the vehicle while drunk. The court held that "even if the form includes technical errors like not checking a particular box, the State can still prove reasonable grounds for requesting a breath test 'through the use of the completed DC-27 form, through competent testimony, or through a combination of the two.'" 2018 WL 2170209, at *4 (quoting *Baker*, 269 Kan. at 388).

Here, the district court already held the officer had reasonable grounds to believe that Davis had operated the vehicle while drunk, so the court noted that even if it did consider the argument, it does not prevail. The district court cited the *Lane* opinion in applying the reasoning to this case, finding "[t]he alleged error on the DC 27 by Deputy Chavez alone does not negate the existing reasonable grounds for requesting the breath test."

Thus, even if this court assumed Chavez erred in checking the box which indicated that he saw Davis operate the truck, such an error is not reversible because there were other reasonable grounds for requesting the preliminary breath test.

We are unpersuaded by Davis' arguments and affirm the driving license suspension.

Affirmed.

(547 P.3d 575)

No. 126,090

STATE OF KANSAS, *Appellant*, v. CHARLES RICHARD BOLINGER, *Appellee*.

SYLLABUS BY THE COURT

1. STATUTES—*Construction of Statutes—Determination of Legislative Intent—Appellate Review.* When construing statutes to determine legislative intent, appellate courts must consider various provisions of an act *in pari materia* with a view of reconciling and bringing the provisions into workable harmony if possible.

2. SAME—*Strict Construction of Criminal Statutes in Favor of Accused.* Criminal statutes are strictly construed in favor of the accused. This rule is subordinate to the rule that the interpretation of a statute must be reasonable and sensible to effect the legislative design and intent of the law.

3. SAME—*Application of Rule of Lenity if Reasonable Doubt of Meaning of Statute.* The rule of lenity arises only when there is any reasonable doubt of the statute's meaning.

4. CRIMINAL LAW—*Statute of Limitations for Prosecution—Tolling Provisions in Statute Provide Certain Time Periods Excluded from Count.* The tolling provisions listed in K.S.A. 1998 Supp. 21-3106(8)(f) do not indefinitely extend the statute of limitations for prosecution. Rather, they provide that certain time periods are excluded from the count. When the statute of limitations contains an exception or condition that tolls its operation, courts deduct a specified period of time when there is substantial competent evidence that two or more of the statutory factors are present.

5. SAME—*Statute of Limitations Begins to Run When Victim Determines Criminal Conduct.* Under K.S.A. 1998 Supp. 21-3106(8)(f)(ii), the statute of limitations begins to run when the victim becomes able to determine the criminal nature of the conduct.

Appeal from Jefferson District Court; CHRISTOPHER ETZEL, judge. Oral argument held March 5, 2024. Opinion filed April 12, 2024. Affirmed.

Ethan Zipf-Sigler, assistant solicitor general, *Joshua A. Ney*, county attorney, *Ryan A. Kriegshauser*, assistant county attorney, *Cameron S. Bernard*, of Goodell, Stratton, Edmonds & Palmer, LLP, of Topeka, and *Kris W. Kobach*, attorney general, for appellant.

Tricia A. Bath and *Thomas J. Bath, Jr.*, of Bath & Edmonds, P.A., of Leawood, for appellee.

Before GREEN, P.J., HILL and CLINE, JJ.

HILL, J.: A district court dismissed two sex crime charges against Charles Bolinger based on the statute of limitations. The State appeals their dismissal. In 2022, the State charged Bolinger with rape and aggravated criminal sodomy of two young girls based on acts committed in the 1990s. The issues on appeal center on the interpretation of the tolling provision of the statute of limitations in K.S.A. 1998 Supp. 21-3106(8)(f). The State challenges both the trial court's interpretation of the statute and the court's application of its interpretation of the statute to the unique facts of the two prosecutions.

Charges are filed for acts alleged to have occurred in 1997 and 1999.

The State charged Bolinger on February 3, 2022, with rape of M.H. occurring between August 1998 and March 1999.

At the preliminary hearing, M.H. testified she was born in 1987. For about six months between 1998 and 1999, when she was 11, she lived with her aunt who was married to Bolinger. During that time, Bolinger digitally penetrated her vagina while reading her stories at night. It made her uncomfortable at first, but after a while she just thought it was normal behavior. She grew up believing such sexual touching was normal. When she got pregnant at age 17, she talked to a psychologist and realized what Bolinger did to her was a crime. She did not report Bolinger at that time because of her immigration status, language barrier, and her parents' attitude. Nobody had threatened her.

At the same time, the State charged Bolinger with aggravated criminal sodomy of K.C. occurring between February 1997 and December 1999.

K.C. testified she was born in 1994. When she was three years old, Bolinger was her mom's boyfriend. After a diaper change, her mom left her alone with Bolinger. Bolinger then picked up K.C. and licked her vagina. Her mom came back in the room and asked if he had touched her. K.C. pointed "down there." Her mom made Bolinger apologize, and it never happened again. "[P]retty soon after" the assault, her mom and Bolinger got married. They were married in June 1997. K.C. remembered being "very upset, crying,

throwing a fit" at the wedding because "she chose to marry him, even after my assault."

K.C. testified that, at the time of the assault, she did not know the action was a crime. She knew what Bolinger did was wrong. But she first realized it was a crime "last year," when she was 27. She was "not sure how to answer" why she only made this realization last year. She was meditating and just "had this . . . realization." When she was a child, she kept bringing the assault up to her mom until she was five years old. Her mom told her to stop bringing it up or her mom would not take care of her anymore. Her mom told her she should be ashamed about it. Her mom told her not to tell anyone what happened. Because of grief and shame, she testified she repressed the memory from age 5 until age 27. She also testified, "I would occasionally think about it growing up, but I would be so disgusted with myself that I just wouldn't let myself think about it."

When she was asked on cross-examination about how she realized it was a crime, K.C. testified she did research and talked to people. She "researched like the Kansas jurisdictions and . . . like how long. . . . the statutes." When asked if she meant she researched the statute of limitations, she said she "researched everything" and went to the police and learned "that there was, like, certain time frames." When asked again why her research in 2021 told her it was a crime, her answer was nonresponsive. She said, "Just because my family wasn't going to do anything about it."

The court ruled that the prosecutions were time barred.

Bolinger moved to dismiss, contending the prosecutions were time barred by the statute of limitations in K.S.A. 1998 Supp. 21-3106(8)(f). Under K.S.A. 1998 Supp. 21-3106(4), prosecutions for rape and aggravated criminal sodomy must commence within five years of the crime's commission, unless tolled by subsection (8). Subsection (8)(f) lists four factors and specifies that if any two are present, the five-year statute of limitations is tolled. There is no dispute here that one of these four factors, set forth in (i), was present since each of the victims was under 15 years of age at the time of the alleged crimes. K.S.A. 1998 Supp. 21-3106(8)(f)(i). And no one argues the two factors listed in (iii) and (iv) apply.

Thus, the existence of factor (ii), "the victim was of such age or intelligence that the victim was unable to determine that the acts constituted a crime," is the heart of this appeal. K.S.A. 1998 Supp. 21-3106(8)(f)(ii).

Since the statute is tolled so long as two or more of the listed factors are present, Bolinger argued at the motion hearing that the five-year statute of limitations starts to run once two of the factors listed in subsection (8)(f) are no longer present. Thus, according to Bolinger, the statute should be read as follows: "The period within which a prosecution must be commenced shall not include any period in which . . . (ii) the victim was of such age or intelligence that the victim was unable to determine that the acts constituted a crime." K.S.A. 1998 Supp. 21-3106(8). M.F. testified she realized the incident was a crime at age 17. She turned 17 in 2004. Thus, the statute of limitations on the alleged crime against M.F. started to run in 2004 and expired in 2009. As for K.C., Bolinger argued there was not substantial competent evidence to believe the presence of (8)(f)(ii) because K.C.'s testimony was conflicting.

The State argued the statute of limitations does not start once the victim becomes of such age or intelligence to realize the conduct was a crime. Using a descriptive word not found in the statute—static—the State contended the statute had been tolled indefinitely. In the State's view, because of the Legislature's use of the word "was" instead of "is," the two factors in (f)(i) and (f)(ii) are static. The State contends that if the circumstances set out in (f)(i) and (f)(ii) were true at the time of the crime, the statute of limitations is tolled indefinitely. In other words, there still is substantial competent evidence to believe the victim was a child under 15 years of age and the victim was of such age or intelligence that the victim was unable to determine that the acts constituted a crime at the time of the crime.

The district court adopted Bolinger's interpretation and dismissed the charges. Using the preliminary hearing testimony, the trial court found M.H.'s rape occurred when she was 11 years old. At that time she did not realize the encounter was a crime. Thus, with the presence of both (f)(i) and (f)(ii), the statute of limitations was tolled. In 2004, at age 17, M.H. realized what Bolinger did to her was a crime. Therefore, the statute of limitations began to run

in 2004 and then expired five years later in 2009. These charges were untimely filed in 2022.

Turning then to the charges involving the victim, K.C., the court found K.C. was three years old at the time of the aggravated criminal sodomy. Subsection (f)(i) was met. While K.C. testified she did not realize the conduct was a crime until last year, when she was 27 years old, she struggled to answer questions on cross-examination.

She remembered being upset and angry with her mother when she was less than three-and-a-half years old about what Bolinger had done to her. And she would occasionally think about the incident while growing up. The court concluded there was not substantial competent evidence to establish that K.C. only realized at age 27 that the act was a crime. Because two of the circumstances in (8)(f) were not shown, the statute of limitations could not be tolled.

To us, the State argues the Legislature intended both subsections of the statute—K.S.A. 1998 Supp. 21-3106(8)(f)(i) and (ii)—to be true at the time the crime occurred. If they were true at the time of the crime, then the statute of limitations is tolled until the victim turns 28 years old.

The State claims the Legislature's use of the term "was" instead of "is" in the 21-3106(8)(f) factors designate static and fixed periods of time. The State contrasts the tolling provisions of 21-3106(8)(a)-(e) that use the term "is." The State claims "to say that the statute of limitations begins to run when the victim becomes able to determine the criminal nature of the conduct is to rewrite the statute." The State claims the statute cannot be read so that (8)(f)(i) is static while (8)(f)(ii) is dynamic.

For its second issue, the State contends the trial court misapplied its own interpretation of the statute to the charge related to K.C. The State posits that the trial court did not believe K.C.'s testimony and argues that the trial court should not have made such a credibility determination in deciding this issue. The trial court should have weighed the evidence in the light most favorable to the State. Only a jury could make such a credibility determination. Without evidence of any other specific date that K.C. realized the conduct was a crime, the trial court should have given effect to

K.C.'s testimony that it was when she was 27. K.C. was 13 years old in 2013 when the statute of limitations was extended indefinitely. We note there was a computational error in the argument; K.C. was, in fact, 19 years old in 2013. See K.S.A. 2013 Supp. 21-5107(a).

Some history of the law of limitations is helpful here.

Prior to 1994, there were only five time periods during which the statute of limitations was tolled—any period in which:

"(a) The accused is absent from the state;

"(b) the accused is concealed within the state so that process cannot be served . . . ;

"(c) the fact of the crime is concealed;

"(d) a prosecution is pending against the defendant for the same conduct . . . ; or

"(e) an administrative agency is restrained by court order from investigating or otherwise proceeding." K.S.A. 1993 Supp. 21-3106(6).

Prosecutors in child sex crime cases tried to argue that threats made to keep child victims from reporting the crime constituted concealment to toll the statute of limitations. But our Supreme Court rejected these claims, holding: "To constitute concealment of the fact of a crime sufficient to toll the statute of limitations, there must be a positive act done by or on behalf of the accused calculated to prevent discovery of the fact of the crime." *State v. Mills*, 238 Kan. 189, Syl. ¶ 1, 707 P.2d 1079 (1985). The court further held:

> "Threats, as this case demonstrates, are an effective way to keep child victims from reporting sexual offenses. They are commonplace in the aftermath of a sexual assault on a child. Therefore, the practical effect of construing a threat to a sexually abused child as concealment would be to extend the statute of limitations beyond its stated two-year period in nearly every case of this nature." *State v. Bentley*, 239 Kan. 334, 339, 721 P.2d 227 (1986).

In 1994, the Legislature added a tolling provision to account for victims that were too young or for other reasons were prevented from reporting their crime "whether or not the fact of the crime is concealed by the active act or conduct of the accused."

K.S.A. 1994 Supp. 21-3106(6)(f). Some specific provisions of that law are at issue.

We offer some observations on this statute.

Except for murder, the Kansas Legislature has established a limited time for the State to prosecute a crime. There are many practical reasons for this policy. Evidence can be lost, memories of witnesses fade with the passage of time, and newly discovered evidence can cast doubt on the guilt of the accused or inversely, increase the proof of that guilt. The limitations statute creates an incentive to the State to be prompt, diligent, and thorough in its investigations. Foot dragging police are not rewarded with this statute of limitations.

The State here had a five-year period of time to prosecute. The controlling statute, K.S.A. 1998 Supp. 21-3106, speaks of this period available to the State to prosecute crimes. Ordinarily, the clock measuring that period starts ticking when the crime is committed and runs until the prosecution commences or until the statutory limit expires.

But sometimes that period to prosecute stops running under certain events and circumstances. Subsection (8) of the statute lists several circumstances that toll the expiration of the limit: "The period within which a prosecution must be commenced shall not include any period in which . . ." and then sets out many events in the next six subsections of the statute. K.S.A. 1998 Supp. 21-3106(8). The question here is, did the clock stop running considering the circumstance of this case? The first five subsections of subsection (8) of K.S.A. 1998 Supp. 21-3106 provide a context that helps us interpret the pertinent subsection (f):

(a) In composing this statute, the Legislature is realistic and addresses what happens in the real world. Some accused will skip town and leave the state. When they step across the state line the clock stops and will not start again until they return to Kansas.

(b) Sometimes an accused hides somewhere in Kansas and avoids process. If so, the period for prosecution abates.

(c) There are crimes that are concealed. Once their existence emerges the clock starts to run but is tolled during the period the crime is concealed.

(d) The period does not run while a prosecution of the same conduct is pending against a defendant.

(e) While a state administrative agency is restrained by court order from investigating any criminal conduct, the period to prosecute stops.

But we focus in this appeal on crimes against children and they are the subject of subsection 8(f).

At the time of these crimes, the statute of limitations for rape and aggravated criminal sodomy was five years. K.S.A. 1998 Supp. 21-3106(4). In 2012, the Legislature amended the statute of limitations for sexually violent crimes so that if the victim was under 18 years of age at the time of the offense, the time started to run when the victim turned 18 years old. K.S.A. 2012 Supp. 21-5107(f). In 2013, the Legislature amended the statute to allow a prosecution for rape and aggravated criminal sodomy to be brought at any time. K.S.A. 2013 Supp. 21-5107(a).

Here, unless tolled, the five-year statute of limitations began to run when the crimes were committed. K.S.A. 1998 Supp. 21-3106(4). The amendments could have extended the time for prosecution if the prosecution was not already time barred by the time the amendment came into effect. See *State v. Noah*, 246 Kan. 291, Syl. ¶ 5, 788 P.2d 257 (1990).

The parties adopt opposing positions on the application of the limitation statute.

The State argues the Legislature intended both K.S.A. 1998 Supp. 21-3106(8)(f)(i) and (ii) to be static factors. In other words, the relevant inquiry is whether the factors were true at the time the crime occurred. If they were true at the time of the crime, the statute of limitations is tolled until the victim turns 28 years old. The State argues the Legislature's use of the term "was" instead of "is" in the 21-3106(8)(f) factors designate static and fixed periods of time. The State contrasts the tolling provisions of 21-3106(8)(a)-(e) that use the term "is." The State claims "to say that the statute of limitations begins to run when the victim becomes able to determine the criminal nature of the conduct is to rewrite the statute." The State claims the statute cannot be read so that (8)(f)(i) is static while (8)(f)(ii) is dynamic.

The State argues the prosecution for the rape of M.H. was timely because M.H. turned 28 in 2015 and in 2013 the Legislature amended the statute of limitations for rape allowing prosecutions to be brought indefinitely. For the aggravated criminal sodomy prosecution, K.C. turned 28 in February 2022 after the State filed its charge.

Bolinger argues the trial court correctly found that at least two factors must be "'present'" during any period for which the statute of limitations would be tolled. Subsection (8)(f)(i) of 21-3106 is static because the statute says that "at the time of the crime." The Legislature chose not to include that language in subsection (8)(f)(ii). Bolinger also invokes the rule of lenity.

We have unlimited review.

Our opinion on this case is guided by well-established law. Statutory interpretation presents a question of law over which appellate courts have unlimited review. *State v. Betts*, 316 Kan. 191, 197, 514 P.3d 341 (2022). The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. *State v. Keys*, 315 Kan. 690, 698, 510 P.3d 706 (2022). An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. See *Betts*, 316 Kan. at 198. When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language, and it should avoid reading something into the statute that is not readily found in its words. *Keys*, 315 Kan. at 698.

When construing statutes to determine legislative intent, appellate courts must consider various provisions of an act *in pari materia* with a view of reconciling and bringing the provisions into workable harmony if possible. *State v. Strong*, 317 Kan. 197, 203, 527 P.3d 548 (2023). Generally, criminal statutes are strictly construed in favor of the accused. This rule is subordinate to the rule that the interpretation of a statute must be reasonable and sensible to effect the legislative design and intent of the law. *State v. Griffin*, 312 Kan. 716, 720, 479 P.3d 937 (2021). The rule of lenity arises only when there is any reasonable doubt of the statute's meaning. *State v. Terrell*, 315 Kan. 68, 73, 504 P.3d 405 (2022).

K.S.A. 1998 Supp. 21-3106(8)(f) tolls the statute of limitations only for a time period.

In general, the tolling provisions listed in K.S.A. 1998 Supp. 21-3106(8) do not indefinitely extend the statute of limitations for prosecution. Rather, they provide that certain time periods are excluded from the count. When the statute of limitations contains an exception or condition that tolls its operation, courts deduct a specified period of time. See *State v. Palmer,* 248 Kan. 681, 683, 810 P.2d 734 (1991) (where a deduction was made for the period of time while the existence of the crime was concealed).

In order to understand and interpret this law it is important to read all of section (8):

"*(8) The period within which a prosecution must be commenced shall not include any period in which:*

"(a) The accused is absent from the state;

"(b) the accused is concealed within the state so that process cannot be served upon the accused;

"*(c) the fact of the crime is concealed;*

"(d) a prosecution is pending against the defendant for the same conduct, even if the indictment or information which commences the prosecution is quashed or the proceedings thereon are set aside, or are reversed on appeal;

"(e) an administrative agency is restrained by court order from investigating or otherwise proceeding on a matter before it as to any criminal conduct defined as a violation of any of the provisions of article 41 of chapter 25 and article 2 of chapter 46 of the Kansas Statutes Annotated which may be discovered as a result thereof regardless of who obtains the order of restraint; or

"*(f) whether or not the fact of the crime is concealed by the active act or conduct of the accused, there is substantially competent evidence to believe two or more of the following factors are present: (i) The victim was a child under 15 years of age at the time of the crime; (ii) the victim was of such age or intelligence that the victim was unable to determine that the acts constituted a crime;* (iii) the victim was prevented by a parent or other legal authority from making known to law enforcement authorities the fact of the crime whether or not the parent or other legal authority

is the accused; and (iv) there is substantially competent expert testimony indicating the victim psychologically repressed such witness' memory of the fact of the crime, and in the expert's professional opinion the recall of such memory is accurate and free of undue manipulation, and substantial corroborating evidence can be produced in support of the allegations contained in the complaint or information but in no event may a prosecution be commenced as provided in this section later than the date the victim turns 28 years of age. Corroborating evidence may include, but is not limited to, evidence the defendant committed similar acts against other persons or evidence of contemporaneous physical manifestations of the crime. 'Parent or other legal authority' shall include but not be limited to natural and stepparents, grandparents, aunts, uncles or siblings." (Emphases added.) K.S.A. 1998 Supp. 21-3106(8).

The disputed subsection (f) is contained within section (8) with all the other tolling provisions. The colon and list format of section (8) signify that the introductory language applies to each letter, (a)-(f). Section (8)(f) begins, "(8) The period within which a prosecution must be commenced shall not include any period in which: . . . (f) . . . there is substantially competent evidence to believe two or more of the following factors *are present*: . . . ." (Emphasis added). K.S.A. 1998 Supp. 21-3106(8). In other words, the statute of limitations is tolled only when two factors are present. The statute of limitations begins to run when two factors are no longer present. That much is clear from the plain language of the statute.

K.S.A. 1998 Supp. 21-3106(8)(f)(ii) must be narrowly construed in favor of Bolinger.

Statutes of limitations are construed liberally in favor of the accused. Exceptions to statutes of limitations are construed narrowly in favor of the accused. *State v. Belt*, 285 Kan. 949, 962, 179 P.3d 443 (2008). "[I]t is not the province of this court to fashion exceptions to the statute of limitations; that task is left to the legislature. Statutes of limitation are measures of public policy and are entirely subject to the will of the legislature." *State v. Bentley*, 239 Kan. 334, 339, 721 P.2d 227 (1986).

Two prior unpublished decisions of this court (not cited by the parties) mirror the trial court's interpretation of the statute here. In *State v. Weeks*, No. 117,475, 2018 WL 4517547, at *2 (Kan. App. 2018) (unpublished opinion), the panel explained the (f)(ii) exception: "Under that exception, the statute of limitations begins to run when the victim becomes able to determine the criminal nature of the conduct." It does not appear the State disputed that interpretation. Rather, the issue was whether the victim could not determine that the acts were criminal. 2018 WL 4517547, at *2.

In *State v. Torbol*, No. 117,474, 2018 WL 3596260, at *5 (Kan. App. 2018) (unpublished opinion), the (f)(ii) exception was also invoked to toll the statute of limitations and the panel similarly stated, "the statute of limitations began to run at the time [the victim] became aware of the criminal nature of Torbol's conduct." Again, it does not appear the State disputed that interpretation.

We look at the careful drafting of these two subsections. By using in subsection (f)(i) the phrase, "at the time of the crime," along with "[t]he victim was a child under 15 years of age," that factor will always be present if the facts support it. In other words that is one factor that will be considered in tolling the limitations period. Then, we note that in subsection (f)(ii) the statute uses the term "was" but does not include the phrase "at the time of the crime." That absence is significant. We do not embrace the State's use of the descriptive term "static" and choose to interpret the statutes as written and not add language to them in order to interpret them.

We presume the Legislature means what it says. The Legislature's failure to include the phrase "at the time of the crime" in subsection (f)(ii) must be read as intentional. The subsection must be construed in context of its placement with the other tolling provisions in the statute. And it must be read narrowly in Bolinger's favor.

When read in context with the introductory language to section (8), the Legislature's use of the term "was" in subsection (f)(ii) is not static. It reads, "(8) The period within which a prosecution must be commenced shall not include any period in which: . . . (f) . . . (ii) the victim was of such age or intelligence that the victim was unable to determine that the acts constituted a crime." Further,

the introductory language in section (8)(f) is not static since it looks at whether "there is substantially competent evidence to believe two or more of the following factors *are* present . . . ." (Emphasis added.) Once the victim is no longer of such age or intelligence that he or she cannot determine the acts constituted a crime, that factor is no longer present and the clock starts to run. The trial court correctly interpreted the statute.

The trial court did not misapply the statute of limitations to the circumstances of this case.

The State contends the trial court misapplied its own interpretation of the statute to the charge related to K.C. The State posits that the trial court did not believe K.C.'s testimony and argues that the trial court should not have made such a credibility determination in deciding this issue. The trial court should have weighed the evidence in the light most favorable to the State; only a jury could make such a credibility determination. Without evidence of any other specific date that K.C. realized the conduct was a crime, the trial court should have given effect to K.C.'s testimony that it was when she was 27. K.C. was 19 years old in 2013 when the statute of limitations was extended indefinitely.

Bolinger argues the trial court did not need to apply the preliminary hearing standard and weigh the evidence in the light most favorable to the State or permit a jury to decide. Rather, K.S.A. 1998 Supp. 21-3106(8)(f) places the burden on the State to present substantial competent evidence to toll the statute of limitations. Bolinger agrees with the State that the trial court made a credibility determination. The trial court simply did not believe K.C.'s testimony. The court was not required to speculate when K.C. likely realized the incident was a crime.

The burden was on the State to present substantial competent evidence.

Bolinger is correct that the State improperly invokes the preliminary hearing standard of review because the district court cited testimony from the preliminary hearing in deciding on the statute of limitations. The standard Bolinger cites only applies when the trial court is deciding whether there is sufficient evidence to bind

over the defendant at a preliminary hearing. In such case, the State must only show probable cause. The trial court must draw inferences in favor of the State. Even if the evidence is weak, the defendant should be bound over for trial if the evidence tends to establish that the offense was committed and that the defendant committed it. *State v. Washington*, 293 Kan. 732, 734, 268 P.3d 475 (2012). The court does not pass on credibility and, when evidence conflicts, the court must accept the version of the testimony most favorable to the State. On appeal, we review the preliminary hearing court's probable cause determination de novo. *State v. Rozell*, 315 Kan. 295, 305, 508 P.3d 358 (2022).

In contrast, the statute of limitations is an affirmative defense that the defendant must plead. *State v. Gleason*, 315 Kan. 222, 226, 505 P.3d 753 (2022). Then the burden of proving facts sufficient to toll the statute of limitations is on the State. See *Slayden v. Sixta*, 250 Kan. 23, 26, 825 P.2d 119 (1992). The Legislature specified that the burden of proof for the (8)(f) exception to the statute of limitations is substantial competent evidence. Thus, the burden was on the State to prove by substantial competent evidence that the exception applied. K.S.A. 1998 Supp. 21-3106(8)(f); *Weeks*, 2018 WL 4517547, at *2. Substantial competent evidence refers to legal and relevant evidence that a reasonable person could accept as adequate to support a conclusion. Appellate courts do not weigh witness credibility. We will not reject a trial court's adverse credibility determination on appeal unless the trial court arbitrarily disregarded undisputed evidence or relied on some extrinsic consideration such as bias, passion, or prejudice. *State v. Smith*, 312 Kan. 876, 887, 482 P.3d 586 (2021).

In general, uncontroverted testimony should not be disregarded by the trial court unless it is improbable, unreasonable, or untrustworthy. *Torbol*, 2018 WL 3596260, at *7. *Torbol* offers a helpful contrast to this case. There, the victim of aggravated criminal sodomy, F.P., was under the age of 15 at the time of the crime. F.P. testified she did not understand Torbol's conduct was illegal until she began watching crime shows in the fourth or fifth grade. The trial court ruled the statute of limitations began to run when F.P. gained that awareness, making the prosecution timely. On appeal, Torbol claimed the evidence failed to support the trial court's

finding. This court affirmed the trial court, noting Torbol did not controvert F.P.'s testimony and that it was "neither improbable nor unreasonable that F.P. did not understand Torbol's conduct was criminal until she was in fourth or fifth grade." 2018 WL 3596260, at *5, 7.

Here, K.C. testified she discovered at age 27 that Bolinger's conduct was criminal. Unlike F.P.'s explanation that she understood Torbol's conduct was illegal when she began watching crime shows, K.C. could not explain how she finally made that realization. K.C.'s testimony that she repressed the memory contradicted her testimony that she would occasionally think about the incident. She stated she researched "the statutes," including the statute of limitations. She could not answer how her research led her to realize what Bolinger did to her was a crime. The parties agree that the trial court simply did not believe K.C.'s testimony. In essence, K.C.'s testimony was improbable and unreasonable. The trial court reviewed and made its decision based on the evidence. The district court's adverse credibility determination did not lack the support of substantial competent evidence, disregard undisputed evidence, rely on unreasonable inferences, or otherwise evince bias, passion, or prejudice. See *Smith*, 312 Kan. at 889.

Statute of limitations disputes sometimes involve questions of fact for a jury.

The State cites *Palmer* for its contention that the district court needed to let the State present evidence to a jury to prove its prosecution was timely. 248 Kan. at 699. *Palmer* supports the idea that a statute of limitations dispute can sometimes involve a question of fact for a jury. 248 Kan. at 690, 699. In *Palmer*, as here, the district court dismissed several charges as barred by the statute of limitations, and the State appealed. The Supreme Court reinstated the campaign finance act violation charges because the evidence showed that a defendant had "designed and executed a scheme calculated to prevent the discovery of his ties to the contributions." 248 Kan. at 698. The court held, "Under the facts presented, the question of concealment is a matter of fact for the jury to determine." 248 Kan. at 699.

But, *Palmer* does not hold that every statute of limitations dispute goes to a jury. The Supreme Court upheld the district court's decision that the charges of theft and conspiracy to commit theft were barred by the statute of limitations because "there was no evidence that the defendants concealed the alleged thefts or conspiracy to commit theft." 248 Kan. at 690. *Palmer* offers little guidance about when a statute of limitations question must go to a jury in a criminal case.

"Since statutes of limitations create a bar to prosecution, once a defendant has raised a statute of limitations defense, the prosecution generally must affirmatively prove the commission of the offense within the period limited by the statute." 29 Am. Jur. 2d, Evidence § 191. In general, "questions of law are for the court's determination and questions of fact are submitted to the jury." *Torbol*, 2018 WL 3596260, at *6. When the evidence is uncontroverted, whether the State presented sufficient evidence to allow tolling of the statute of limitations under the applicable statute is a question of law. *Torbol*, 2018 WL 3596260, at *6.

Our Supreme Court has affirmed a district court's dismissal of charges against a defendant due to the passage of the statute of limitations because the State did not offer sufficient evidence to explain the delay and because statutes of limitations are liberally construed in favor of the accused. *State v. Long*, 276 Kan. 297, 303-04, 75 P.3d 1217 (2003). Here, the trial court found K.C.'s testimony could not satisfy the State's burden as a matter of law. Given that statutes of limitations are liberally construed in favor of the accused, the dismissal was proper.

The State did not ask the trial court to put the statute of limitations question before a jury. Generally, issues not raised before the trial court cannot be raised on appeal. *State v. Green*, 315 Kan. 178, 182, 505 P.3d 377 (2022). Therefore, this court need not reach the issue.

The trial court was not required to speculate about an appropriate age.

Because the tolling provisions operate to pause the statute of limitations for a specified period of time, a lack of evidence in the record needed to establish that timeframe "precludes any reasoned

application of the tolling provision." See *State v. Hinchsliff*, No. 103,608, 2011 WL 4031502, at *5 (Kan. App. 2011) (unpublished opinion). The statute of limitations will not be tolled based on mere "speculation and guess." See 2011 WL 4031502, at *5.

The trial court was not required to guess at what age K.C. became able to determine the act constituted a crime. The trial court was correct to grant the motion to dismiss because the State did not show the existence of two (8)(f) factors.

Affirmed.

(547 P.3d 593)

No. 126,130

STATE OF KANSAS, *Appellant*, v. CHRISTOPHER SHAWN ADAMS, *Appellee*.

SYLLABUS BY THE COURT

CONSTITUTIONAL LAW—*Privilege against Self-incrimination—District Court Properly Permitted Witness Not to Testify at Criminal Trial under These Facts.* In the circumstances of this case, the district court properly permitted a witness to assert her constitutional privilege against self-incrimination to avoid testifying at the defendant's criminal trial after the State charged her with perjury based on her preliminary hearing testimony. The State's offer of statutory immunity under K.S.A. 22-3415 was insufficient to shield the witness from the real risk she would face an additional perjury charge if she were compelled to testify.

Appeal from Ellis District Court; THOMAS J. DREES, judge. Submitted without oral argument. Opinion filed April 19, 2024. Affirmed.

Kristafer R. Ailslieger, deputy solicitor general, and *Kris W. Kobach*, attorney general, for appellant.

Heather R. Fletcher, of Johnson Fletcher, LLC, of Hays, for appellee.

Before ARNOLD-BURGER, C.J., ATCHESON, J., and TIMOTHY G. LAHEY, S.J.

ATCHESON, J.: If a prosecutor charges a witness with perjury based on his or her preliminary hearing testimony in a criminal case, may that person then assert a constitutional privilege against self-incrimination when called as a State's witness in the later jury trial? The Ellis County District Court ruled Stephanie Lang could exercise her right to avoid another perjury charge in that circumstance. We agree. In reaching that conclusion, the district court made two related determinations. First, the district court held that the State's grant of immunity to Lang under K.S.A. 22-3415 was insufficient to protect her against a second perjury charge. Again, we agree. The district court also ruled that the State could not use Lang's preliminary hearing testimony and her out-of-court statements presented during the preliminary hearing as evidence in the

jury trial, even though she would be unavailable as a witness. Because the State has not challenged that ruling in bringing this interlocutory appeal, it may be reconsidered in the district court.

FACTUAL AND PROCEDURAL BACKGROUND

Given the issue on appeal, we may quickly sketch the underlying criminal charges against Defendant Christopher Shawn Adams. The procedural developments in the district court more closely frame the legal dispute.

A couple of hours after a Saturday night slipped into Sunday morning in September 2021, a man was punched in the face outside a bar and grill in downtown Hays. The man's jaw and nose were broken in the sudden attack, and he did not know who struck him. Police officers responded quickly, but none of the onlookers could identify the attacker.

The police received a report of a domestic disturbance nearby. When they arrived, they found Lang, Adams, and a third man. The man told police he saw a physical dispute between Lang and Adams, attempted to intervene, and called 911. According to the man, Adams struck him. When questioned by officers there—in a recorded interview—Lang said Adams grabbed her and threw her to the ground. She also said Adams had punched a man outside a bar, knocking him to the ground. Lang said she was a nurse and briefly attended to the man.

About a week later, the State filed three charges against Adams: (1) aggravated battery, a severity level 4 person felony, for punching the man near the bar and grill; (2) misdemeanor domestic battery of Lang; and (3) misdemeanor battery of the man who stepped into their altercation. The State called Lang at Adams' preliminary hearing on the aggravated battery charge. In her testimony, Lang said she did not see Adams punch anyone outside the bar and grill. And she testified she did not recall what she had told the police because she was quite intoxicated that night. The State called one of the police officers and played the recorded interview of Lang in which she inculpated Adams. The magistrate judge bound Adams over for trial.

The prosecutor then charged Lang with perjury for testifying falsely at the preliminary hearing and alternatively with interference with law enforcement for making false statements to the investigating police officers. Each charge against Lang was a felony. At the start of Adams' jury trial, Lang appeared with her lawyer and on his advice informed the district court that she asserted her right not to incriminate herself and, therefore, would not testify. The prosecutor tendered a grant of use and derivative immunity to Lang for her trial testimony under K.S.A. 22-3415. By its terms, statutory immunity does not cover perjury "in giving such evidence." K.S.A. 22-3415(d). While explaining "the State's theory" as to why Lang could not assert her privilege against self-incrimination, the prosecutor told the district court he viewed Lang's preliminary hearing testimony as perjurious "and therefore any consistent statements would be perjury again."

Under the circumstances, the district court concluded both that the prosecutor's grant of immunity would not protect Lang from a new perjury charge if her trial testimony mirrored her preliminary hearing testimony and that she faced a substantial threat of being so charged. Accordingly, the district court found Lang had properly invoked her constitutional right against self-incrimination and did not have to testify in Adams' trial, making her an unavailable witness. See K.S.A. 60-459(g)(1). The district court went on to find that the State—having already asserted Lang's preliminary hearing testimony to be false—could not offer that testimony during the trial and, in turn, could not present Lang's out-of-court statements admitted as evidence at the preliminary hearing.

Based on those evidentiary rulings, the prosecutor concluded the case against Adams had been substantially impaired and sought an interlocutory appeal under K.S.A. 22-3603 for that reason.

LEGAL ANALYSIS

Appellate Jurisdiction

Although the parties focus on the portion of the district court's ruling allowing Lang to assert her constitutional privilege against

self-incrimination, we necessarily consider a gatekeeping requirement for the State's interlocutory appeal. To bring an appeal under K.S.A. 22-3603, the State must show that the district court's exclusion of evidence would "seriously impede" the successful prosecution of the defendant. *State v. Huninghake*, 238 Kan. 155, 157, 708 P.2d 529 (1985). The Kansas Supreme Court has held the statute covers rulings precluding the presentation of previous testimony of an unavailable witness if the effect would "substantially impair" the State's case against the defendant at trial. *State v. Newman*, 235 Kan. 29, 35, 680 P.2d 257 (1984).

Considering the overall impact of the district court's decision, we readily conclude the ruling materially undercut the State's ability to prosecute Adams successfully. Lang's out-of-court statements provided the primary evidence identifying Adams as the perpetrator of the aggravated battery outside the bar and grill. The preclusion of those statements satisfied the standard for an interlocutory appeal outlined in *Huninghake* and *Newman*. We, therefore, have appellate jurisdiction. The State and Adams have filed briefs. Lang has not requested the opportunity to do so, although her constitutional rights are directly at stake. We suppose she could have been heard here through her lawyer, as she was in the district court, if only as an amicus curiae.

Constitutional Privilege Against Self-Incrimination

We now turn to the district court's decision permitting Lang to assert her privilege against self-incrimination and explain why the ruling properly serves the constitutional protection given the unusual facts of this case. After addressing that part of the district court's ruling, we offer a closing comment about the scope of the district court's concomitant exclusion of evidence. And I elaborate on that comment in a concurring opinion to suggest the exclusion of Lang's preliminary hearing testimony along with her out-of-court statement to the police may be error.

The Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The protection permits an individual to refuse to answer questions put to them in a police interview, a grand jury proceeding, a judicial hearing or trial, and other

governmental inquisitions when a prosecutor could later use the responses to pursue criminal charges against that individual. See *Michigan v. Tucker*, 417 U.S. 433, 440-43, 94 S. Ct. 2357, 41 L. Ed. 2d 182 (1974); *Kastigar v. United States*, 406 U.S. 441, 444-45, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972). The Framers viewed the right as a shield against Star Chamber prosecutions and the use of confessions induced through physical coercion rendering them inherently unreliable. See *Idaho v. Wright*, 497 U.S. 805, 822-23, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990) (unreliability of statement given under duress); *Tucker*, 417 U.S. at 439-41; *Miranda v. Arizona*, 384 U.S. 436, 444-48, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) (Fifth Amendment protection against self-incrimination intended to eliminate physical abuse as means of interrogation). The Fifth Amendment right has been incorporated through the Fourteenth Amendment and, therefore, applies to criminal proceedings in state court. *Malloy v. Hogan*, 378 U.S. 1, 6, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964). The Kansas Constitution contains a comparable protection construed coextensively with the Fifth Amendment privilege. Kansas Constitution Bill of Rights § 10; *State v. Boysaw*, 309 Kan. 526, 537-38, 439 P.3d 909 (2019) (self-incrimination protections of United States Constitution and Kansas Constitution "coextensive").

Appellate courts review claims involving the privilege against self-incrimination using the well-known bifurcated standard that accords deference to the district court's factual findings if they are supported by substantial competent evidence but reserves unlimited review of the ultimate legal conclusion based on those findings. *State v. Delacruz*, 307 Kan. 523, 533, 411 P.3d 1207 (2018). More particularly here, the relevant facts are undisputed, so the district court's decision necessarily entails a question of law. *State v. Mejia*, 58 Kan. App. 2d 229, 231-32, 466 P.3d 1217 (2020); *State v. Bennett*, 51 Kan. App. 2d 356, 361, 347 P.3d 229 (2015). Consistent with those standards, we exercise unlimited review over the district court's decision permitting Lang to exercise her Fifth Amendment privilege.

The Fifth Amendment protection against self-incrimination extends not only to statements of witnesses that might directly inculpate them but to those that might furnish an evidentiary link in

a prosecutorial chain leading to criminal charges. *Ohio v. Reiner*, 532 U.S. 17, 20, 121 S. Ct. 1252, 149 L. Ed. 2d 158 (2001); *Maness v. Meyers*, 419 U.S. 449, 461, 95 S. Ct. 584, 42 L. Ed. 2d 574 (1975). To trigger the protection, the prospect of criminal prosecution must be realistic rather than merely an academic or hypothetical possibility. Indeed, any witness testifying under oath—even a truthteller—faces an abstract risk of being charged with perjury by a mistaken or overly zealous prosecutor. That sort of metaphysical chance grounded in the witness' abstract and entirely subjective fear is insufficient. *Reiner*, 532 U.S. at 21 ("danger of 'imaginary and unsubstantial character' will not suffice") (quoting *Mason v. United States*, 244 U.S. 362, 366, 37 S. Ct. 621, 61 L. Ed. 1198 [1917]); *In re Grand Jury Subpoena (McDougal)*, 97 F.3d 1090, 1094 (8th Cir. 1996) (recognizing subjective belief of witness that testimony might result in perjury charge insufficient to permit assertion of privilege against self-incrimination). The United States Supreme Court has characterized "the basic test" for invoking the privilege this way: "'[W]hether the claimant is confronted by substantial and "real," and not merely trifling or imaginary, hazards of incrimination.'" *United States v. Apfelbaum*, 445 U.S. 115, 128, 100 S. Ct. 948, 63 L. Ed. 2d 250 (1980) (quoting *Marchetti v. United States*, 390 U.S. 39, 53, 88 S. Ct. 697, 19 L. Ed. 2d 889 [1968]); see also *In re Flint Water Cases*, 53 F.4th 176, 194 (6th Cir. 2022) (recognizing and quoting *Apfelbaum* characterization of when privilege applies); *United States v. Gersky*, 816 Fed. Appx. 772, 778 (4th Cir. 2020) (unpublished opinion); 3 Wharton's Criminal Evidence § 11:8 (15th ed. 2023); 21A Am. Jur. 2d, Criminal Law § 1009.

In short, individuals may invoke the privilege when they have "reasonable cause to apprehend danger" from their statements—the danger being "the peril of prosecution" for one or more crimes. *Hoffman v. United States*, 341 U.S. 479, 486, 488, 71 S. Ct. 814, 95 L. Ed. 1118 (1951). In *Reiner*, the Court cited the apprehension-of-danger language from *Hoffman* as articulating a proper basis for asserting the privilege. 532 U.S. at 21. So the privilege extends to "'any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.'" *Hiibel v. Sixth Judicial Dist. Court*

of Nevada, 542 U.S. 177, 190, 124 S. Ct. 2451, 159 L. Ed. 2d 292 (2004) (quoting *Kastigar*, 406 U.S. at 445); *United States v. Solis*, 915 F.3d 1172, 1177 (8th Cir. 2019) (relying on *Hoffman*, court recognizes privilege shields statements that "reasonably could lead to that individual's own prosecution"); *Convertino v. United States Dept. of Justice*, 795 F.3d 587, 593 (6th Cir. 2015) (citing *Hoffman* and other authority, court finds privilege properly invoked in face of "'a sound basis for a reasonable fear of prosecution'") (quoting *In re Morganroth*, 718 F.2d 161, 169 [6th Cir. 1983]). The reasonable apprehension of criminal prosecution, then, supports a claim of privilege without necessarily considering the prospects for conviction.

We need not endeavor to draw a dividing line between the "real" and the "trifling" in this case. The prosecutor's actions in charging Lang with perjury for her preliminary hearing testimony in tandem with his assertion during the pretrial hearing that she would be committing "perjury again" if she testified in the same manner at trial were more than sufficient to create a substantive and immediate prospect of a new criminal charge. Either standing alone very likely would have been enough. On the eve of Adams' trial, Lang faced about as clear a hazard of being prosecuted anew for her consistent testimony as might be imagined. Lang, therefore, had a Fifth Amendment privilege to avoid placing herself in that position.

When the circumstances depict a tangible basis for prosecution aided by the witness' testimony or other compelled statements, the privilege against self-incrimination should be liberally construed to effect its purpose. *Maness*, 419 U.S. at 461; *Hoffman*, 341 U.S. at 486; *In re Flint Water Cases*, 53 F.4th at 192-93; *United States v. Oriho*, 969 F.3d 917, 924 n.2 (9th Cir. 2020). Accordingly, individuals may assert they have done nothing wrong, i.e. they are innocent, yet invoke the privilege if they, nonetheless, realistically might be prosecuted based on what they would say. *Reiner*, 532 U.S. at 21. Likewise, the privilege may attach to future testimonial acts that would tend to be incriminating and not merely to statements that might implicate the claimant in past criminal conduct, although such situations would be uncommon. *Marchetti*, 390 U.S. at 54 (privilege may extend to "hazards of

incrimination created . . . as to future acts" because application not "inflexibly defined by a chronological formula"); see *Apfelbaum*, 445 U.S. at 129 (recognizing *Marchetti* rule but finding it factually inapplicable).

Offer of Statutory Immunity

The prosecutor's offer of immunity to Lang under K.S.A. 22-3415 for her trial testimony does not alter the legal calculus, as the district court correctly determined. The offer provided use and derivative immunity. As outlined in the statute, use immunity precludes the government from using the witness' statements against him or her, and derivative immunity bars the use of inculpatory evidence uncovered as a result of the statements. K.S.A. 22-3415(b)(2); see *Delacruz*, 307 Kan. at 534 (describing use, derivative, and transactional immunities). But a grant of statutory immunity cannot shield the recipient from prosecution for perjury based on the statements or other evidence he or she then provides. K.S.A. 22-3415(d).

So, as the district court correctly recognized, the grant of immunity to Lang would not extend to a new perjury charge based on her anticipated testimony in Adams' trial if it were comparable to her preliminary hearing testimony. And, as we have already explained, Lang faced a real and imminent danger that the prosecutor would charge her with perjury—for a second time—should she testify that way. In this quite unusual circumstance, Lang retained her constitutional privilege against self-incrimination notwithstanding the prosecutor's offer of immunity.

The immunity statute carves out perjury to avoid creating a license to testify falsely. That is, witnesses granted immunity in the run of cases are expected to testify truthfully and can be prosecuted for perjury if they do not. For those witnesses the apprehension of prosecution amounts to the sort of abstract or hypothetical concern that does not trigger the privilege against self-incrimination. But the prosecutor's strategy here to charge Lang with perjury for her preliminary hearing testimony created exactly the sort of real danger permitting an individual to invoke the privilege.

Neither the district court nor this panel is in a position to determine the truth or falsity of Lang's preliminary hearing testimony or of her anticipated trial testimony as against the account she gave the police officers. The task belongs to fact-finders—such as jurors—charged with that duty and having had the opportunity to observe Lang as she testifies. As we have explained:

"Sorting out testimonial inconsistencies and evaluating credibility is a function uniquely entrusted to jurors. And '[t]he judicial process treats an appearance on the witness stand, with the taking of an oath and the rigor of cross-examination, as perhaps the most discerning crucible for separating honesty and accuracy from mendacity and misstatement.' *State v. Bellinger*, 47 Kan. App. 2d 776, 787, 278 P.3d 975 (2012), *rev. denied* 298 Kan. 1204 (2013) (Atcheson, J., dissenting). The ability of the jurors to observe witnesses as they testify is integral to that evaluation. *State v. Scaife*, 286 Kan. 614, 624, 186 P.3d 755 (2008). Appellate courts have no comparable vantage point when they read a trial transcript, and that is precisely why they do not make credibility determinations." *State v. Franco*, 49 Kan. App. 2d 924, 936-37, 319 P.3d 551 (2014).

In advance of the trial, the district court was in no better a position to make any sort of credibility determination in sorting out Lang's conflicting accounts than we are now.

Consistent with the broad construction accorded the privilege, Lang faced a real danger of being prosecuted for giving what might be truthful testimony and, therefore, could invoke her right against self-incrimination. The magistrate judge's passing comment at the conclusion of the preliminary hearing to the effect he thought Lang's testimony was untruthful doesn't constitute a binding credibility determination. It is no more than oral dicta, since the magistrate judge was legally bound to view the evidence in the best light for the State and, thus, to resolve any discrepancies in the State's favor as a matter of law. See *Cadle Company II, Inc. v. Lewis*, 254 Kan. 158, 167, 864 P.2d 718 (1993) (district court's "gratuitous" comments that corporate officer was not holder in due course "not binding upon further consideration of this case"); *Anne H. v. Michael B.*, 1 Cal. App. 5th 488, 500, 204 Cal. Rptr. 3d 495 (2016) ("[T]here is no reason to require subsequent judges to adhere to an earlier judge's expression of views on issues that were not actually before him or her . . . [because] [s]uch a rule would grant arbitrary and unnecessary authority to judicial musings, as opposed to judicial decisions."); *People v. Wandell*, 143

A. D. 2d 446, 447, 532 N.Y.S.2d 442 (1988); see *State v. Rozell*, 315 Kan. 295, Syl. ¶ 2, 508 P.3d 358 (2022) ("[A] preliminary hearing judge does not pass on credibility, and, when the evidence conflicts, the judge must accept the version of the testimony most favorable to the State."); *State v. Bell*, 268 Kan. 764, 764-65, 1 P.3d 325 (2000) (same).

As the district court pointed out, a prosecutor typically would handle a recanting witness by calling the witness at trial and then introducing the witness' previous and conflicting statements inculpating the defendant as substantive evidence via the hearsay exception in K.S.A. 60-460(a). In their deliberations, the jurors would fulfill their fact-finding duty to sort out the worthy accounts from the unworthy and credit the worthy ones in reaching a verdict. See *Shannon v. United States*, 512 U.S. 573, 579, 114 S. Ct. 2419, 129 L. Ed. 2d 459 (1994) ("The jury's function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged."); *State v. Kemble*, 291 Kan. 109, 120, 238 P.3d 251 (2010) (noting role of jury in trial process as "the finder of facts"); *State v. Bellinger*, 47 Kan. App. 2d 776, 807, 278 P.3d 975 (2012) (Atcheson, J., dissenting) (juries "clean up those messes" involving differing accounts and recollections of events "by weighing evidence, evaluating credibility, and finding facts"). The prosecutor short-circuited the usual process by charging Lang with perjury for her preliminary hearing testimony and, in doing so, animated her constitutional privilege against self-incrimination.

In sum, we find the district court correctly held that Lang could assert her Fifth Amendment privilege against self-incrimination and, therefore, did not have to testify in Adams' trial.

Evidentiary Repercussions

Having permitted Lang to assert her Fifth Amendment privilege, the district court found her to be an unavailable witness. See K.S.A. 60-459(g)(1). As we have outlined, in completing its pretrial ruling, the district court nonetheless concluded the State could not offer Lang's preliminary hearing testimony in Adams' trial. The district court reasoned that the State had already taken the position that the testimony was false and, therefore, could not

present it to the jury during the trial, although the prosecutor undoubtedly intended to then offer Lang's out-of-court statements inculpating Adams—just as he had done at the preliminary hearing. The district court, in turn, thwarted that plan because without the preliminary hearing testimony, the out-of-court statements amounted to inadmissible hearsay.

The State has not appealed those aspects of the district court's ruling. They are, therefore, not in front of us. And, as a result, they are not binding going forward as law of the case. See *State v. Collier*, 263 Kan. 629, 632-33, 952 P.2d 1326 (1998) (law of the case directs that questions raised and decided on appeal bind parties in further proceedings in that case). They remain interlocutory determinations the district court may revisit.

Dissent Fails to Account for Key Circumstances of this Case

In opting for reversing the district court, the dissent offers a reductive assessment of the facts and the law that fails to account for a pair of critical circumstances setting this case apart from the run of cases applying self-incrimination and immunity doctrines: The prosecutor chose to charge Lang with perjury for her preliminary hearing testimony—testimony she presumably would have repeated at trial—and the inability of either the district court or this court to gauge Lang's truthfulness. The State's decision to formally place the heavy hand of a perjury prosecution on Lang in advance of her appearance as a witness at trial upends the governing law, given the demonstrable likelihood she would face an additional perjury charge for testifying as she already had.

We reemphasize that the constitutional privilege against self-incrimination permits an individual to refrain from making statements to government agents that would directly or indirectly support or advance a criminal prosecution of that individual. *Hiibel*, 542 U.S. at 190. So the protection shields against the burdens of facing criminal charges and not just the punitive consequences of a possible conviction. Those burdens include financial and emotional costs, intrusive bond conditions, and for individuals unable to post bail the complete loss of liberty as pretrial detainees. See *Barker v. Wingo*, 407 U.S. 514, 532-33, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972) (In assessing constitutional speedy trial rights, the

Court recognized that a criminal prosecution requires the accused to "liv[e] under a cloud of anxiety, suspicion, and often hostility" and often "oppressive pretrial incarceration."). Moreover, even a person who asserts his or her innocence may claim the privilege in the face of a material threat of prosecution. *Reiner*, 532 U.S. at 21.

The dissent's analysis rests on an unwarranted premise that Lang's preliminary hearing testimony was false and a repetition of that testimony at Adams' trial would, of course, also be false. And the dissent, therefore, characterizes the question at hand as "whether Lang can properly invoke the Fifth Amendment to avoid giving false testimony in the future." 64 Kan. App. 2d at 161. So without having seen Lang testify, the dissent concludes she lied during the preliminary hearing, and that credibility determination against Lang infuses its rationale and conclusion. But neither we nor the district court (which hadn't observed Lang testify) may properly determine she lied then and, as a substitute, invoke some divination of untruthfulness as a factual foundation to negate her right against self-incrimination.

Armed with its credibility determination against Lang, the dissent examines *Apfelbaum*, 445 U.S. 115, at great length. The exercise ultimately establishes that *Apfelbaum* is factually inapposite. There, Stanley Apfelbaum was suspected of assisting in a theft scheme. The federal prosecutor granted Apfelbaum immunity under a federal statute similar to K.S.A. 22-3415 before he testified in front of a grand jury. The grand jury later indicted Apfelbaum for two counts of perjury for making false statements in his testimony. The question before the United States Supreme Court was how much of Apfelbaum's immunized testimony the government could introduce against him at trial apart from the alleged perjurious statements themselves. The Court held that any otherwise relevant portions of Apfelbaum's grand jury testimony could be admitted at trial because he had faced no more than a "'trifling or imaginary' hazard of self-incrimination" when he was granted immunity in advance of testifying to the grand jury. 445 U.S. at 130-31.

The factual setting of *Apfelbaum* and the resulting legal issue bear little resemblance to Lang's situation. The circumstances

would be more nearly analogous if: (1) Apfelbaum had testified in front of the grand jury without immunity; (2) the United States Attorney then charged him with perjury for a material statement he made in that testimony; and (3) the United States Attorney then subpoenaed him to testify in a trial of another defendant and tendered a statutory grant of immunity that didn't cover perjury in his trial testimony. In that scenario—like the one confronting Lang—the threat of an additional perjury charge would be palpably real and would have presented a demonstrably different legal problem for the Court. There is no reason to assume—as the dissent does—that the rationale in *Apfelbaum* should necessarily govern the outcome here without explicitly accounting for those marked differences.

The failure to undertake that accounting fosters a misguided reasoning by analogy where a rule stated in one case is detached from its factual underpinnings and applied in another case with materially different facts. Upon examination, those differences may call for the rule from the initial case to be substantially modified or abandoned altogether as inapposite in the later case. See *Illinois v. Lidster*, 540 U.S. 419, 424, 124 S. Ct. 885, 157 L. Ed. 2d 843 (2004) (Language in judicial opinions should be read "as referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering."); *Armour & Co. v. Wantock*, 323 U.S. 126, 132-33, 65 S. Ct. 165, 89 L. Ed. 118 (1944). In *Armour*, Justice Robert Jackson admonished lawyers that "words of our opinions are to be read in the light of the facts of the case under discussion." 323 U.S. at 133. And he cautioned: "General expressions transposed to other facts are often misleading." 323 U.S. at 133. Professor Cass Sunstein more recently explained that "analogical reasoning can go wrong when . . . some similarities between two cases are deemed decisive with insufficient investigation of relevant differences." Sunstein, *On Analogical Reasoning*, 106 Harv. L. Rev. 741, 757 (1993).

The dissent effectively treats the prosecutor's decision to charge Lang with perjury as if it were of no legal or factual relevance in determining whether she then faced a real threat of an *additional* perjury charge if she were compelled to testify during

Adams' trial. As a result, the dissent builds its analysis on the notion that Lang's fear of future prosecution for perjury "is no different from the typical fear facing any other witness." 64 Kan. App. 2d 161. The assertion is blind to reality. The feared consequence—being charged with perjury—may be the same. But the chances of facing the consequence are wholly dissimilar.

As we have explained, the typical witness has only an abstract and entirely hypothetical chance of being charged with perjury. Lang had already been charged, and the prosecutor had voiced his position that if her trial testimony matched her preliminary hearing testimony a new charge would be warranted. In that circumstance, Lang properly could assert her constitutional right against self-incrimination in the face of a real threat of further prosecution. In short, when the prosecutor exercised his discretionary authority to charge Lang with perjury, his decision had multiple legal repercussions—among them, triggering various of Lang's constitutional rights including her privilege against self-incrimination. Conversely, had the prosecutor done nothing following the preliminary hearing, Lang would have been similarly situated with the dissent's "any other witness." See 64 Kan. App. 2d at 161.

The dissent likewise misfires in concluding the prosecutor's grant of immunity to Lang after charging her with perjury negates her privilege against self-incrimination. The dissent relies on the general rule that a grant of immunity is not a license to commit perjury. Though true, the proposition in its very generality fails to account for the peculiar circumstance where the government has already charged an individual with giving allegedly perjurious testimony and intends to place that individual in a position where he or she will face an additional perjury charge if he or she repeats the testimony in another proceeding. In that situation, the government would be actively and powerfully coercing a truthteller to renounce the truth—replicating the kind of fundamental governmental abuse the privilege against self-incrimination was intended to prevent.

Rather, the general proposition presumes individuals testifying with grants of immunity will adhere to the oath they take and will tell the truth. Carving out an exception from the grant of immunity to permit a prosecution for perjury based on that testimony

simply puts in place a sanction to promote the presumption. The incentive is a reasonable one. And a contrary rule—immunizing perjury—would entice at least some witnesses to give false testimony.

Here, however, the prosecutor has jumbled up the incentives in a way that would punish a particular rendition of relevant events without regard to the truth or falsity of the rendition. And the rub is that we cannot determine whether Lang may be a truthteller or a perjurer. Given that forced agnosticism, we should not fall back on a generality applicable in common circumstances quite unlike those we face where the government has interceded in an exceptionally punitive fashion to condemn Lang as a perjurer for a rendition of events it finds disadvantageous in prosecuting Adams in this case. The grant of immunity, thus, fails of its basic purpose—to incentivize truthful testimony.

Again, the circumstances would be different if there were a sound legal basis at this juncture to conclude Lang committed perjury when she testified at the preliminary hearing. We would have such a foundation if Lang had pleaded guilty to the perjury charge already lodged against her or a judge or jury had convicted her following a trial on that charge. Even compelling evidence of an out-of-court admission from Lang that she had lied during the preliminary hearing might be enough. But we have nothing of the sort from which to make a reasoned credibility determination.

The dissent also falls back on a pair of irrelevancies. First, the Court somewhat cryptically observed in *Apfelbaum* that "there . . . is no doctrine of 'anticipatory perjury,'" so a grant of immunity would not shield an individual intent on testifying falsely in the future. 445 U.S. at 131. Contextually, however, the comment doesn't have much bearing on Lang's situation. The Court noted that crimes typically require both a bad act and a bad intent. Perjury is such a crime. That's why a person who testifies honestly though inaccurately does not commit perjury. The Court linked its observation to the idea that a potential witness' intent to commit perjury would not itself create a real harm or danger triggering the privilege against self-incrimination in the first place. 445 U.S. at 131. But, as we have said, we are in no position to assess Lang's intent, and the prosecutor has already created the very real danger

Lang will face an additional perjury charge. We, thus, confront something quite different and more complex than a hypothetical witness' unarticulated design to testify falsely notwithstanding a grant of immunity.

Second, the dissent points out that if Lang were forced to testify in Adams' trial under a grant of immunity, her testimony could not then be used in the case the prosecutor has already filed against her. Again, that's true. But it has nothing to do with the issue we have been asked to decide—whether Lang can be compelled to testify at Adams' trial under a grant of immunity when the State has announced that a repetition of her preliminary hearing testimony would support an additional perjury charge against her.

Conclusion

The district court correctly permitted Lang to assert her Fifth Amendment privilege not to testify at Adams' trial. The State's offer of statutory immunity under K.S.A. 22-3415 was insufficient in the face of its decision to charge Lang with perjury for her preliminary hearing testimony and the likelihood she would have given comparable testimony during the trial. We, therefore, affirm the district court on the specific issue the State has appealed.

Affirmed.

* * *

ATCHESON, J., concurring: One aspect of this most unusual case begs for some elaboration beyond the majority opinion: The Ellis County District Court's evidentiary ruling on the effect of allowing Stephanie Lang to assert her constitutional right against self-incrimination in the criminal trial of Christopher Shawn Adams. In a bench ruling without much input from the parties, the district court concluded the State could not present Lang's preliminary hearing testimony and her out-of-court statements as evidence in Adams' trial. There appear to be weaknesses in that evidentiary ruling that we ought to explore further.

As the majority opinion outlines, the district court found that Lang could assert her right against self-incrimination, as guaranteed in the Fifth and Fourteenth Amendments to the United States Constitution, in the face of the prosecutor's decision to charge her

with perjury based on her preliminary hearing testimony. And the district court held that the prosecutor's grant of statutory immunity to Lang was insufficient to overcome her constitutional protection, so she could not be compelled to testify at Adams' trial. We properly have affirmed those determinations.

The district court, however, concomitantly prohibited the State from presenting at Adams' trial both Lang's preliminary hearing testimony and her recorded statements to law enforcement officers that were admitted as evidence during the preliminary hearing. Although the district court's determinations are related, the correctness of the self-incrimination ruling does not guarantee the correctness of the evidentiary ruling. For whatever reason, the State did not challenge the evidentiary ruling in this interlocutory appeal.

I would have preferred to invite the parties to brief the district court's decision to bar the introduction of the preliminary hearing evidence at Adams' trial. As I explain, there is good reason to question that determination. But without briefing from the parties, we should not and really cannot definitively address the point. Judicial decision-making depends upon the sharpened debate of legal adversaries offering competing arguments on a disputed issue, and we at the very least tarnish due process if we sidestep that exchange to reach an issue the parties have not addressed. See *United States v. Cronic*, 466 U.S. 648, 655-56, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) ("'The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.'") (quoting *Herring v. New York*, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 [1975]); *GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375, 382-83, 100 S. Ct. 1194, 63 L. Ed. 2d 467 (1980) ("The clash of adverse parties 'sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions.'"); *State v. Puckett*, 230 Kan. 596, 600-01, 640 P.2d 1198 (1982) (appellate court may raise and address issue "to serve the ends of justice" so long as parties have been given opportunity to brief matter); cf. *Trest v. Cain*, 522 U.S. 87, 92, 118 S. Ct. 478, 139 L. Ed. 2d 444 (1997) (suggesting "fairer . . . way home" calls for court to

request supplemental briefing if it intends to "dispose[] of a case on a basis not previously argued").

We do, however, have the judicial authority to take up the district court's evidentiary ruling if we seek the parties' input. *State v. Parry*, 305 Kan. 1189, 1191-92, 390 P.3d 879 (2017). Neither of my colleagues wishes to take that step. I recognize our prerogative should be exercised sparingly and arguably almost never in run-of-the-mill civil actions in which private parties are fighting over money or equitable relief through lawyers of their choosing. But there are good reasons to do so here. First, the district court's evidentiary ruling is intertwined with its decision to allow Lang to assert her Fifth Amendment privilege. Second, there are fair arguments rooted in Kansas law to doubt the evidentiary ruling. If the ruling were erroneous, its correction would likely obviate much of the State's distress over Lang's assertion of the privilege and would likely render this appeal moot, meaning we would not have to venture into the constitutional thicket that has enveloped us. See *Lyng v. Northwest Indian Cemetery Prot. Assn.*, 485 U.S. 439, 445-46, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988) (Courts should "avoid reaching constitutional questions in advance of the necessity of deciding them."); *State ex rel. Schmidt v. City of Wichita*, 303 Kan. 650, 658, 367 P.3d 282 (2016).

Because the evidentiary issue will remain open for reconsideration on remand, I offer my observations recognizing full well they may be off the mark, especially in the absence of the parties' studied legal arguments.

When the district court permitted Lang to assert her Fifth Amendment privilege, she became an unavailable witness under K.S.A. 60-459(g)(1). Lang's preliminary hearing testimony, therefore, fit within the hearsay exception in K.S.A. 60-460(c)(2). In precluding the State from offering Lang's preliminary hearing testimony at trial, the district court appeared to reason that the prosecutor presumably considered the testimony to be false, since it formed the basis for the perjury charge. So, in turn, the district court concluded the prosecutor would be acting improperly in presenting the testimony for the jurors' consideration. And without the preliminary hearing testimony, the prosecutor could not offer

Lang's out-of-court statements to the law enforcement officers inculpating Adams under the hearsay exception in K.S.A. 60-460(a).

The premise of the district court's evidentiary ruling seems faulty because parties may impeach witnesses they call. See K.S.A. 60-420; *Bicknell v. Kansas Department of Revenue*, 315 Kan. 451, 503, 509 P.3d 1211 (2022) ("Parties may even impeach their own witnesses at trial through their prior inconsistent statements."); *State v. Farley*, 225 Kan. 127, 131-32, 587 P.2d 337 (1978) (The State could call witnesses anticipating they would recant out-of-court statements they had given inculpating the defendant and, in turn, could then offer those inculpatory statements.); *State v. Ford*, 210 Kan. 491, 495-96, 502 P.2d 786 (1972). If Lang's preliminary hearing testimony were admitted at trial because of her unavailability, the State could then offer her out-of-court statements admitted at the preliminary hearing as substantive evidence. They would fall within the hearsay exception in K.S.A. 2023 Supp. 60-460(a). We may reasonably assume the State would invite the jurors to treat Lang's out-of-court statements inculpating Adams as credible evidence over her preliminary hearing testimony that pulled back from those statements.

The *Ford* decision is particularly instructive. A witness testified at trial in a way that exculpated Defendant Theodore Ford, but the State admitted inculpatory statements the witness had given earlier to law enforcement investigators. There was a mistrial, and the State could not locate the witness for the retrial. Over Ford's objection, the district court allowed the State to present the witness' testimony from the first trial and the out-of-court statements. The Kansas Supreme Court affirmed, recognizing that the witness' out-of-court statements "could well be viewed as an integral part of his testimony" and that "his testimony at the first trial would have been incomplete at best" without those statements. 210 Kan. at 496. The court distilled the rule this way: "Where the recorded testimony of an unavailable witness given at a former trial is properly admitted into evidence, it is not error to admit also a prior contradictory statement of such witness with which he was confronted and about which he was cross-examined at the former trial." 210 Kan. 491, Syl. ¶ 3. The rule would seem to apply here.

Likewise, Adams would not have a valid Confrontation Clause objection to the State presenting Lang's preliminary hearing testimony and her out-of-court statements to the police for the jury's consideration. The out-of-court statements were testimonial, triggering Adams' right under the Fifth Amendment to confront and question Lang about them. See *Crawford v. Washington*, 541 U.S. 36, 52-53 125 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). But testimonial statements of an unavailable witness may be admitted against a criminal defendant at trial if the defendant had an earlier opportunity to confront the witness. 541 U.S. at 68 ("Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."). At the preliminary hearing, Adams—through his lawyer—had an ample opportunity to question Lang about the relevant events and her statements to the law enforcement officers about those events. That opportunity satisfied his right to confront Lang, and he took advantage of the opportunity.

* * *

ARNOLD-BURGER, C.J., dissenting: I respectfully dissent. I believe the district court erred when it refused to compel Stephanie Lang to testify in Christopher Shawn Adams' criminal trial once she was granted use and derivative use immunity from the State. I would reverse the district court's decision and remand the case for trial. I would order that Lang be compelled to testify about the events that gave rise to these charges, although her testimony could not be used against her in her pending perjury case.

To fully understand the context of the decisions made by the State, Lang, the district court, and the majority, I believe it is necessary to set forth more than just the barebones factual recitation by the majority. So I will begin with more facts for context.

ADDITIONAL FACTS

There is no dispute that Richard Diehl was "sucker punched" in the lower teeth and jaw—busting his jaw, fracturing his nose, and breaking his four bottom teeth, all requiring surgery. He did not see or recognize the person who hit him. He hit the ground and

asked those surrounding him what had happened. Diehl believes he blacked out due to the force of the blow.

No one at the scene could identify who hit Diehl. Yet the descriptions were consistent—a shorter male, "maybe 5'2"; had chinstrap-style facial hair, goatee; and possibly red colored hair." One witness indicated that the male was accompanied by a "female wearing a gray sweatshirt with curly styled hair."

While officers were talking to witnesses, a domestic disturbance was reported at a nearby location. Officers responded to that scene.

Upon arrival Shilo Meska told Sargent Brandon Hauptman that he had reported the disturbance. Meska stated that he heard an argument behind his house and went to see what was going on. He observed Adams and Lang fighting and tried to break them up. As Meska tried to get in between them, Adams punched Meska in the face.

Master Patrol Officer Derick Nordell next contacted the female victim, Lang. Adams and Lang lived together and had been in a dating relationship for about a year. Lang told Nordell that she and Adams argued as they were walking home from the Sip and Spin. Adams grabbed her and threw her to the ground. Nordell noted that Lang had a visible scratch and a bruise had begun to form where she hit the ground and fell on her right elbow. She revealed that she called 9-1-1 as they were walking home through a cemetery.

Nordell asked Lang if Adams had been in a fight at the Sip and Spin and Lang said he had. She stated that she had been talking to Diehl and Diehl offered them a ride home. Then, out of nowhere, Adams punched Diehl in the face causing him to fall to the ground. Lang fit the description given by witnesses as the person accompanying the man that hit Diehl.

Hays Police Corporal Dakota Reese arrived at the couple's residence and found Lang in the back of Officer Nordell's patrol car. He approached Lang and started asking her questions about what happened at Sip and Spin. The conversation was recorded on both the in-car video in Nordell's patrol car and on Reese's body camera. Both recordings were admitted during the preliminary hearing in the case. Lang advised Reese that she saw Adams

"punch that man." She was standing next to Diehl at the time and walked away after it happened. She said she was mad at Adams for hitting Diehl.

There is also no dispute that Lang had been drinking that evening. As she was writing out her statement, Lang told Reese that she did not wish to pursue domestic battery charges against Adams and was starting to recant some of her prior statements. Reese advised her that regardless of the domestic battery charges, there was still a battery charge related to hitting Meska and an aggravated battery charge related to hitting Diehl that would be filed. Reese advised her that it would not be a good idea to have Adams around her children.

Officer Reese noted that apart from height—Adams was 5'7"—Adams otherwise matched the description the witnesses gave of the person who struck Diehl.

A. Adams is charged with aggravated battery against Diehl.

As promised, the State charged Adams with one count each of aggravated battery, domestic battery, and battery. The alleged victims of the crimes were Diehl, Lang, and Meska, respectively.

B. Lang tells a different story at the preliminary hearing.

Lang testified at Adams' preliminary hearing. She denied that she saw Adams punch anybody in the face. She said the officers had threatened to take her kids away and she may not have been truthful with them that evening. She relayed that she was very intoxicated at the time and although she remembers arguing with Adams, she did not recall the argument ever becoming physical. She later adjusted her testimony and said she simply did not remember what happened that evening. She said she had been drinking for "almost 12 hours" when the police questioned her. She remembered "checking the pulse of someone laying on the ground and then walking away." She said she did that because she is a nurse, and he was unconscious—but breathing. She assumed they were standing close to the man when he went to the ground. She testified she did not leave Sip and Spin with Adams. She stated she did not even see him again until the next morning. When asked

whether it would surprise her to learn she screamed for help during her 9-1-1 call, Lang said she would not be surprised by that because she had been walking alone by a cemetery a few hours after midnight. Finally, she testified that she tried to see her statement the next day to correct it but was denied that opportunity.

C. The district court finds Lang's testimony to be untruthful.

In closing, the State argued:

"[I]t's complete and total nonsense that Ms. Lang is now testifying today that she doesn't remember anything. She knows what happened that night, and she gave statements of what happened that night that are part of the recording that was admitted into evidence. She identified [Adams] as being the one who hit Richard Diehl in the face breaking his jaw and teeth."

Ultimately, the district court agreed with the State. It found the testimony of Diehl and Reese believable, while it specifically found Lang's to be untruthful. The district court found it implausible that Lang would remember checking a man's pulse but hardly anything else. And so the district court found probable cause to bind Adams over on the felony charge of aggravated battery.

D. The State charges Lang with perjury.

Following the preliminary hearing, the State charged Lang with perjury, or, in the alternative, interference with law enforcement. Its theory of the case was that Lang either lied during the preliminary hearing (perjury) or she lied to police at the time she spoke to them (interference with law enforcement).

E. Lang reveals her plan to invoke her Fifth Amendment privilege against self-incrimination at Adams' trial.

A few days before Adams' criminal trial was scheduled to begin, Lang's attorney notified the district court that Lang planned to invoke her Fifth Amendment privilege against self-incrimination if called as a witness due to her pending perjury charge. Lang's counsel explained that Lang would invoke her Fifth Amendment privilege *even if* the State offered use and derivative use immunity because such immunity would not be coextensive with her privilege against self-incrimination under the circumstances.

On the day of trial, the State provided the district court with the written grant of use and derivative use immunity. As promised, despite the grant of immunity, Lang told the district court she planned to invoke her Fifth Amendment privilege and not testify at trial.

F. The district court declares Lang unavailable, declines to compel her to testify, and excludes her preliminary hearing testimony from Adams.

After considering the positions of both Lang and the State, the district court found that Lang was an unavailable witness. In so finding, the district court concluded that the State could not grant immunity for perjury, including "post perjury, current perjury, or future perjury," and Lang had a Fifth Amendment privilege against self-incrimination. Accordingly, the court would not force her to testify and, inexplicably, the district court prohibited the State from introducing Lang's statements to law enforcement and her preliminary hearing testimony even though she had been effectively declared an unavailable witness. See *State v. Showalter*, 318 Kan. 338, Syl. ¶ 3, 543 P.3d 508 (2024) (Hearsay testimonial evidence in criminal prosecutions is admissible under the Confrontation Clause of the Sixth Amendment when the witness is unavailable, and the accused had a prior opportunity to cross-examine the witness.). The district court then granted the State's request for a continuance to pursue an interlocutory appeal.

The next day, the district court held another hearing that allowed the State to make a proffer of evidence. The State began by arguing that the district court's ruling declaring Lang an unavailable witness effectively suppressed the State's evidence in the case because the district court ruled Lang did not have to testify *and* excluded her out-of-court statements. The State then proffered that there would have been two police officers, including Reese, that would have testified that Lang made statements to them during their investigation. Those statements were recorded, which the State planned to use as exhibits during trial.

The State asserted that the video recordings depicted Lang identifying Adams as her boyfriend and saying that he got into a fight when they were leaving the bar. The video also depicted

some of Lang's bodily injuries, which she sustained after Adams grabbed her and threw her to the ground. Similarly, the State asserted that the audio recordings depicted Lang's interactions with Reese. During that conversation, Lang said that Adams grabbed her by the arm. The audio recordings also depicted Lang getting emotional about the possibility of Adams facing charges at which point she began diminishing her statements and recanting.

The State also proffered that it planned to call one of Lang's sons to testify. The State believed the son would have testified to overhearing statements made by Lang during the night of the underlying events. The State believed the son would also have testified about overhearing another conversation between Adams and Lang about a month after the underlying events where Lang asked Adams why he hit the man in the bar and Adams provided an explanation. In sum, the State argued that, because this evidence had been suppressed, the State could no longer prosecute its case. I agree with the majority that there was a proper basis to accept this interlocutory appeal.

THE DISTRICT COURT ERRED BY NOT COMPELLING LANG'S TESTIMONY

The State argues the district court erred by concluding that the State's grant of use and derivative use immunity to Lang was not coextensive with her Fifth Amendment privilege against self-incrimination.

The majority finds the district court was correct—that because the prosecutor charged Lang with perjury for her preliminary hearing testimony, she faced the "substantive and immediate prospect of a new criminal charge" if she testified in the same manner at trial as she did at preliminary hearing. 64 Kan. App. 2d at 138. Therefore, she "had a Fifth Amendment privilege to avoid placing herself in that position." 64 Kan. App. 2d at 138. I agree the Fifth Amendment protects Lang from being compelled to testify at trial in a way that could be used to bolster the State's pending perjury case against her. But where I part company with the majority is its belief that Lang can properly invoke the Fifth Amendment privilege to avoid a subsequent perjury charge based on the testimony

she may give at trial. 64 Kan. App. 2d at 137-38. This is an interpretation of Fifth Amendment jurisprudence that is both unsupported by the caselaw and overly broad.

A. Truth or consequences are at the core of our system of justice.

"All oaths and affirmations alike subject the party who shall falsify them to the pains and penalties of perjury." K.S.A. 54-105.

The above requirement has been in our Kansas state statutes since statehood. Any witness who testifies subjects themself to the possibility they could be charged with perjury. It is clearly a statute that is intended to place the fear of punishment front and center in the mind of any witness who may be tempted to lie.

"[T]he oath or affirmation required of a witness nevertheless constitutes a strong reminder that he has a special obligation to testify truthfully and that he is subject to punishment should he fabricate. The ceremony in whatever form must embrace the commitment to tell the truth out of fear of punishment. [Citations omitted.]" *State v. Caraballo*, 330 N.J. Super. 545, 555, 750 A.2d 177 (2000).

Witnesses are advised every day in courtrooms around the country in both civil and criminal trials about the importance of testifying truthfully. It is not at all unusual for a witness to be reminded by the judge or the attorney doing the questioning that they could face perjury charges if they violate their oath to tell the truth. This is often, though not always, used as a strategy by counsel when counsel expects that the witness may be tempted to lie—requiring a reminder. So threatening a witness with the real possibility that they may be criminally charged if they do not testify truthfully—either in the courtroom or prior to trial—does not allow the witness to assert a Fifth Amendment privilege against testifying. If that were enough, the search for the truth in courtrooms around this country would come to a screeching halt. See *In re Michael*, 326 U.S. 224, 227, 66 S. Ct. 78, 90 L. Ed. 30 (1945) ("All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth.").

B. Lang has no privilege against self-incrimination for untruthful testimony, regardless of whether the core of the testimony is immunized.

Lang seeks to shield herself from testifying because she asserts that if she testifies the same way she did in the preliminary hearing—

testimony that at least one fact-finder has already found to be disingenuous—she may be prosecuted for it. It is as basic as that.

As the majority notes, the United States Supreme Court has furnished a "'basic test'" for invoking the privilege against self-incrimination: "'[W]hether the claimant is confronted by substantial and "real," and not merely trifling or imaginary, hazards of incrimination.'" *United States v. Apfelbaum*, 445 U.S. 115, 128, 100 S. Ct. 948, 63 L. Ed. 2d 250 (1980) (quoting *Marchetti v. United States*, 390 U.S. 39, 53, 88 S. Ct. 697, 19 L. Ed. 2d 889 [1968]). 64 Kan. App. 2d at 137. The majority then concludes that Lang could invoke the Fifth Amendment to avoid testifying at trial based on the prosecutor's charging decision because she "faced about as clear a hazard of being prosecuted anew for her consistent testimony as might be imagined." 64 Kan. App. 2d at 138. In other words, she faces a real possibility of being charged anew with perjury or with interference with a police officer if she testifies the same way she did in the preliminary hearing. By allowing Lang to shield herself in this way, the majority makes a critical error by discounting relevant caselaw discussing the Fifth Amendment privilege against self-incrimination as applied to a potential perjury charge. And *Apfelbaum* is instructive.

In *Apfelbaum*, the defendant was compelled to testify after being given a grant of immunity regarding his involvement in a staged robbery at a car dealership. During his testimony he denied telling FBI agents that he had loaned $10,000 to one of the owners of the dealership. And he denied that he had gone looking for the same individual while on a trip in Ft. Lauderdale. Both statements were false. So Apfelbaum was charged with knowingly making these false statements. The prosecution introduced a significant amount of the otherwise immunized testimony in Apfelbaum's perjury trial for contextual purposes. The Third Circuit reversed Apfelbaum's conviction, holding that the Government could only use the "Corpus delicti" or "core" of the statements made under a grant of immunity to support a perjury charge. *United States v. Apfelbaum*, 584 F.2d 1264, 1265 (3d Cir. 1978) (relying on *Kastigar v. United States*, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 [1972]).

The United States Supreme Court granted certiorari to address a split among the circuit courts on that issue, which consisted of three conflicting views: (1) the corpus delicti approach recognized

by the Third and Seventh Circuits; (2) allowing introduction of false immunized testimony only, the view recognized by the Second and Tenth Circuits; and (3) allowing introduction of any immunized testimony, the view recognized by the Sixth and Eighth Circuits. See *Apfelbaum*, 445 U.S. at 119 n.5 (discussing holdings). Writing for the Court, Justice Rehnquist concluded that the federal immunity statute "makes no distinction between truthful and untruthful statements made during the course of the immunized testimony. Rather, it creates a blanket exemption from the bar against the use of immunized testimony in cases in which the witness is subsequently prosecuted for making false statements." 445 U.S. at 122. In other words, the Court rejected the limitation placed on the use of immunized testimony by the Third Circuit in reversing Apfelbaum's conviction.

Elaborating on its rationale, the Court then addressed several flaws in the appellate court's reasoning. To begin with, the Court explained that the proper focus for determining whether a grant of immunity is coextensive with the Fifth Amendment does not require treating the witness as if they had remained silent. 445 U.S. at 125-27. Rather, the focus should be on the "protections conferred by the privilege," which reflects "the fact that immunity statutes and prosecutions for perjury committed during the course of immunized testimony are permissible." 445 U.S. at 127. Yet, the perjury exception in 18 U.S.C. § 6002 was not without limits precisely because immunized testimony "remains inadmissible in all prosecutions for offenses committed prior to the grant of immunity that would have permitted the witness to invoke his Fifth Amendment privilege absent the grant." *Apfelbaum*, 445 U.S. at 128; see also *United States v. DeSalvo*, 26 F.3d 1216, 1220-21 (2d Cir. 1994) (recognizing that *Apfelbaum* did not change the general rule that immunized testimony cannot be used in a prosecution for perjury committed *prior* to the grant of immunity).

Then, as noted above and by the majority, the Court reaffirmed the basic test for assessing the scope of the Fifth Amendment privilege as looking to "'whether the claimant is confronted by substantial and "real," and not merely trifling or imaginary, hazards of incrimination.'" *Apfelbaum*, 445 U.S. at 128 (quoting *Marchetti*, 390 U.S. at 53); 64 Kan. App. 2d at 137. Yet the Court then concluded that the Fifth

Amendment did not prevent using Apfelbaum's immunized testimony "because, at the time he was granted immunity, the privilege would not have protected him against false testimony that he later might decide to give." 445 U.S. at 130. In other words, "a future intention to commit perjury or to make false statements . . . is not by itself sufficient to create a 'substantial and "real"' hazard that permits invocation of the Fifth Amendment." *Apfelbaum*, 445 U.S. at 131 (citing *Rogers v. United States*, 340 U.S. 367, 71 S. Ct. 438, 95 L. Ed. 344 [1951]; *Brown v. Walker*, 161 U.S. 591, 16 S. Ct. 644, 40 L. Ed. 819 [1896]); see also *Brogan v. United States*, 522 U.S. 398, 404, 118 S. Ct. 805, 139 L. Ed. 2d 830 (1998) ("[N]either the text nor the spirit of the Fifth Amendment confers a privilege to lie.") (citing *Apfelbaum*, 445 U.S. at 117).

As the United States Supreme Court also observed in *Glickstein v. United States*, 222 U.S. 139, 142, 32 S. Ct. 71, 56 L. Ed. 128 (1911):

> "[I]t cannot be conceived that there is power to compel the giving of testimony where no right exists to require that the testimony shall be given under such circumstances and safeguards as to compel it to be truthful. In other words, this is but to say that an authority which can only extend to the licensing of perjury is not a power to compel the giving of testimony. Of course, these propositions being true, it is also true that the immunity afforded by the constitutional guaranty relates to the past, and does not endow the person who testifies with a license to commit perjury."

Our statutes define perjury as intentionally and falsely testifying to any material fact in any court proceeding after being placed under oath. K.S.A. 21-5903. And like the federal statute at issue in *Apfelbaum*, Kansas law exempts perjury prosecutions from the general prohibition against using immunized testimony or evidence derived from such testimony against a witness. K.S.A. 22-3415(d) ("No immunity shall be granted for perjury . . . which was committed in giving such evidence."). Contrary to the district court's conclusion, K.S.A. 22-3415(d) did not prevent the State from granting Lang immunity for her trial testimony because the grant of immunity would only apply to her prior conduct. Rather, the exception reflects the *Apfelbaum* Court's recognition that perjury prosecutions based on immunized testimony are specifically allowed under the Fifth Amendment.

Now, the majority agrees with Adams that the prosecutor's strategy here created a real and immediate danger of new perjury charges, thus permitting her to invoke her right against self-incrimination. 64 Kan. App. 2d at 140. But as *Apfelbaum* shows, the Fifth Amendment

jurisprudence contains "no doctrine of 'anticipatory perjury.'" 445 U.S. at 131. Granted, the procedural posture of this case differs from *Apfelbaum*, in that Lang is not challenging a perjury conviction based on testimony given under a grant of immunity. But the question before this court—whether Lang can properly invoke the Fifth Amendment to avoid giving false testimony in the future—is nonetheless answered by *Apfelbaum*.

Lang asserted her right against self-incrimination because she feared her testimony would be used against her in her pending case and she feared being prosecuted in the future for perjury based on that same immunized testimony. But the later fear is no different from the typical fear facing any other witness. While she may have been better off remaining silent, that is merely a benefit derived from invoking the Fifth Amendment and not a protection conferred by the privilege against self-incrimination. 445 U.S. at 126-27; see also *State v. Morales*, 788 N.W.2d 737, 750 (Minn. 2010) (holding witness who was granted use immunity did not have a valid Fifth Amendment privilege based on fear of a perjury prosecution).

So, to sum up, the Fifth Amendment does not protect individuals from prosecution for perjury committed while under or after a grant of immunity. Thus, Lang cannot assert such a privilege to avoid testifying in fear of future perjury charges based on her immunized testimony. Stated another way, even when granted immunity, a witness must still testify truthfully or face sanctions, whether that be contempt findings or new charges. So the chance that Lang could be charged with perjury, for any untruthful testimony in the criminal trial, does not justify exercising her Fifth Amendment privilege against self-incrimination and avoiding compelled testimony in Adams' trial.

C. Lang can assert her privilege against self-incrimination only as it relates to her pending perjury charges.

The purpose of immunity statutes is to accommodate the imperatives of the Fifth Amendment privilege while recognizing the government's legitimate need to compel testimony from citizens. See *Kastigar v. United States*, 406 U.S. 441, 445-46, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972). The State can remove the fear of incrimination and compel testimony if it grants the witness immunity in return for the witness' testimony. But not all grants of immunity will satisfy the constraints of

the right against self-incrimination. There are three recognized types of immunity: (1) "'transactional,'" (2) "'use and derivative use,'" and (3) "'use.'" *Cabral v. State*, 19 Kan. App. 2d 456, 460, 871 P.2d 1285 (1994).

"'Transactional' immunity protects the witness from prosecution for offenses to which the compelled testimony relates. This type of immunity is broader than the constitutional privilege against self-incrimination and need not always be granted, although it does, of course, constitute adequate immunity." 19 Kan. App. 2d at 460-61.

"'Use and derivative use' immunity protects the witness from the use of compelled testimony and evidence derived therefrom. It is coextensive with the constitutional privilege against self-incrimination and is therefore a sufficient grant of immunity to compel self-incriminatory testimony. On the other hand, mere 'use' immunity, which only prevents the prosecution from using the compelled testimony in any criminal proceeding, is not constitutionally adequate since it does not prevent prosecuting authorities from making derivative use of the fruits of a witness' compelled testimony by obtaining investigatory leads from it." 19 Kan. App. 2d at 461.

The United States Supreme Court has held that if the government wants to compel testimony from a witness claiming the Fifth Amendment privilege against compulsory self-incrimination, it must grant the witness at least use and derivative use immunity. *Kastigar*, 406 U.S. at 453-54. Here, the State granted Lang use and derivative use immunity.

But the district court held that the immunity granted was not coextensive with the scope of Lang's Fifth Amendment privilege, so the court would not compel her testimony Moreover, even though declared an unavailable witness, the district court would not allow her preliminary hearing testimony to be admitted. The court elaborated in response to protests from the State, that because the judge had found she lied at preliminary hearing "[w]e certainly don't want to put lies in front of the jury. So we can't use her testimony from prelim." So let's break that down a little.

Courts have often described a requirement that whatever immunity is granted to a witness it must be coextensive with the scope of the privilege. Coextensive is defined as "having the same extent in time or space." Webster's New World College Dictionary 290 (5th ed. 2018). So the immunity must protect the same con-

duct that the Fifth Amendment would protect under the same circumstances. Generally, use and derivative use immunity are coextensive with the Fifth Amendment—and the United States Supreme Court has so held. *Kastigar*, 406 U.S. at 453. And important here, the immunity need not be broader than the Fifth Amendment protections granted a witness. 406 U.S. at 453.

I think we can all agree that if Lang had not been charged with anything, she could not refuse to testify because the judge and prosecutor thought she was lying at preliminary hearing—even if they expressed their beliefs on the record. She would have no Fifth Amendment privilege against perjuring herself again at the trial—a new crime. A witness has no constitutional privilege that allows them to present false testimony in court. And as we have already established, a witness cannot be granted immunity for perjury.

So rather than continue to argue over the scope of Lang's Fifth Amendment privilege, the prosecutor offered to dismiss the perjury charges against Lang with prejudice so that the trial could proceed. The court found that would not be enough. The court reasoned that "because if she testifies in a manner [at trial] that you believe is perjury, you can't grant immunity for that, and she could still be charged with her testimony today for perjury." The court went on to state that to compel Lang's testimony, the State would have to "[c]ompletely resolve her case, whether that be a plea or by trial. You are going to have to resolve her case before she can be a witness in this case." The State pointed out the inconsistency in such a position—the State could not dismiss the case and compel Lang's testimony, but if her case was resolved by plea or trial, they could compel her testimony. The prosecutor emphasized that he was not granting her immunity from perjury, he was simply against her at her perjury trial. "I'm expected to prove my perjury case without any statement from this trial."

Here, Lang has been charged with perjury or interference with a law enforcement officer for her testimony at the preliminary hearing. In support of that charge, the State is claiming either she lied to police during their investigation on the night of the incident or she lied during her testimony at the preliminary hearing. Lang has now been subpoenaed to testify in Adams' criminal trial where, we are speculating that, she will offer the same testimony

as given in the preliminary hearing. Thus, Lang invoked her privilege against self-incrimination, partly in fear that her testimony will be used to bolster the existing perjury or interference charges—an understandable and well-advised strategic move on Lang's part.

But as discussed above, once the State granted Lang immunity any testimony Lang gives under the grant of immunity at Adams' trial would be inadmissible during a prosecution for offenses committed before the grant of immunity. *Apfelbaum*, 445 U.S. at 128. More recently, this court reiterated that, by granting a witness use and derivative use immunity, "the State could not use his trial testimony, if true, to convict him of any crime, including perjury for any contrary statements made during his preliminary examination." *State v. Martinez-Diaz*, 63 Kan. App. 2d 363, 379, 528 P.3d 1042 (2023). So if she testifies differently than she testified at the preliminary hearing—for example, if she says she did see Adams hit Diehl or she does not remember but she has no reason to doubt what she said then—that testimony could not be used to show Lang committed perjury at the preliminary hearing. Thus, the State's grant of immunity prevented the State from using any of Lang's trial testimony against her in *her* pending criminal case. Whether her testimony at Adams' trial is the same or different or whether it is truthful or deceitful, will have to stand on its own. And, contrary to the majority's mischaracterization of my analysis, I offer no opinion related to the truthfulness of her prior testimony, nor does my analysis rest on any such "unwarranted premise." 64 Kan. App. 2d at 143.

And contrary to the district court's finding, the use and derivative use immunity provided by the State did not afford Lang *less* protection than her Fifth Amendment privilege against compulsory self-incrimination. In fact, I would assert it is the district court, Lang, and the majority that attempts to require a *broader* grant of immunity than is required to compel Lang's testimony. This court has stated that for a grant of immunity to be coextensive with the Fifth Amendment, "the immunity must insulate the witnesses as to all *prior* criminal conduct." (Emphasis added.) *State v. Brewer*, 11 Kan. App. 2d 655, 660, 732 P.2d 780 (1987) (citing *Kastigar*, 406 U.S. 441; *In re Birdsong*, 216 Kan. 297, 299-300,

532 P.2d 1301 [1975]), *abrogated on other grounds by State v. Schoonover*, 281 Kan. 453, 133 P.3d 48 (2006). The use and derivative use immunity provided by the State afforded Lang the necessary insulation. It protected her from the use of her testimony at Adams' trial against her during her own trial for a prior perjury.

In sum, the *Kastigar* Court held that "immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege." 406 U.S. at 453. Here, neither the district court nor Lang nor the majority provide any support for the notion that the principle does not apply when a witness has been charged with perjury. As a result, the district court erred by finding that Lang retained her Fifth Amendment privilege to testify despite the State's grant of immunity.

(547 P.3d 531)

No. 125,734

AUSTIN PROPERTIES, LLC, *Appellant*, v. CITY OF SHAWNEE, KANSAS, *Appellee*.

SYLLABUS BY THE COURT

1. ZONING—*Broad Zoning Ordinances May Be Enacted by Cities and Counties*. Cities and counties may enact broad zoning ordinances and procedures so long as they do not violate state zoning statutes.

2. SAME—*Applications for Multi-family Residential Developments May Be Treated as Zoning Amendments.* State zoning statutes do not prohibit zoning authorities from treating applications for multi-family residential planned unit developments as zoning amendments governed by K.S.A. 12-757.

3. SAME—*Protest Provisions of Statute Apply to Multi-family Residential Development Applications*. Zoning authorities are not prohibited from applying the protest provisions of K.S.A. 12-757(f)(1) to multi-family residential planned unit development applications.

4. SAME—*Valid Protest Petition Filed against Zoning Amendment—3/4 Majority Vote Required for Zoning Authority to Approve*. When neighbors file a valid protest petition against a zoning amendment pursuant to K.S.A. 12-757(f), the zoning authority can only approve the amendment by a 3/4 majority vote.

5. SAME—*Resubmission of Failed Zoning Amendments Inapplicable if Protested Zoning Amendment Not Approved by 3/4 Majority Vote*. If a zoning authority fails to approve a protested zoning amendment by 3/4 majority vote, the protested zoning amendment is denied, and the processes for resubmission of failed zoning amendments in K.S.A. 12-757(d) are inapplicable.

6. SAME—*Factors in* Golden v. City of Overland Park *May Be Considered When Zoning Authorities Evaluating Zoning Amendments*. Zoning authorities are strongly encouraged, although not required, to consider and document the factors enumerated in *Golden v. City of Overland Park*, 224 Kan. 591, 584 P.2d 130 (1978), when evaluating zoning amendments. Zoning authorities may consider some *Golden* factors more important than others and are not limited to the factors enumerated in *Golden* for their zoning decisions.

7. SAME—*Zoning Decisions May Not Be Based on Unsupported Generalities*. Zoning authorities cannot rely on unsupported generalities or a plebiscite of neighbors when making zoning decisions.

Appeal from Johnson District Court; JAMES F. VANO, judge. Oral argument held August 15, 2023. Opinion filed April 26, 2024. Affirmed.

Melissa Hoag Sherman and *Lewis A. Heaven, Jr.*, of Spencer Fane LLP, of Overland Park, for appellant.

Andrew D. Holder, of Fisher, Patterson, Sayler & Smith, LLP, of Overland Park, for appellee.

Before WARNER, P.J., GARDNER and HURST, JJ.

HURST, J.: Austin Properties, LLC (Austin) submitted an application to the City of Shawnee (the City) to develop a "high-end" multi-family residential planned unit development on approximately 29 acres near Highway K-7 and Woodsonia Drive. Unfortunately for Austin, an overwhelming number of neighbors filed a protest petition opposing Austin's application, thus requiring the City to achieve a three-fourths (3/4) majority vote for approval of Austin's application. After failing to achieve the requisite super majority vote for approval, Austin's proposal failed to pass. Austin sought judicial review and the district court upheld the City's decision. Austin now appeals, claiming the district court erred.

Along with determining the reasonableness of the City's decision to not approve Austin's development, this case presents novel questions about the City's application of state zoning statutes to its application process for mixed residential planned unit developments. Ultimately, the broad authority and discretion of zoning authorities supports the City's decisions on each issue. The City may enact zoning ordinances—that are not inconsistent with state zoning statutes—to its application process for planned unit developments for mixed residential use. Although not how most people characterize rezoning, the City is permitted to treat applications for planned unit developments as requests for rezoning and apply statutes and ordinances accordingly. Additionally, this court cannot say the City acted unreasonably when it denied Austin's proposed development. While there is no doubt this court's review, and likely the credibility and reliability of the City's zoning decisions, would benefit from a more complete explanation of its rationale for denying Austin's application, there is sufficient information in the record to demonstrate the reasonableness of the City's decision.

The district court's decision is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

Austin owns 29.2 acres of undeveloped land (the Subject Property) in the 5100 to 5300 blocks of Woodsonia Drive in the City of Shawnee in Johnson County. Most of the Subject Property is bounded by 51st Street to the north, Woodsonia Drive to the east, 53rd Street to the south, and Highway K-7 to the west. A small parcel of the Subject Property is located just south of 53rd Street. The elevation of the Subject Property declines as it nears Highway K-7.

The City's 1996 Approved Use for the Subject Property

J.C. Nichols Company previously owned property that included the Subject Property, and the City granted its rezoning request from agricultural use to planned mixed residential use in 1996. That 1996 rezoning included approval for construction of a multi-family and townhome development of 330 garden level multi-family units in 33 buildings and 68 townhome units in a combination of two-, three-, and four-plex buildings on 44.6 acres. The overall density of the 1996 approved plan was approximately 8.9 dwelling units per acre (du/acre). However, the approved 1996 plan was never developed, and the Subject Property was later acquired by Rodrock Homes (Rodrock).

The City's 2002 and 2004 Approved Use for the Subject Property

In 2002, the City approved Rodrock's development plan for the Subject Property which contained 224 townhome units in 57 buildings and 137 single-family cottage units on 43.7 acres. The overall density of Rodrock's plan was approximately 8.3 du/acre. But a subsequent land acquisition and development plan by the State affected the Subject Property and made Rodrock's 2002 plan no longer feasible. In 2004, Rodrock obtained the City's approval for yet another development plan for the Subject Property which contained 314 townhome units in 111 buildings on 43.7 acres, yielding an overall density of approximately 7.2 du/acre. However, later State action also rendered this development plan infeasible. Austin eventually acquired the Subject Property before any development occurred.

The Current Property Development Dispute

The Subject Property is currently zoned planned unit development mixed residential use (PUDMR). The land to the north and east of the Subject Property is zoned single-family residential use and contains single-family homes located in the Woodsonia subdivision. Land to the south of the Subject Property is zoned commercial highway use (CH) and PUDMR. The southern land zoned CH is developed with office and retail uses in the Woodsonia West Center, and a newly constructed fire station and under-construction daycare facility are located on part of the southern land zoned PUDMR. The remaining portion of the southern land zoned PUDMR is undeveloped but approved for townhomes.

The City's Future Land Use Map within its Comprehensive Plan (the Comprehensive Plan) designates the Subject Property for development with a mix of high- and medium-density residential uses. The Comprehensive Plan contemplates that the highest density be on the western side of the Subject Property adjacent to Highway K-7 and medium density be on the eastern side next to Woodsonia Drive. The City's Comprehensive Plan defines high-density residential uses as between 10 and 15 du/acre and medium-density residential uses as between 5.01 and 10 du/acre.

In 2019, Austin applied for approval of a new preliminary development plan—the "Woodsonia West Multi-Family Development" (the Woodsonia West Development)—and the necessary "rezoning" of the Subject Property from PUDMR to PUDMR. As explained below, the City defines applications for PUDMR as requests for rezoning or zoning amendments. Austin's Woodsonia West Development spanned 29.2 acres and contained 42 townhome units in 14 triplex buildings and 384 multi-family units in 16 multi-story apartment buildings, yielding 426 units with an overall density of approximately 14.6 du/acre.

The City Planning Commission's Report on Austin's Woodsonia West Development

The City Planning Commission prepared a staff report (the Report) in which it summarized the impact of Austin's proposed development and found it "should have little, if any, detrimental effect upon the surrounding properties." The Report summarized feedback from the USD 232 School District, which provided there was ample student

capacity without changing any boundaries and that "[t]he School District has planned for this type of growth and has indicated it will not negatively affect their services." The City staff relied on Austin's traffic impact study prepared by traffic engineers to conclude that "the street network adjacent to the proposed development is currently well under capacity and the extra traffic generated by the development will have little to no impact on roadway level of service as a result." The City's Transportation Manager reviewed Austin's traffic study and testified at a City Council meeting that he agreed with its conclusions and the routes in and around the neighborhood were "built to handle additional traffic."

The Report ultimately recommended approval of Austin's Woodsonia West Development. The Report explained:

"Denial of the request would not appear to benefit the health and welfare of the community. The property has been zoned PUDMR for multi-family uses since 1996. Staff believes the proposed development conforms to the Future Land Use Guide of the Comprehensive plan by providing a desirable residential transition/buffer from existing single-family homes to townhomes to multi-family buildings along K-7 Highway. The use of the Planned Unit Development allows for a mixture of differing residential types while governing building materials and site layout to provide a more cohesive, quality development. The development is a high quality plan that provides a variety and mixture of housing stock as a unified, cohesive community. The multi-family uses add to an increase in population needed to help attract and sustain desired restaurants and retail uses.

. . . .

"Staff is supportive of the project and the efforts the developer has made in creating a quality multi-family plan that provides a variety and mixture of housing stock as a unified, cohesive community. Staff believes the plan conforms to the Future Land Use Guide of the Comprehensive Plan by providing a desirable residential transition/buffer from existing single-family homes to townhomes to multi-family along K-7 Highway. The use of the Planned Unit Development allows for a mixture of differing residential types, while governing building materials and site layout to provide a more cohesive, quality development. The multi-family dwellings create an increase in population, which is needed to help attract and sustain desired restaurants and retail uses in this area of Shawnee.

"Staff recommends approval . . . ."

In November 2019, the Planning Commission held a public meeting where it heard evidence and testimony about Austin's application and it ultimately voted unanimously to recommend approval of Austin's Woodsonia West Development. Following the

Planning Commission's recommendation of approval, neighboring property owners filed a protest petition. The City determined the protest petition triggered a requirement that Austin's application required at least a 3/4 majority vote of the City Council for approval. See Shawnee Municipal Code of Ordinances (S.M.O.) § 17.92.030(E)(6).

The December 2019 City Council Meetings

The City Council first considered Austin's Woodsonia West Development application at a public meeting on December 9, 2019. After hearing evidence and testimony, the City Council voted to continue the matter for two weeks to allow Austin time to meet and consult neighboring property owners regarding their concerns. Before the next City Council meeting, the City's Community Development Director issued a memorandum outlining Austin's efforts to address the neighboring property owners' concerns and describing the resulting modifications to the proposed development plan. Austin modified the development plan by reducing the number of units from 426 to 413, comprised of 362 apartments and 51 townhomes, thereby decreasing the overall density to 14.1 du/acre.

The City Council again considered Austin's application at its next public meeting on December 23, 2019, and took a vote after receiving evidence and testimony. Four councilmembers—Matt Zimmerman, Jim Neighbor, Mickey Sandifer, and Lindsey Constance—voted to approve Austin's application. Four councilmembers—Eric Jenkins, Mike Kemmling, Stephanie Meyer, and Lisa Larson-Bunnell—voted to deny Austin's application. The City Council therefore advised Austin that its Woodsonia West Development application was not approved because it failed to receive the requisite 3/4 majority vote from the City Council.

Judicial Review of the City's Denial

Austin petitioned for judicial review, challenging the City's denial under two general categories: (1) the City Council's decision was unreasonable; and (2) the City Council's decision was invalid because it failed to follow the zoning procedures required by state law. Austin later deposed the four councilmembers who

voted against approving its application. Between the two City Council meetings and their depositions, the councilmembers who voted against approval generally identified four reasons for their votes: (1) density; (2) traffic; (3) size and character; and (4) public opposition.

For example, all four councilmembers who voted to deny the application stated in some manner that they believed Austin's Woodsonia West Development was too dense and would negatively impact local traffic. The denying councilmembers also cited concerns that the Woodsonia West Development was incompatible with the neighborhood's character because of its size and design. The councilmembers' specific statements about their concerns with the Woodsonia West Development are addressed more fully in other parts of this opinion.

In addition, the councilmembers emphasized the overall public opposition to Austin's Woodsonia West Development. At the first City Council meeting, Councilmember Larson-Bunnell said, "To say that this is an unpopular project is an understatement . . . I know that I am not to take popular opinion as the sole deciding factor of this—of my vote and I don't want to give the impression that I am. But I think that that context is important." Councilmember Jenkins likewise stated that "[t]he neighbors were there first . . . I think there's kind of a right to being there first. That gives you certain additional rights." Councilmember Jenkins further elaborated at the second City Council meeting:

"I've received many, many e-mails on this subject on this particular development. And they've kind of been different than e-mails I've gotten on a lot of other subjects that have been brought before this Council. And the way they've really differentiated from what I normally get from people is that they weren't highly emotionally charged. They weren't screw you, guys, we want this changed. They were very well thought out. And people spent a lot of time analyzing this problem and providing information and data to me. And I read all of them. I'm trying to answer all you guys back. But I did read them all, one by one, and I digested them as carefully as I could. And it still left me with this underlying concern that the density is too great. And I think the one gentlemen [*sic*], you know, it is important that we—that the people have a say-so in this. And that can't be the only consideration. I understand that. That's the way the legal process works. The developer has rights as well as the residents have rights. But I do feel that it certainly is something to take into consideration. It's a significant consideration. And when you have this monolithic opposition as opposed to fractured opposition like, yeah, I like this project, oh, I hate it. I like it. I mean we're not getting

that. It's all I hate it. So, that's kind of an unusual bent too that we're having such a steadfast front here that says no, we don't want this impacting our neighborhood. And that has quite an impact on me because something keeps bothering me, something about by and for the people or something like that. And that gives me a lot of concern."

Councilmember Jenkins reiterated his reliance upon public opposition during his deposition testimony: "It was a factor," although "it's not my prime consideration, but it's something that does matter."

Upon competing motions for summary judgment, the district court ultimately granted summary judgment to the City and dismissed Austin's petition with prejudice, reasoning that "the City's denial of [Austin]'s Application was lawful."

Austin now appeals.

DISCUSSION

Austin appeals the district court's grant of summary judgment to the City, claiming: (1) the City abused its discretion in denying Austin's application; (2) the City violated Austin's due process rights by failing to comply with K.S.A. 12-757(d); and (3) the City violated Austin's due process rights by unlawfully expanding the right to protest under K.S.A. 12-757(f). Before addressing the substantive issue of whether the City's decision to deny Austin's Woodsonia West Development application was reasonable, this court must determine whether the City violated Austin's due process rights during the process.

I. THE CITY DID NOT DEPRIVE AUSTIN OF ITS DUE PROCESS RIGHTS.

Austin argues the City violated its due process rights by requiring it to submit a rezoning application and permitting protest petitions for the Woodsonia West Development because the Subject Property was already zoned PUDMR. Austin claims this case "involves the wrongful denial of a preliminary development plan, not the rezoning of the Subject Property," and that the City incorrectly relied on the protest petition provisions in K.S.A. 12-757(f)(1). Essentially, Austin argues that because the Woodsonia West Development was not an application to amend the Subject

Property from one type of zoning, such as agricultural, to a different type of zoning, such as residential, the City improperly permitted protest petitions.

This court exercises unlimited review over the interpretation of statutes and ordinances. *Nauheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019); *State ex rel. Schmidt v. City of Wichita*, 303 Kan. 650, 659, 367 P.3d 282 (2016). The most fundamental rule of statutory interpretation "is that the intent of the legislature governs if that intent can be ascertained." *Stewart Title of the Midwest v. Reece & Nichols Realtors*, 294 Kan. 553, 557, 276 P.3d 188 (2012). That review begins with the "plain language of the statute, giving common words their ordinary meaning," and when that plain language is clear and unambiguous this court "refrain[s] from reading something into the statute that is not readily found in its words." *In re M.M.*, 312 Kan. 872, 874, 482 P.3d 583 (2021).

Additionally, the various provisions of a statute or ordinance must be considered *in pari materia*, "to reconcile and bring those provisions into workable harmony, if possible." *Roe v. Phillips County Hospital*, 317 Kan. 1, Syl. ¶ 3, 522 P.3d 277 (2023). This court "must give effect, if possible, to the entire act" and read the provisions "so as to make them consistent, harmonious, and sensible." *State v. Bee*, 288 Kan. 733, Syl. ¶ 4, 207 P.3d 244 (2009).

A. *The City has the authority to enact broad zoning ordinances and procedures.*

The first part of Austin's due process claim is that the City illegally allowed "protest petitions outside of zoning amendments that altered and changed the zoning of real estate." Austin claims the phrases "rezoning" and "zoning amendment" in K.S.A. 12-757 only apply to requests to change a property's zoning designation for its permissible uses. For example, Austin argues that a request to change zoning from residential to agricultural or commercial is the only type of change that constitutes "rezoning" or "zoning amendment" under the statute. This court recognizes that the Woodsonia West Development application is a far cry from a traditional rezoning request.

The Subject Property is currently—and has been for decades—zoned PUDMR, and Austin's Woodsonia West Development complies with the permitted uses of PUDMR zoning. Moreover, the City has previously approved multi-family residential developments on the Subject Property. The issue here is not the *type* of development—such as residential, agricultural, or commercial—but the *scope*. Although this court recognizes the distinction, it must determine whether state law permits the City to treat applications for multi-family residential planned use developments as rezoning or zoning amendments.

The enabling statute provides that cities and counties may enact "planning and zoning laws and regulations . . . for the protection of the public health, safety and welfare" and that it "is not intended to prevent the enactment or enforcement of additional laws and regulations on the same subject which are not in conflict" with the statute. K.S.A. 12-741(a). This means that cities and counties have broad discretion to enact and enforce zoning regulations so long as they do not conflict with state zoning statutes. K.S.A. 12-741(a); K.S.A. 12-755(a)*; 143rd Street Investors v. Board of Johnson County Comm'rs*, 292 Kan. 690, 707-08, 259 P.3d 644 (2011). Therefore, the City's zoning ordinances are invalid only if they conflict with state zoning statutes. *Zimmerman v. Board of Wabaunsee County Comm'rs*, 289 Kan. 926, 939, 218 P.3d 400 (2009); *Genesis Health Club, Inc. v. City of Wichita*, 285 Kan. 1021, 1033, 181 P.3d 549 (2008).

Cities and counties "may adopt *zoning regulations* which may include, but not limited to, provisions which . . . [p]rovide for planned unit developments." (Emphasis added.) K.S.A. 12-755(a)(1). The phrase "zoning regulations" is defined as "lawfully adopted zoning ordinances of a city and the lawfully adopted zoning resolutions of a county." K.S.A. 12-742(a)(11). "Zoning" is defined as "the regulation or restriction of the location and uses of buildings and uses of land." K.S.A. 12-742(a)(10). The plain, unambiguous language of the statutes permits the City to adopt ordinances that "[p]rovide for planned unit developments" and regulate or restrict the location or use of buildings and land within planned unit developments. See K.S.A. 12-755(a)(1). However, some might argue that this case relates to the amendment or

change of a planned unit development, not the *provision* of one, because the Subject Property has previously been approved for a multi-family residential planned unit development.

So this court must analyze the process for zoning changes—or changes to "the regulation or restriction of the location and uses of buildings and uses of land." The state statute permits the City to "supplement, change or generally revise the boundaries or regulations contained in *zoning regulations by amendment.*" (Emphasis added.) K.S.A. 12-757(a). After adopting such zoning regulations, they may be amended through procedures initiated by the governing body, or "[i]f such *proposed amendment* is not a general revision of the existing regulations and affects specific property, the amendment may be initiated by *application of the owner of property affected*." (Emphases added.) K.S.A. 12-757(a). So, as here, where a property owner wants to amend the zoning—that is, change the "regulation or restriction of the location and uses of buildings and uses of land"—the City may adopt ordinances that govern such amendment.

When the statutes are read together and given their plain, ordinary meaning, they do not prohibit the City from considering an application for multi-family residential planned unit developments—such as the Woodsonia West Development—as a proposal for rezoning or a zoning amendment governed by K.S.A. 12-757. Not only is this finding consistent with the plain language of the statute, but it is also consistent with Kansas Supreme Court precedent applying K.S.A. 12-757(d) to requests for special use permits (SUP) and conditional use permits (CUP). See, e.g., *Manly v. City of Shawnee*, 287 Kan. 63, 67-68, 194 P.3d 1 (2008); *Crumbaker v. Hunt Midwest Mining, Inc*., 275 Kan. 873, 886-87, 69 P.3d 601 (2003). Neither a CUP nor SUP involves the limited type of rezoning that Austin claims is required before the City may apply the provisions of K.S.A. 12-757, which demonstrates the breadth of what the court considers a zoning amendment.

B. *The City is not prohibited from allowing neighbors to file protest petitions to applications for multi-family residential planned unit developments.*

Having found that the City has the authority to treat PUDMR applications as requests for rezoning or zoning amendments, this court must determine whether the City may also apply the protest petition

process to PUDMR applications. The state protest petition statute provides:

"[W]hether or not the planning commission approves or disapproves a *zoning amendment*, if a protest petition *against such amendment* is filed in the office of the city clerk or the county clerk within 14 days after the date of the conclusion of the public hearing pursuant to the publication notice, signed by the owners of record of 20% or more of any real property proposed to be rezoned or by the owners of record of 20% or more of the total real property within the area required to be notified by this act of the *proposed rezoning* of a specific property, excluding streets and public ways and property excluded pursuant to paragraph (2) of this subsection, *the ordinance or resolution adopting such amendment shall not be passed except by at least a 3/4 vote of all of the members of the governing body*." (Emphases added.) K.S.A. 12-757(f)(1).

The City adopted the provisions of K.S.A. 12-757(f)(1) in its Municipal Code of Ordinances, which provides in pertinent part:

"Regardless of whether or not the Planning Commission approves or disapproves a proposed *zoning amendment* or fails to recommend, if a protest petition against such amendment is filed in the office of the City Clerk . . . the ordinance shall not be passed except by at least three-fourths (3/4) vote of all of the members of the Governing Body." (Emphasis added.) S.M.O. § 17.92.030(E)(6).

The City's protest petition ordinance mirrors the state statute. Thus, if the state statute does not prohibit protest petitions under these circumstances, then the City's protest petition ordinance applies to PUDMR applications like the Woodsonia West Development. See *Genesis Health Club*, 285 Kan. at 1033.

Under K.S.A. 12-757(f)(1), protest petitions are permitted when there is "property proposed to be rezoned." Nothing in this subsection changes the meaning of the phrases "zoning amendment" or "rezone" as used elsewhere in the statute. As explained above, there is not statutory language prohibiting the City from treating PUDMR applications as zoning amendments or rezoning proposals. Additionally, through dicta in *Crumbaker*, the Kansas Supreme Court presumed the protest provision in K.S.A. 12-757(f)(1) applied to the application for a special use permit. 275 Kan. at 887. Although this is merely dicta, the Kansas Supreme Court has not indicated an intent to deviate from that stance or this court's interpretation of that language. Therefore, the City is not prohibited from adopting ordinances that apply the protest provisions of K.S.A. 12-757(f)(1) to multi-family residential planned

unit development applications like the Woodsonia West Development.

The City did not violate Austin's due process rights by creating ordinances that incorporated the zoning amendment requirements in K.S.A. 12-757(d) and (f) to PUDMR applications.

C. *The City did not violate K.S.A. 12-757(d) when it failed to approve Austin's Woodsonia West Development pursuant to K.S.A. 12-757(f).*

Having found the City has the authority to treat PUDMR applications as zoning amendments under K.S.A. 12-757(d), and likewise that the City may provide for protest petitions against those applications under the procedures in K.S.A. 12-757(f)(1), this court must determine whether the City exercised its authority in accordance with those statutes. What follows when a zoning amendment fails to garner the requisite 3/4 majority vote for approval in the face of a valid protest petition appears to be a matter of first impression for this court.

The parties apparently agree that when the Planning Commission recommends a proposed zoning amendment to the City Council and no protest petition has been filed, K.S.A. 12-757(d) requires the City Council to either adopt or override the Planning Commission's recommendation or return the recommendation with an explanation of why it failed to adopt or override. K.S.A. 12-757(d). But they disagree about what is required when neighbors file a valid protest petition against the proposed zoning amendment—as is the case here. Austin claims that, after the City failed to approve its application by a 3/4 majority vote, the City was still required to either override the Planning Commission's recommendation by a two-thirds (2/3) vote or return the application to the Planning Commission "with a statement specifying the basis for the governing body's failure to approve or disapprove." K.S.A. 12-757(d). The City disagrees, and argues that because neighbors filed a valid protest petition under K.S.A. 12-757(f), the City was relieved of the requirements in K.S.A. 12-757(d) to override or return the application to the Planning Commission. Essentially, the City argues that if it receives a valid protest petition to a zoning amendment, the application must either be approved by

a 3/4 majority or it is automatically denied with no further steps required.

Unlike K.S.A. 12-757(d), the protest petition statute contains no process for situations when the City fails to approve a protested zoning amendment. See K.S.A. 12-757(f). When neighbors file a protest petition, K.S.A. 12-757(f) provides that:

"[W]hether or not the planning commission approves or disapproves a zoning amendment, if a protest petition against such amendment is filed . . . the ordinance or resolution adopting such amendment shall not be passed except by at least a 3/4 vote of all the members of the governing body." K.S.A. 12-757(f)(1).

The parties disagree on whether and how K.S.A. 12-757(d) and K.S.A. 12-757(f) work together.

This court cannot consider subsection (d) in isolation. Rather, the various provisions of the statute must be considered together to bring the result "into workable harmony, if possible." *Roe*, 317 Kan. 1, Syl. ¶ 3. Typically, "when statutory provisions are in conflict, the more specific provision generally prevails." *Bruce v. Kelly*, 316 Kan. 218, 255, 514 P.3d 1007 (2022). Here, subsection (f) specifically applies to the approval process for proposed zoning amendments under the less-common circumstance when neighbors file a valid protest petition. Therefore, subsection (f) is the more specific provision and thus, when applicable, controls over subsection (d).

However, when applying these rules of construction, there is a gap in the process. If subsection (f) applies, the governing body can only approve the proposed amendment with a 3/4 majority vote but, unlike the process in subsection (d) when there is no protest petition, subsection (f) does not require the governing body to override the Planning Commission's recommendation or explain its reasons for failing to approve the proposed amendment. Moreover, the statute does not explicitly provide that the City's failure to approve the proposed zoning amendment over a valid protest petition would result in an outright denial of the application and therefore terminate the process.

Austin points to this lack of resolution as a problem with the City's interpretation of the statute. Austin argues the heightened voting requirement in subsection (f)—requiring approval by a 3/4 majority—should merely supplement the simple majority required

for approval in subsection (d) rather than supplant subsection (d)'s requirements altogether. Austin's interpretation would mean that when the City fails to adopt the Planning Commission's recommendation to approve a protested zoning amendment by a 3/4 majority, the City would still need to either override the Planning Commission's recommendation by 2/3 majority or return the proposed amendment to the Planning Commission with an explanation for its failure to approve or override. While that seems reasonable—particularly because subsection (f) simply increases the required votes for approval but includes no other limitations—this court must determine whether that was the Legislature's intent.

Hypothetically if neighbors had not filed a protest petition and the City still failed to approve the Woodsonia West Development or override the Planning Commission's approval recommendation, the City would have to return the application to the Planning Commission with an explanation for the failure to adopt or override. In that situation, the Planning Commission would have a second chance to resubmit the Woodsonia West Development (with or without changes) to the City Council for passage by a simple majority vote. K.S.A. 12-757(d). The statute provides:

"If the governing body returns the planning commission's recommendation, the planning commission, after considering the same, may resubmit its original recommendation giving the reasons therefor or submit new and amended recommendation. Upon the receipt of such recommendation, *the governing body, by a simple majority thereof, may adopt or may revise or amend and adopt such recommendation by the respective ordinance or resolution, or it need take no further action thereon.* If the planning commission fails to deliver its recommendation to the governing body following the planning commission's next regular meeting after receipt of the governing body's report, the governing body shall consider such course of inaction on the part of the planning commission as a resubmission of the original recommendation and proceed accordingly. The proposed rezoning shall become effective upon publication of the respective adopting ordinance or resolution." (Emphasis added.) K.S.A. 12-757(d).

If this court reads subsection (f) as Austin proposes—i.e., to simply increase the required vote for approval in subsection (d) from a simple majority to a 3/4 supermajority—the City's failure to approve or override could result in applicants receiving a second attempt at approval by only a simple majority. After receiving a resubmitted application, whether changed from the original or not, the City Council may then approve it by a simple majority or

"take no further action." K.S.A. 12-757(d). In other words, under Austin's interpretation of the statute, even when neighbors file a valid protest petition, the heightened voting requirement would not apply to the second attempt at approval. This "loophole" in the statutory scheme could allow applicants to effectively circumvent the heightened voting requirement triggered by a valid protest petition.

While it appears that neighbors could file a second protest petition on the next attempt, this result could create an endless loop. In that endless loop, neighbors would carry a heavy burden to refile protest petitions each time the Planning Commission resubmits the proposed zoning amendment to the City Council, even if unaltered from the original application that failed to receive the requisite 3/4 majority approval. It is conceivable that litigants could strategically use this process to obtain approval for protested amendments by a simple majority. By requiring a 3/4 majority to approve zoning amendments after neighbors have filed a valid protest petition, the Legislature expressed a clear intent that protested zoning not be approved by a simple majority vote.

Because neighbors filed a valid protest petition against the Woodsonia West Development pursuant to K.S.A. 12-757(f), the City Council could only approve the development by a 3/4 majority vote. The City Council's failure to achieve the 3/4 majority vote needed for approval resulted in the application's denial, and the processes for resubmission of failed zoning amendments in K.S.A. 12-757(d) are inapplicable.

II. THE CITY COUNCIL DID NOT ACT UNREASONABLY WHEN IT FAILED TO APPROVE THE WOODSONIA WEST DEVELOPMENT.

Austin claims the City unreasonably failed to approve the Woodsonia West Development because:

(1) the councilmembers did not provide a sufficient explanation on the record for their decision;
(2) the councilmembers prejudged the proposal;
(3) the *Golden* factors weighed in favor of approval;
(4) the City had previously approved similar development plans on the Subject Property; and

(5) the City's denial was based on an improper plebiscite of the neighbors.

The Kansas Judicial Review Act (KJRA) does not provide for judicial review of city zoning decisions, but "any person aggrieved" by a zoning decision may bring an action "to determine the reasonableness of such final decision." K.S.A. 12-760(a); *Frick v. City of Salina*, 289 Kan. 1, 10, 208 P.3d 739 (2009) ("[T]he KJRA does not apply to the actions of cities, counties, or other political subdivisions of the state."). At the first step of judicial review, the district court reviews the zoning decision for reasonableness. The district court's decision is then appealable to this court, which "must make the same review of the zoning authority's action as did the district court." *Combined Investment Co. v. Board of Butler County Comm'rs*, 227 Kan. 17, 28, 605 P.2d 533 (1980). "The standard for review of an order denying or granting a zoning change is whether the order entered is reasonable." *Golden v. City of Overland Park*, 224 Kan. 591, Syl. ¶ 5, 584 P.2d 130 (1978).

Courts give broad deference to zoning authorities in determining whether to grant or deny zoning amendments or rezoning requests. The scope of this court's review is "limited to determining (a) the lawfulness of the action taken, and (b) the reasonableness of such action," and this court must presume the zoning authority acted reasonably. *Combined Investment Co.*, 227 Kan. at 28. This court gives no deference to the district court's determination as to whether the zoning authority's actions were reasonable, because "[w]hether action is reasonable or not is a question of law, to be determined upon the basis of the facts which were presented to the zoning authority." 227 Kan. at 28. A zoning authority's "[a]ction is unreasonable when it is so arbitrary that it can be said it was taken without regard to the benefit or harm involved to the community at large, including all interested parties, and was so wide of the mark that its unreasonableness lies outside the realm of fair debate." 227 Kan. at 28.

Zoning authorities should consider the *Golden* factors when deciding whether to approve a proposed zoning amendment:

(1) The character of the neighborhood;
(2) the zoning and uses of properties nearby;
(3) the suitability of the Subject Property for the uses to which it has been restricted;

> (4) the extent to which removal of the restrictions will detrimentally affect nearby property;
> (5) the length of time the Subject Property has remained vacant as zoned;
> (6) the relative gain to the public health, safety, and welfare by the destruction of the value of plaintiff's property as compared to the hardship imposed upon the individual landowner;
> (7) the recommendations of permanent or professional staff; and
> (8) the conformity of the requested change to the adopted or recognized master plan being used by the city. See *Golden*, 224 Kan. at 598.

Kansas appellate courts have repeatedly reaffirmed the importance of the *Golden* factors in evaluating the reasonableness of a zoning authority's decision. See, e.g., *143rd Street Investors*, 292 Kan. 690, Syl. ¶ 3 ("Zoning authorities should consider the nonexclusive factors established in [*Golden*], other relevant factors, and the zoning authority's own comprehensive plan when acting on an application for rezoning."); *Zimmerman*, 289 Kan. at 945-46; *Manly*, 287 Kan. 63, Syl. ¶ 5 ("When considering zoning matters, a governing body should consider the factors set forth in [*Golden*]."); *McPherson Landfill, Inc. v. Board of Shawnee County Comm'rs*, 274 Kan. 303, Syl. ¶ 3, 49 P.3d 522 (2002); *Johnson County Water Dist. No. 1 v. City of Kansas City*, 255 Kan. 183, 184, 871 P.2d 1256 (1994); *Davis v. City of Leavenworth*, 247 Kan. 486, 493, 802 P.2d 494 (1990); *Landau v. City Council of Overland Park*, 244 Kan. 257, 261-62, 767 P.2d 1290 (1989); *Taco Bell v. City of Mission*, 234 Kan. 879, Syl. ¶ 5, 678 P.2d 133 (1984).

A. *The City Council created a minimally sufficient record of the reasons it failed to approve the Woodsonia West Development.*

As far back as the original enumeration of the *Golden* factors, the Kansas Supreme Court has admonished zoning authorities to "place in their minutes a written order summarizing the evidence and stating the factors which were considered in reaching the decision either to deny or to grant a requested zoning change." *Golden*, 224 Kan. 591, Syl. ¶ 4; *Davis*, 247 Kan. at 493; *Zimmerman*, 289 Kan. 926, Syl. ¶ 11. This is because "[a] mere yes or no vote upon a motion to grant or deny

leaves a reviewing court, be it trial or appellate, in a quandary as to why or on what basis the board took its action." *Golden*, 224 Kan. at 597. While reasonableness remains the standard, that reasonableness is "more readily, more effectively, and more uniformly applied if zoning bodies will place in their minutes a written order delineating the evidence and the factors the board considered in arriving at its conclusion." *Golden*, 224 Kan. at 599. Although not required, the Kansas Supreme Court has "strongly encouraged" zoning authorities "to make formal findings of fact concerning its decisions regulating land use." *Zimmerman*, 289 Kan. 926, Syl. ¶ 11.

During City Council meetings, some of the councilmembers expressed concerns about the Woodsonia West Development's impact on the character, density, and traffic of the existing neighborhood. Councilmember Larson-Bunnell discussed the large number of neighbors, both residential and commercial, who opposed the development and noted neighbors' concerns "about the potential for increased crime, overcrowded schools, and decreased property values" but further stated, "I really haven't seen strong data to support these concerns and my decision tonight is not based on those factors." Councilmember Larson-Bunnell identified traffic concerns, specifically the number of cars during the morning and evening commute, the increased likelihood of danger through the roundabouts on Johnson Drive, the safety of the proposed exits to get to 47th Street, and the likelihood of an increase in traffic cutting through the Woodsonia neighborhood. The councilmember further explained, "On the whole, these traffic concerns are valid and there is a direct correlation between the number of units in the proposed development and the impact to traffic." Finally, Councilmember Larson-Bunnell expressed concern about the size of the proposed buildings detracting from the character of the neighborhood.

Councilmember Jenkins explained that the original neighbors were there first and that "gives [them] certain additional rights." Councilmember Jenkins also said, "I don't think this development fits the characteristics of the neighborhood it's being built next to." Councilmember Jenkins noted the proposed development would have buildings that "tower, literally tower over this [existing] de-

velopment," and "I'm having trouble with the, like I say, the density of this project." Councilmember Jenkins also pointed to increased traffic, although noting that the traffic study showed it would stay "within reason." Councilmember Meyer expressed concerns "about the buffer, particularly on that north side and then what the traffic concerns would look like."

During the December 23, 2019 City Council meeting, only Councilmember Jenkins expressed concerns on the record. The councilmember's concerns mimicked those expressed during the first meeting about the development's density and character arising from having taller buildings in a smaller space than was previously approved. Councilmember Jenkins explained, "[W]e get these bigger buildings and that's what's causing the problem here that people are concerned about. And I have those same concerns because everybody says it meets the *Golden* rule test. No, it doesn't. It negatively affects the neighborhood, the character of the neighborhood." Councilmember Jenkins explained that, after reading emails from concerned neighbors, there was an "underlying concern that the density is too great."

After the City Council failed to approve the Woodsonia West Development, Austin initiated litigation and deposed the disapproving councilmembers. While the district court did not rely on the deposition testimony, its inclusion in the record is not an error and the court may inquire into the facts or factors the councilmembers considered when making their decision. While not necessary, the parties agree that such an inquiry would be helpful in this case and for that reason this court will consider the deposition testimony only to the extent it informs the court of the councilmembers' reasons for opposing Austin's application. See *Landau*, 244 Kan. at 261 (permitting limited discovery into the facts or factors considered in the rezoning decision).

Councilmember Larson-Bunnell testified that traffic was a concern, particularly at two intersections, although the councilmember did not question the sufficiency of the road capacity but was more concerned about the "experiences that impact our residents day to day." Councilmember Larson-Bunnell testified that the neighbors' concerns were given consideration and that they identified concerns that she shared.

Councilmember Jenkins testified that his "big issue was density." Councilmember Jenkins noted that the Subject Property had been reduced from about 44 acres to 29 acres, but the Woodsonia West Development nevertheless "tried to put in basically the same size development" as was previously approved. Councilmember Jenkins also discussed damage to "the character of the neighborhood" associated with the proposed building elevations compared to the adjacent neighborhood and the neighbors' related concerns. The neighbors' concerns about density "paralleled closely to" Councilmember Jenkins' concerns. Jenkins relied on his personal experience, a "gut feeling based on years and years of experience," common sense about human behavior, and the "comments from the individuals that live in the area and what their current situation is and their extrapolation as to what they anticipated the additional traffic to cause."

Although Councilmember Kemmling expressed no concerns during the public City Council meetings, he testified at his deposition that the "[t]he density of the plan caused me concern." Additionally, Councilmember Kemmling believed the Woodsonia West Development failed to meet the Future Land Use Guide even though the Planning Commission found that it met the City's Comprehensive Plan for future land use. Councilmember Kemmling also thought the height of the buildings "would be fairly imposing to the surrounding structures," which would not match the existing character of the neighborhood. The likely increase in traffic cutting through the Woodsonia neighborhood, as well as problems with parking, also concerned Councilmember Kemmling. Councilmember Kemmling further testified that neighbors "raised a lot of concerns which were concerns of mine as well that I heard at that meeting."

Finally, Councilmember Meyer testified that she was concerned about the density, traffic, and lack of an adequate buffer zone between the "single-family homes and the high-density apartment buildings." Her specific traffic concerns related to the roundabouts getting backed up at certain intersections. Councilmember Meyer acknowledged the Planning Commission's approval but disagreed with their determination. The councilmember explained that those disagreements were based on experience

looking at a lot of development plans and "living very near that site, it's a place that I sort of drive by the intersection every day" and "it's a pretty congested single-family neighborhood."

While some of the councilmembers referred to the *Golden* factors or a particular factor, the record would have benefited greatly if the councilmembers had specifically identified the factors considered. This panel joins the numerous previous panels of this court, and the Kansas Supreme Court, in cautioning zoning authorities to take care in their quasi-judicial role to create a record enabling review and lending credibility to the process. See, e.g., *Johnson County*, 255 Kan. at 184-85; *Sechrest v. City of Andover*, No. 118,052, 2018 WL 4655611, at *6-7 (Kan. App. 2018) (unpublished opinion) (zoning authority failed to explain concerns about small zoning amendment).

However, this failure does not render the City Council's decision per se unreasonable. See *Landau*, 244 Kan. at 263 (finding the zoning authority's failure to address the *Golden* factors did not prevent review). Austin contends the councilmembers' stated concerns are not supported by evidence, but that is a different issue than whether the record is sufficient to allow for judicial review of the City Council's decision. The answer to the latter question is yes. Under the circumstances here, where neighbors filed a valid protest petition and the City Council failed to reach the 3/4 majority necessary for approval, the information in the record permits appellate review of the City's zoning decision. See, e.g., *Board of Johnson County Comm'rs v. City of Olathe*, 263 Kan. 667, 679, 952 P.2d 1302 (1998); see also *Landau*, 244 Kan. 257, Syl. ¶ 7 ("The trial court may take additional evidence in a zoning appeal where the evidence is relevant to the issue of reasonableness of the zoning decision.").

B. *The councilmembers' failure to approve the Woodsonia West Development was not unreasonable under the* Golden *factors.*

In an exceedingly succinct overview, the district court concluded the City's decision was reasonable without evaluating the *Golden* factors, or any specific factors. While this

court's review is conducted anew, there is no doubt the process benefits when the district court conducts its own independent analysis. Both parties have cradled their arguments in the fabric of the *Golden* factors, and although the City Council did not go through each *Golden* factor and the district court chose not to elaborate on the factors, this court finds no error in analyzing reasonableness in light of the *Golden* factors as the parties have presented. As the court explained in *McPherson*, the following analysis of each *Golden* factor "should not be viewed as reweighing of the evidence, but, rather, a process of pointing out how the [zoning authority's] findings of facts were reasonable in light of the record on appeal." 274 Kan. at 331.

The range of reasonableness in zoning decisions is quite broad, and one single factor—whether a *Golden* factor or not—might weigh so heavily in support of a zoning authority's decision that it outweighs multiple factors in opposition. See, e.g., *Zimmerman*, 289 Kan. at 951-52.

In *Zimmerman*, the appealing intervenors argued that "either the amount of the evidence presented in support" of the Board's decision or "the arguably greater amount of evidence presented in opposition to" the Board's decision warranted reversal. 289 Kan. at 956. The court explained it could not simply reweigh the evidence but could only determine "whether the given facts could reasonably have been found by the Board to justify its decision." 289 Kan. at 956. The question is not whether more or better evidence supported a decision contrary to the zoning authority's, but whether the zoning authority had a reasonable basis for its decision.

The City's failure to approve the Woodsonia West Development is unreasonable only if it was "taken without regard to the benefit or harm" to the community. *Combined Investment Co.*, 227 Kan. at 28. This court may not reverse a zoning authority's decision merely because a great weight of the evidence supports a contrary outcome. See, e.g., *Zimmerman*, 289 Kan. at 956-57. The landowner objecting to the zoning

authority's decision "has the burden of proving unreasonableness by a preponderance of the evidence." *Combined Investment Co*., 227 Kan. at 28.

1. *The Character of the Neighborhood*

Several councilmembers cited concerns about how the Woodsonia West Development would impact the character of the neighborhood, and this seems to be the reason most heavily relied upon for denying Austin's application. Specifically, they expressed concerns about the height of the proposed apartment buildings, the population density, and how the density would impact traffic. Austin argues it presented evidence that these concerns are unfounded. Even still, Austin's evidence does not demonstrate that the councilmembers' concerns about character were "'so wide of the mark'" that the "'unreasonableness lies outside the realm of fair debate.'" *Golden*, 224 Kan. at 596.

Specifically, it is undisputed that the proposed three-story apartment buildings in the Woodsonia West Development would be taller than neighboring houses. Austin argues that the apartment buildings would be built on a lower elevation making the height less noticeable and minimizing the visual impact of the height difference but has provided no evidence of that contention. Would the lower elevation make the apartment buildings look more like two stories? This court cannot say that the councilmembers' concern about the apartment building height marring the neighborhood's character is unreasonable.

Additionally, Austin argues that the proposed density is within the City's Comprehensive Plan and the traffic studies show the traffic impact would be de minimis. But it is undisputed that the Woodsonia West Development's proposed density is higher than the surrounding neighborhood and previously approved developments and would thus naturally increase traffic in the area. While the court in *Taco Bell* cautioned authorities against relying on general traffic concerns to deny a zoning amendment, that admonition is inapplicable to this case. In *Taco Bell*, the governing body refused to rezone a property located on Johnson Drive (a four-lane highway) from an automobile service station to a drive-

thru window restaurant and cited increased traffic as a concern. *Taco Bell,* 234 Kan. at 880-81. Unlike here, the property at issue in *Taco Bell* was immediately adjacent to two food establishments. 234 Kan. at 881. The City denied the request and voted to "down zone" the area to office use only, and the district court found the City's actions arbitrary. 234 Kan. at 881-82.

On appeal, the Kansas Supreme Court analyzed the *Golden* factors and found the City's conclusion that the proposed drive-thru restaurant would disrupt the peace and quiet of the area unreasonable, "as if there were no other commercial activity nearby." *Taco Bell*, 234 Kan. at 888-89. The court noted that the existing adjacent residential property "would not be harmed by the addition of the Taco Bell as compared to all the other retail businesses" that were already adjacent to the residential property. 234 Kan. at 888. Taco Bell anticipated the existing 20,000 daily vehicles traveling on Johnson Drive would become its customers, and there was no evidence that the addition of a drive-thru restaurant would have any meaningful effect on the already-copious existing traffic.

Here, the Woodsonia West Development differs from the character of the adjacent single-family neighborhood. While the density might be just within the City's Comprehensive Plan, it is significantly higher than the nearby neighborhood and any previously approved developments for the Subject Property. The Woodsonia West Development includes about 413 total units, and the highest number of units previously approved for the Subject Property was 398 in 1996. The unit increase from 398 to 413 might seem insignificant, but the Subject Property is currently about 15 acres smaller than its size 1996 size. Therefore, the development approved in 1996 had a density of 8.9 du/acre, while the Woodsonia West Development has a density of 14.1 du/acre. Moreover, the previously approved plans included a larger percentage of townhomes than the Woodsonia West Development. It was not unreasonable for the councilmembers to conclude that having more apartment units—and thus more residents—in a smaller area than any previously approved development would create an increase in traffic that impairs the character of the existing neighborhood.

Austin argues that the councilmembers' concerns about neighborhood character are merely excuses masking a prejudice against apartment buildings or other multi-family housing. This court's opinion should not be read to conclude that multi-family residential developments are per se of such a distinct character compared to single-family residential neighborhoods making any denial of such developments reasonable. The councilmembers' concerns about how the development's density and apartment building height, which also create more specific concerns about traffic and the buffer zone between the higher-density apartments and the existing neighborhood, impact the neighborhood character and aesthetic are not so wide of the mark as to be unreasonable. See *Landau*, 244 Kan. 257, Syl. ¶ 3 (appellate review of zoning decisions is limited to determining reasonableness); see also *Zimmerman*, 289 Kan. at 951-52 (explaining that zoning authorities may consider aesthetics in zoning decisions and that some considerations may outweigh other *Golden* factors). Additional traffic concerns are addressed more specifically below.

2. *The Zoning and Uses of Properties Nearby*

The Subject Property is currently zoned PUDMR, and the City has previously approved multi-family residential developments for the Subject Property. While the Woodsonia West Development technically fits within the zoning requirements for PUDMR, not all multi-family residential planned unit developments are created equal. Zoning authorities may consider how the development's specific characteristics fit within the zoning and uses for the existing property.

By failing to approve the Woodsonia West Development, the City has not restricted Austin's ability to use the Subject Property for a different multi-family residential planned unit development, including apartment buildings. The councilmembers' specific concerns about how the density, traffic, and buffer zone affect nearby property uses mirror the concerns about how the development impacts the neighborhood's character. However, the councilmembers failed to specifically explain how those concerns negatively impact the zoning and use of nearby properties. But the City

Council's decision is presumed to be reasonable, and Austin carries the burden to prove its proposed development's density and buffer zone will not harm the use of nearby property. Even without more specifics, this court cannot say the councilmembers' concerns about the Woodsonia West Development's impact on nearby property uses were unreasonable. See *Taco Bell*, 234 Kan. at 878-88 (finding the zoning authority's concerns speculative).

3. *The Suitability of the Subject Property for the Uses to Which It Has Been Restricted*

Under this factor, the court evaluates whether the City's denial of the Woodsonia West Development leaves Austin with other suitable uses for the Subject Property. This situation is unique because neither party seeks to change how the Subject Property may be used or to restrict or permit a particular use. By refusing to approve the Woodsonia West Development, the City has not prohibited a future similar development on the Subject Property. Rather, the Subject Property has been and remains zoned PUDMR—suitable for a multi-family residential planned unit development, including apartment complexes.

As explained below, the City concedes that the Woodsonia West Development comports with the City's Comprehensive Plan, and the councilmembers did not suggest suitable alternative uses for the Subject Property. See *McPherson,* 274 Kan. at 325 (evaluating alternative uses for the property when the requested use was denied). The City argues its prior approval of developments on the Subject Property sufficiently demonstrates there are other suitable PUDMR uses for the Subject Property. Yet it has been about 20 years since the City last approved a multi-family residential development on the Subject Property.

Although the City has not technically further restricted the Subject Property prohibiting future multi-family residential planned unit developments, it has also not identified what criteria would make Austin's future application suitable for the Subject Property. But while such a discussion may have been helpful to provide Austin direction for future applications, the absence of that discussion did not invalidate or render unreasonable the City's denial of Austin's current application.

4. *The Extent to Which Removal of the Restrictions (i.e., Approval of the Woodsonia West Development) Will Detrimentally Affect Nearby Property*

Although the City Council did not create a report identifying how they believed the Woodsonia West Development would detrimentally affect nearby property, the councilmembers identified traffic, school overcrowding, and density as reasons for their votes against approving Austin's application. While some of these concerns also related to the neighborhood's character, this court will also analyze the detrimental effect unrelated to the impact on character.

i. *Density*

As explained above, the Woodsonia West Development's density of 14.1 du/acre, as amended, was higher than the density of any previously approved development on the Subject Property. Even so, the Planning Commission's staff Report states that the Woodsonia West Development's density is lower than another nearby development and within the range contemplated by the City's Comprehensive Plan. While councilmembers identified density as a concern, they did not explain how that density level would detrimentally affect nearby property beyond traffic and school overcrowding.

This court therefore analyzes the councilmembers' concerns about density related to their expressed concerns about school capacity and traffic safety and service.

ii. *School Capacity*

Neighbors expressed generalized concerns that the Woodsonia West Development would cause school overcrowding, but it does not appear the councilmembers relied on those generalized concerns in voting against the application's approval. Although Councilmember Kemmling's deposition testimony noted the neighbors' concerns about school overcrowding, it was not the primary reason for the councilmember's vote. Councilmember Kemmling did not meet with anyone at the school district about potential overcrowding and cited no evidence, personal experience, or observations that supported the neighbors' generalized

concerns about school capacity. No other councilmembers cited concerns about school capacity as a reason for denying the Woodsonia West Development, and Councilmember Larson-Bunnell specifically stated there was no evidence the development would contribute to school crowding and that school capacity was not a consideration in her vote.

The City also cites no evidence in its appellate brief supporting the neighbors' generalized concerns that the Woodsonia West Development would negatively impact schools. As explained below, "[z]oning is not to be based upon a plebiscite of the neighbors." *Zimmerman*, 289 Kan. 926, Syl. ¶ 7. The school district reported that there was ample capacity to absorb additional students that may result from the Woodsonia West Development. With knowledge of the current standards and outgoing/incoming students, the school district is uniquely qualified to determine its ability to accept additional students related to teacher/student ratios and building capacity for the area schools. No councilmembers challenged or contradicted the school district's contention about its capacity to absorb additional students from the Woodsonia West Development.

Austin has established by a preponderance of the evidence that it would have been unreasonable for councilmembers to rely on the neighbors' generalized concerns about school capacity. See *143rd Street Investors,* 292 Kan. at 720 (explaining that the landowner must "establish by a preponderance of the evidence that the challenged decision is not reasonable"). However, it does not appear the councilmembers relied on their personal concerns or the neighbors' generalized concerns about school capacity in not approving the development. Thus, the neighbors' unsubstantiated concerns regarding school capacity have no bearing on the reasonableness of the City's denial of that application.

iii. *Traffic*

Multiple councilmembers identified specific concerns about increased traffic during busy commute times, particularly at specific intersections, roundabouts, and cut-through areas. Many of these concerns were based on the councilmembers' personal expe-

riences driving and walking in the area. Austin claims the councilmembers' traffic concerns are unreasonable because the Planning Commission's staff Report stated the traffic increase "would have little to no impact on roadway level of service." The City's Traffic Manager explained the overall impact on traffic from the proposed development would be "minor in the overall scheme of the development."

After traffic concerns were identified, the City's staff provided updated information that "Woodsonia Drive, 51st Street, and 53rd Street were all designed and built to a higher collector to facilitate future traffic volumes." The staff Report explained the traffic study showed an additional 190 trips in the morning peak period and an additional 215 trips in the evening peak period, but because the "street network adjacent to the proposed development is currently well under capacity," the additional trips "will have little to no impact on roadway level of service as a result." The staff Report also included charts that showed the signal light time would increase by about 1 second in the morning and half a second in the afternoon. It further showed the service operation level at the controlled stops, including Johnson Drive, Roberts Drive, Woodsonia Drive, and Silverheel Street, would all remain between a B and A.

The City's staff reviewed the traffic modeling reports that showed the traffic increase would not significantly alter the commute time or roadway safety of the existing neighbors. Some councilmembers questioned the accuracy of these findings but they did not identify any inaccuracies in the traffic reports or present contradicting evidence.

However, unlike the school capacity issue, it is undisputed that the Woodsonia West Development would increase traffic in the area. The councilmembers cited their personal experiences in the area for why they believed the traffic increase caused concern for neighboring property. While generalized traffic concerns are not a reasonable basis for denial, the councilmembers' personal and shared experiences with the traffic patterns and practices at specific intersections that were not addressed by the traffic models are more than generalized traffic concerns. See *Taco Bell*, 234 Kan. at 887-88 (general traffic concerns about a potential drive-thru restaurant in a commercial area near other restaurants were

not reasonable). For example, Councilmember Larson-Bunnell identified the difficulty of the angle at Silverheel Street and 47th Street as a particular concern, and while that issue is apparently known to the City, there is no plan to address it in the near future. While the City staff explained that the area operated "in a reasonably safe manner" when it was used as a detour about a decade earlier, this court cannot say such an explanation so definitively satisfied the councilmembers' concerns as to make them unreasonable. Moreover, Austin did not address the specific concern about people cutting through the existing Woodsonia neighborhood. Austin relies on the traffic studies and models, but those did not address the councilmembers' observations about the current issues of people maneuvering the roundabouts or the increase in people cutting through the existing neighborhood.

The councilmembers provided no additional basis for their expressed traffic concerns, nor any solution within the PUDMR zoning or the City's Comprehensive Plan, but the issue still lies in the realm of fair debate. There will be an objective increase in traffic, and this court will not substitute its personal experience and judgment regarding the traffic study for that of the councilmembers'. See, e.g., *McPherson*, 274 Kan. at 330 (noting the zoning authority's decision was not "so wide of the mark that the decision lies outside the realm of fair debate"). Austin failed to prove by a preponderance of the evidence that the councilmembers' concerns about the effect of the traffic increase on specific intersections, roundabouts, and people cutting through the existing neighborhood were unreasonable.

5. *The Length of Time the Subject Property Has Remained Vacant as Zoned*

On one hand, the Subject Property has been zoned for multi-family residential planned unit development for almost 30 years without being developed. On the other hand, the City has previously approved multi-family residential planned unit developments on the Subject Property, but the last approval was about 20 years ago. Austin has not shown that the City will refuse all future multi-family residential developments on the Subject Property, thus leaving it unused or underutilized. But the City has provided

no guidance on how Austin could obtain future approval. On the whole, this factor is not of primary importance to assessing the reasonableness of the City's denial of Austin's application. See *Landau*, 244 Kan. at 267 (finding this factor unpersuasive before the surrounding area had been developed when there was no evidence of inability to develop the area).

6. *The Relative Gain to the Public Health, Safety, and Welfare by the Possible Destruction of the Value of Austin's Property as Compared to the Hardship Imposed on the Individual Landowner*

Austin claims that it has been "significantly harmed by its inability to move forward" with the Woodsonia West Development but has failed to include evidence supporting that contention. Additionally, Austin has provided no evidence that the Woodsonia West Development benefits public health, safety, and welfare. There is no evidence that the proposed development fits the quantity and quality of housing needed in the area. Nor is there evidence that the Subject Property's lack of development harms the public. Likewise, however, the City has not demonstrated that the harm to the individual landowner outweighs the harm to Austin or the public by not approving the Woodsonia West Development. Austin has not shown that this factor has any bearing on the reasonableness of the City's decision.

7. *The Recommendations of Permanent or Professional Staff*

The Planning Commission's staff unanimously and repeatedly approved the Woodsonia West Development. After neighbors expressed concerns about school overcrowding, the City's staff obtained additional information and the school district "provided their methodology used . . . and re-affirmed its original response to school impact." Additionally, after hearing neighbors' concerns about traffic, the City's staff provided a memorandum with additional explanation about how traffic levels, patterns, and intersections would remain safe. The City's staff also addressed concerns about density by explaining that, since 1995, the City's Compre-

hensive Plan provides that the Subject Property "has been designated as appropriate for High Density Residential with a narrow sliver of medium density residential for townhomes to buffer single family to the east," which aligns with the Woodsonia West Development. The City's staff also provided the Calamar project as an example of a higher-density project of 17.5 du/acre that is currently under construction with three-story heights.

The City does not cite any independent evidence from traffic experts, school officials, city planning engineers, or other experts that contradict or undermine their staff's overall analysis and conclusions about the Woodsonia West Development. Gut feelings and speculation are not a reasonable basis for concluding the staff's recommendations are incorrect, but the City is also not required to accept the staff's recommendation. *Manly,* 287 Kan. at 70-71 (noting the planning commission "is created to fulfill an advisory function"). The City's staff acts in merely an advisory role, and Austin has not shown that the City's failure to follow the Staff recommendation rendered the City's decision unreasonable.

8. *The Proposal's Conformity to the Adopted or Recognized City Master Plan*

This *Golden* factor ensures that proposed developments align with the City's long-term planning because the "legislature has stressed the making of such plans, and . . . they should not be overlooked when changes in zoning are under consideration." *Golden*, 224 Kan. at 598. The City argues the Woodsonia West Development's density of 14.1 du/acre creates a concern about whether the development fits within the City's Comprehensive Plan. The parties agree the City's Comprehensive Plan designates the Subject Property for high- and medium-density multi-family residential development. High density is defined as 10-15 du/acre while medium density is defined as 5.01-10 du/acre. The City concedes that the Woodsonia West Development "narrowly fits within the density limits of the Comprehensive Plan." Even still, the City notes that the development has higher density than previously approved developments for the Subject Property, which ranged from 7.2 to 8.9 du/acre.

While it is true that the proposed development's population density fell within the City's Comprehensive Plan, the City is not required to approve every development application that falls within the scope of its Comprehensive Plan. In light of the City councilmembers' other expressed concerns, the fact that councilmembers were concerned that the Woodsonia West Development's density per acre was at the high end of the Comprehensive Plan does not render the City's denial unreasonable.

9. *Overall the City's decision is not unreasonable under the* Golden *Factors*

The *Golden* factors are meant to assist in evaluating zoning decisions, but reasonableness remains the standard. When evaluating the overall reasonableness of a zoning authority's decision, the *Golden* factors are used as an aid; they are not exclusive, and the importance of each factor may weigh differently depending on the proposal. See *Zimmerman*, 289 Kan. at 951-53 (explaining that a zoning authority may weigh a factor such as aesthetics more heavily than other factors). The *Golden* factors are not exclusive, and "[o]ther factors may and no doubt will be of importance in the individual case." *Golden*, 224 Kan. at 599. Therefore, the "traditional tests of reasonableness were not abandoned but are enhanced by the eight factors which provide a reviewing court with a basis for testing the action of a governing body in a meaningful way." *Taco Bell*, 234 Kan. at 887.

Here, the Woodsonia West Development's impact on the surrounding neighborhood and its character carries a significance that would not be the same if the proposed development were a commercial property surrounded by other commercial properties. See *Taco Bell*, 234 Kan. at 882. While several *Golden* factors may support approval of the Woodsonia West Development, Austin has nevertheless failed to show that the City acted unreasonably. Austin failed to show the councilmembers' concerns about building height, traffic associated with higher density, and the development layout's impact on the character of the existing neighborhood were unreasonable.

This court's review is limited by the governing reasonableness standard, but that standard is not without consequence. Zoning authorities' decisions must be reasonable, and the basis for those decisions must be meaningfully discernable from the record. Given the councilmembers' concerns about traffic, density, height, and buffer zones, Austin has not shown that the City's denial of its application for the Woodsonia West Development was unreasonable.

C. *The councilmembers did not improperly rely on a plebiscite of the neighbors or prejudge the Woodsonia West Development.*

Austin claims that councilmembers improperly prejudged the Woodsonia West Development and denied it based on a plebiscite of the neighbors. Austin alleges that Councilmember Larson-Bunnell prejudged the Woodsonia West Development because she developed notes explaining her opposition before the public City Council meeting. Austin claims bias but cites no personal incentive or benefit to the councilmember.

A zoning authority decisionmaker is not prohibited from forming prejudgments so long as the decisionmaker "maintained an open mind and continued to listen to all the evidence presented before making a final decision." *McPherson*, 274 Kan. at 318. Austin claims that the weight of the evidence supporting the development is sufficient evidence that Councilmember Larson-Bunnell improperly prejudged the proposal. However, as explained above, the City Council's decision was not unreasonable. Moreover, Councilmember Larson-Bunnell did not ignore Austin's evidence. Importantly, Councilmember Larson-Bunnell stated there was not sufficient evidence supporting neighbors' concerns about potential for increased crime, property devaluation, or school overcrowding and her decision was not based on those concerns. Austin failed to show any prejudgment prevented the councilmembers from keeping an open mind and adjusting to evidence presented.

Additionally, this court cannot ignore the potential impact of the nearly universal neighborhood opposition to the Woodsonia West Development. Neighbors filed a protest petition and spoke at the City

Council meetings in opposition, citing concerns about traffic, neighborhood character, and school overcrowding, among other things. While the councilmembers who voted to deny the Woodsonia West Development shared some of the concerns expressed by neighbors, this court cannot say the councilmembers abandoned their quasi-judicial responsibility in favor of neighborhood fervor. "Zoning is not to be based upon a plebiscite of the neighbors; neighborhood objections alone are not legally sufficient to support land use regulation. Nevertheless, their views remain a consideration in a governing body's ultimate decision." *Zimmerman*, 289 Kan. 926, Syl. ¶ 7.

Important here, because the neighbors filed a protest petition, the Woodsonia West Development required a 3/4 majority vote to pass. That means Austin needed six of the eight voting councilmembers to gain approval. So, even if Councilmember Kemmling's deposition testimony that he had "questions about or concerns about" school capacity demonstrates that the neighbors' unsupported generalizations "that it's very crowded" at the schools improperly influenced his vote, one additional vote to approve would not have changed the outcome. None of the other councilmembers discussed potential school overcrowding as a reason for their vote to deny.

Zoning authorities need not ignore neighbors' concerns to avoid falling victim to improper influence. In fact, the statutory scheme gives neighbors' concerns weight by requiring a super majority vote for passage of a proposed zoning amendment when a valid protest petition has been filed. See K.S.A. 12-757(f). This demonstrates the Legislature's intent that neighbors' concerns be given thoughtful consideration. Likewise, the fact that councilmembers shared concerns with the neighbors does not demonstrate improper influence. Unlike the facts here, cases cautioning against neighborhood influence often involve a zoning amendment with only a slight change, or a lack of zoning authority reasoning. See *Taco Bell*, 234 Kan. at 891-92 (the zoning request was similar to the existing neighborhood); *Sechrest*, 2018 WL 4655611, at *6-7 (zoning authority failed to explain concerns about small zoning amendment). A zoning authority can and should consider neighbors' concerns and then examine them to determine whether they outweigh the community benefits. See *Waterstradt v. Board of Commissioners*, 203 Kan. 317, Syl. ¶ 3, 454 P.2d 445 (1969).

Austin failed to establish the councilmembers improperly prejudged the Woodsonia West Development to the extent they failed to maintain an open mind before reaching a conclusion or that their decision was based on a plebiscite of the neighbors.

CONCLUSION

The City may enact zoning ordinances that are not inconsistent with state zoning statutes and apply those ordinances to applications for multi-family residential planned unit developments. Austin's challenge to the reasonableness of the City's decision demonstrates the tension between landowners and zoning authorities, particularly in residential zoning cases. Because zoning authorities are encouraged, but not required, to consider the *Golden* factors and create a record of specific reasons for their decisions, it can be difficult for landowners to create development plans that anticipate and alleviate the zoning authority's concerns while achieving the most desired use of their land. Ultimately, this court's review is limited to determining whether the zoning authority acted reasonably—which is presumed. The City provided a minimally sufficient record upon which this court could review its decision, and Austin failed to demonstrate the City's decision was unreasonable.

The district court's grant of summary judgment to the City is therefore affirmed.

(547 P.3d 617)

No. 125,831

STATE OF KANSAS, *Appellee*, V. MALIK D. BEASLEY, *Appellant*.

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Criminal Use of Weapons Violation—Proof That Defendant Knowingly Possessed Firearm and Was Convicted of Domestic Violence Offense within Five Years.* In a prosecution for criminal use of weapons in violation of K.S.A. 2019 Supp. 21-6301(a)(18), the State must prove beyond a reasonable doubt not only that the defendant knowingly possessed a firearm, but also that the defendant did so while knowingly convicted of a domestic violence offense within the preceding five years. The "knowingly" culpable mental state applies to each element of the crime.

2. TRIAL—*Jury Instructions—No Meaningful Distinction between Using "No Reasonable Doubt" or "Beyond a Reasonable Doubt" Terminology.* A district court's jury instruction that states: "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," is legally appropriate. Using the terminology "no reasonable doubt" does not lower the State's burden of proof to a lesser standard than "beyond a reasonable doubt" as there is no meaningful distinction between the terms.

Appeal from Sedgwick District Court; DAVID J. KAUFMAN, judge. Submitted without oral argument. Opinion filed May 3, 2024. Affirmed.

James M. Latta, of Kansas Appellate Defender Office, for appellant.

Julie A. Koon, assistant district attorney, *Marc Bennett*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before ARNOLD-BURGER, C.J., MALONE and WARNER, JJ.

MALONE, J.: Malik D. Beasley appeals his convictions of two counts of criminal use of weapons following a jury trial. Beasley claims: (1) The State presented insufficient evidence to support his convictions; (2) the district court committed clear error in instructing the jury; (3) the reasonable doubt jury instruction lowered the State's burden of proof to a lesser standard than beyond a reasonable doubt, causing structural error; (4) the State committed reversible prosecutorial error during closing argument; and (5) cumulative trial error requires reversal of the convictions. For the reasons explained below, we disagree with Beasley's claims and affirm the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The facts are straightforward and mostly uncontested. In April 2020, Wichita police officer Jared Henry saw photographs of Beasley on social media with what appeared to be firearms during a routine investigation by the violent crimes community response team. A records check revealed that Beasley had been convicted of a domestic violence offense within the previous five years that prohibited him from possessing firearms. Based on this information, law enforcement executed a search warrant on the home where Beasley was staying. Investigators found an AK-style weapon under the mattress in the bedroom occupied by Beasley and his girlfriend. In the same bedroom, investigators found a handgun underneath the bottom drawer in a chest of drawers. Beasley's debit card and his wallet were found in the bedroom with the two guns.

The State charged Beasley with two counts of criminal use of weapons in violation of K.S.A. 2019 Supp. 21-6301(a)(18). The case proceeded to a two-day jury trial beginning on June 27, 2022. At trial, the State admitted into evidence pictures from the internet and videos from a cellphone showing Beasley with apparently the same AK-style weapon found during the search. The State also admitted into evidence a one-page form journal entry from the Wichita Municipal Court. The journal entry showed that on January 17, 2017, Beasley pleaded no contest and was found guilty of one count of "Domestic Battery—Bodily Harm" under W.M.O. § 5.10.025(a)(1). A stamp at the bottom of the journal entry signed and dated by the municipal judge designated that the conviction was an act of domestic violence. Beasley presented no defense at trial.

The jury found Beasley guilty as charged. The district court imposed a controlling sentence of 26 months' imprisonment but granted Beasley probation for 18 months. Beasley timely appealed the district court's judgment.

DID THE STATE PRESENT SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTIONS?

Beasley first claims the State presented insufficient evidence to support his convictions of criminal use of weapons. Beasley was convicted under K.S.A. 2019 Supp. 21-6301(a)(18), which prohibits: "[K]nowingly . . . possessing any firearm by a person who, within the

preceding five years, has been convicted of a misdemeanor for a domestic violence offense, or a misdemeanor under a law of another jurisdiction which is substantially the same as such misdemeanor offense."

"'When the sufficiency of the evidence is challenged in a criminal case, we review the evidence in a light most favorable to the State to determine whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt. An appellate court does not reweigh evidence, resolve conflicts in the evidence, or pass on the credibility of witnesses.' [Citations omitted.]" *State v. Aguirre*, 313 Kan. 189, 209, 485 P.3d 576 (2021).

Beasley's claim has two parts. First, he argues that K.S.A. 2019 Supp. 21-6301(a)(18) required the State to prove beyond a reasonable doubt not only that he knowingly possessed a firearm, but also that he did so while knowingly convicted of a domestic violence offense within the preceding five years. The State argues that the "knowingly" culpable mental state applies only to the possession of a firearm element of the crime. Second, Beasley argues that the evidence was insufficient to prove beyond a reasonable doubt that he knew he had been convicted of a domestic violence offense within the preceding five years that prohibited him from possessing a weapon. The State argues that the municipal court journal entry showing that Beasley was convicted of "Domestic Battery—Bodily Harm" was sufficient evidence to prove this element of the crime. As explained below, Beasley wins his first argument but loses the second.

Does the "knowingly" culpable mental state apply to each element of the crime?

Starting with the first argument, Beasley claims the State needed to prove beyond a reasonable doubt not only that he knowingly possessed a firearm, but that he did so while knowingly convicted of a domestic violence offense within the preceding five years. In other words, he argues that the "knowingly" culpable mental state applies to each element of the crime. K.S.A. 21-5202 addresses the culpable mental state for crimes and defines intentionally, knowingly, and recklessly. The statute states in part:

"(f) If the definition of a crime prescribes a culpable mental state that is sufficient for the commission of a crime, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the crime, unless a contrary purpose plainly appears.

"(g) If the definition of a crime prescribes a culpable mental state with regard to a particular element or elements of that crime, the prescribed culpable mental state shall be required only as to specified element or elements, and a culpable mental state shall not be required as to any other element of the crime unless otherwise provided." K.S.A. 21-5202.

Beasley argues that K.S.A. 21-5202(f) applies to his conviction under K.S.A. 2019 Supp. 21-6301(a)(18) because the weapons violation for which he was convicted requires a knowing mental state without distinguishing between the material elements of the crime. The State argues that K.S.A. 21-5202(g) applies to Beasley's conviction. Other panels of this court have addressed similar issues with conflicting opinions.

In *State v. Wiley*, No. 123,814, 2022 WL 1436398, at *5 (Kan. App. 2022) (unpublished opinion), *rev. denied* 317 Kan. 850 (2023), this court considered whether K.S.A. 2020 Supp. 21-6301(a)(17) required a finding that Wiley knew he was subject to a court order prohibiting him from possessing a weapon. K.S.A. 2020 Supp. 21-6301(a)(17) prohibits "knowingly . . . possessing any firearm by a person while such person is subject to a court order . . . ." This court found that K.S.A. 2020 Supp. 21-5202(f) applied to K.S.A. 2020 Supp. 21-6301(a)(17) because the latter statute did not distinguish a specific element to which the knowing mental state applied. This court relied in part on *Rehaif v. United States*, 588 U.S. 225, 231, 139 S. Ct. 2191, 204 L. Ed. 2d 594 (2019), where a knowing mental state was extended to the status element of a federal statute. Thus, this court held that K.S.A. 2020 Supp. 21-6301(a)(17) required the State to prove that Wiley knowingly possessed a weapon, and that Wiley knew he was subject to a certain type of court order at that time. *Wiley*, 2022 WL 1436398, at *5.

But in *State v. Leija*, No. 123,079, 2022 WL 333606, at *8-9 (Kan. App. 2022) (unpublished opinion), a case decided three months before *Wiley*, a panel of this court analyzed an argument similar to Beasley's and applied to K.S.A. 2018 Supp. 21-6301(a)(18)—an unaltered version of the same subsection under

which Beasley was convicted. The *Leija* panel analyzed the statute in accordance with federal cases like *Rehaif* but came to the opposite conclusion as the panel in *Wiley*. The *Leija* panel reasoned that because the term "knowingly" modified the term "possession" in K.S.A. 2018 Supp. 21-6301(a)(18), the knowing mental state applied only to possession of a weapon and not to the status element of having been convicted of a domestic violence offense. *Leija*, 2022 WL 333606, at *8-9. Significantly, the *Leija* panel did not cite or discuss K.S.A. 21-5202(f) or K.S.A. 21-5202(g) in its analysis.

We conclude the *Wiley* panel reached the correct result on this issue. As stated, the *Leija* panel did not cite or discuss K.S.A. 21-5202(f) which provides that the designated culpable mental state for a crime applies to each element of the crime unless a contrary purpose plainly appears. And as Beasley points out, federal cases like *United States v. Minor*, 63 F.4th 112, 121-22 (1st Cir. 2023), have analyzed federal equivalents to K.S.A. 21-6301(a)(18) and found that the knowing mental state applies to the status element of having been convicted of a domestic violence offense. Other federal courts have interpreted similar statutes similarly. See, e.g., *United States v. Kaspereit*, 994 F.3d 1202, 1208 (10th Cir. 2021); *United States v. Benton*, 988 F.3d 1231, 1236-39 (10th Cir. 2021).

Kansas courts have applied K.S.A. 21-5202(g) to criminal statutes to find that a particular culpable mental state applies to some elements of a crime but not to all the elements. In *State v. Dinkel*, 314 Kan. 146, 156-58, 495 P.3d 402 (2021), the court applied K.S.A. 2020 Supp. 21-5202(g) to the rape statute and found that because the statute included a culpable mental state for some means of committing rape but did not include a culpable mental state for rape of a child, there was no mental culpability requirement for rape of a child under 14 years of age in violation of K.S.A. 2020 Supp. 21-5503(a)(3). And in *State v. Pulliam*, 308 Kan. 1354, 1368, 430 P.3d 39 (2018), the court found that the culpable mental state of "recklessly" applied only to involuntary manslaughter under K.S.A. 2017 Supp. 21-5405(a)(1) but not under 21-5405(a)(4).

Here, the statutory structure supports a finding that the "knowingly" culpable mental state applies to each element of the crime.

K.S.A. 2019 Supp. 21-6301(a) states that "[c]riminal use of weapons is knowingly" and then lists 18 subsections prohibited by the statute. Subsection 18 states "possessing any firearm by a person who, within the preceding five years, has been convicted of a misdemeanor for a domestic violence offense." The statute does not indicate that the knowing mental state applies only to the possession of a firearm element of the crime. Instead, the statute designates that the crime must be committed knowingly and does not distinguish between the material elements of the offense. In this situation, K.S.A. 21-5202(f) applies to K.S.A. 2019 Supp. 21-6301(a)(18), and K.S.A. 21-5202(g) does not apply to the statute. The "knowingly" culpable mental state applies to the possession of a firearm element and to the status element of having been convicted of a domestic violence offense. Thus, we hold that the State needed to prove beyond a reasonable doubt not only that Beasley knowingly possessed a firearm, but also that he did so while knowingly convicted of a domestic violence offense within the preceding five years.

Did the State present sufficient evidence to prove the status element of the crime?

Beasley next argues that the evidence was insufficient to prove beyond a reasonable doubt that he knew he had been convicted of a domestic violence offense that prohibited him from possessing a weapon. Beasley does not assert that his domestic battery conviction cannot support his criminal use of a weapon convictions. Instead, he argues that the evidence did not show that he knew he had been convicted of a domestic violence offense as defined in K.S.A. 2019 Supp. 21-6301(m)(1). The only evidence the State presented on that element of the crime was a journal entry of sentencing showing that Beasley pleaded no contest to and was convicted of "Domestic Battery—Bodily Harm" in the Wichita Municipal Court.

K.S.A. 2019 Supp. 21-6301(m)(1) has its own definition of domestic violence: "[T]he use or attempted use of physical force, or the threatened use of a deadly weapon, committed against a person with whom the offender is involved or has been involved in a dating relationship or is a family or household member."

Beasley concedes that the evidence is enough to prove each element of this definition other than that he used physical force. Beasley argues: (1) that "bodily harm" may be caused by means other than physical force; (2) that the record does not show that he was informed that the legal definition of bodily harm includes physical force; (3) that his conviction was based on a plea of no contest that "does not necessarily reflect a conviction for the actual crime committed because pleas often rely on legal fictions"; and (4) that the State bore the burden to show that he knew of his status beyond a reasonable doubt.

Beasley was convicted of bodily harm domestic battery under W.M.O. § 5.10.025(a)(1). That ordinance defines bodily harm domestic battery as "knowingly or recklessly causing bodily harm by a family or household member to a family or household member or knowingly or recklessly causing bodily harm by an individual in a dating relationship to an individual with whom the offender is involved or has been involved in a dating relationship." W.M.O. § 5.10.025(a)(1). In the context of committing a battery, Kansas courts have long defined bodily harm as "'any touching of the victim against [the victim's] will, *with physical force*, in an intentional hostile and aggravated manner.'" (Emphasis added.) *State v. Phillips*, 312 Kan. 643, 671, 479 P.3d 176 (2021); *State v. Dubish*, 234 Kan. 708, 715, 675 P.2d 877 (1984). So by definition, the conviction for bodily harm domestic battery required a touching with physical force. Thus, the journal entry of Beasley's municipal court conviction is sufficient evidence to prove the physical force element in the definition of domestic violence at K.S.A. 2019 Supp. 21-6301(m)(1).

Beasley is presumed to know the law and the legal effect of his actions. *State v. Cook*, 286 Kan. 766, 775, 187 P.3d 1283 (2008). So his argument that his lack of awareness of legal definitions shields him from culpability is unfounded. See *Wiley*, 2022 WL 1436398, at *6 ("When Wiley became the subject of a [protection from abuse] PFA order, he was presumed to know that he could not own a firearm while that order was in effect, whether or not he knew about the statute prohibiting such conduct."). Beasley's assertion that his no contest plea somehow invalidates

or diminishes his domestic battery conviction is also unpersuasive. A conviction based on a plea of no contest is still a conviction. *State v. Fisher*, 233 Kan. 29, 34-35, 661 P.2d 791 (1983) ("While a plea of nolo contendere, unlike a plea of guilty, may not be used as an admission in any other action based on the same act, for all other purposes a conviction based on a plea of nolo contendere is just like any other conviction.").

Looking closer at the journal entry, it shows that Beasley pleaded no contest to bodily harm domestic battery and was convicted and sentenced to probation. It also shows that Beasley was required to sign the journal entry of probation, had fees imposed, and was advised of his right to appeal. All these things are evidence that Beasley was active in his case and therefore aware of his conviction. And because he is presumed to know the law and the legal effect of his actions, the journal entry also evidences that he was aware of his status and its prohibition against possessing firearms. Finally, the journal entry bears a stamp indicating that the conviction was an act of domestic violence, at least as that term is defined in the Wichita Municipal Code.

In sum, the journal entry was sufficient evidence to show that Beasley's conviction was designated as an act of domestic violence involving physical force against a person in the household, a family member, or someone whom he was dating. Beasley offered no evidence to counter the State's proof of this element of the crime. Viewing the evidence in the light most favorable to the State, the State presented sufficient evidence to prove to a rational fact-finder beyond a reasonable doubt that Beasley knowingly possessed two weapons and that he did so while knowingly convicted of a domestic violence offense within the preceding five years that prohibited him from possessing a weapon.

DID THE DISTRICT COURT COMMIT CLEAR ERROR IN INSTRUCTING THE JURY?

Beasley claims the district court committed clear error in instructing the jury on two points. First, Beasley argues that the district court failed to instruct the jury on the definition of domestic violence in K.S.A. 2019 Supp. 21-6301(m)(1). Second, Beasley argues that the district court failed to explicitly instruct the jury

that the "knowingly" culpable mental state of the crime applied to Beasley's status as a domestic violence offender. Beasley concedes that he did not request these instructions at his trial. The State argues that the district court properly instructed the jury.

When analyzing jury instruction issues, appellate courts follow a three-step process: (1) determining whether the appellate court can or should review the issue, in other words, whether there is a lack of appellate jurisdiction or a failure to preserve the issue for appeal; (2) considering the merits of the claim to determine whether error occurred below; and (3) assessing whether the error requires reversal, in other words, whether the error can be considered harmless. *State v. Holley*, 313 Kan. 249, 253, 485 P.3d 614 (2021). At the second step, appellate courts consider whether the instruction was legally and factually appropriate, using an unlimited standard of review of the entire record. 313 Kan. at 254. In determining whether an instruction was factually appropriate, courts must determine whether there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, that would have supported the instruction. 313 Kan. at 255.

Whether a party has preserved a jury instruction issue affects the appellate court's reversibility inquiry at the third step. 313 Kan. at 254. When a party fails to object to a jury instruction before the district court, or fails to request a specific instruction, an appellate court reviews the instruction to determine whether it was clearly erroneous. K.S.A. 22-3414(3). For a jury instruction to be clearly erroneous, the appellate court must be firmly convinced the jury would have reached a different verdict if the erroneous instruction had not been given. The party claiming clear error has the burden to show both error and prejudice. *State v. Crosby*, 312 Kan. 630, 639, 479 P.3d 167 (2021).

As we stated earlier, K.S.A. 2019 Supp. 21-6301(m)(1) has its own definition of domestic violence. The State concedes that an instruction on the K.S.A. 2019 Supp. 21-6301(m)(1) definition of domestic violence "might have been" legally and factually appropriate. We agree. Providing the jury with the statutory definition of domestic violence would have been legally appropriate in that

it would have fairly and accurately stated the law. And the instruction would have been factually appropriate where the State needed to present sufficient evidence that Beasley had been convicted of a domestic violence offense to be guilty of violating K.S.A. 2019 Supp. 21-6301(a)(18).

But even though an instruction on the definition of domestic violence would have been legally and factually appropriate at Beasley's trial, he has not shown that the district court committed clear error by failing to give the instruction. Beasley's sole argument is that jurors may have considered domestic violence to be more than physical force, like mental or emotional abuse. But that argument ignores the journal entry that indicated that Beasley was convicted of "Domestic Battery—Bodily Harm." For the reasons discussed, the journal entry of conviction satisfied the domestic violence status element of the crime. Beasley did not refute this evidence. The only evidence showed that the domestic battery Beasley committed was not a case of mental or emotional abuse. We are not firmly convinced the jury would have reached a different verdict had the district court instructed the jury on the definition of domestic violence at K.S.A. 2019 Supp. 21-6301(m)(1).

Next, Beasley argues that the district court committed clear error by failing to explicitly instruct the jury that the "knowingly" culpable mental state of the crime applied to Beasley's status as a domestic violence offender. We disagree. For Count One, the district court instructed the jury that the State needed to prove that Beasley "knowingly possessed a firearm (rifle) within five years of a misdemeanor conviction for a domestic violence offense." For Count Two, the district court instructed the jury that the State needed to prove that Beasley "knowingly possessed a firearm (handgun) within five years of a misdemeanor conviction for a domestic violence offense." The instructions followed PIK Crim. 4th 63.010 (2022 Supp.) and mirrored the statutory language of K.S.A. 2019 Supp. 21-6301(a)(18). The use of PIK instructions is strongly recommended for district courts. *State v. Bernhardt*, 304 Kan. 460, 470, 372 P.3d 1161 (2016). Although the instructions did not explicitly state that the "knowingly" culpable mental state applied to each element of the crime, the language would lead the jury to reach that conclusion. Even if an instruction could have

better clarified the application of the culpable mental state, the instructions given by the district court did not misstate the law. The district court did not err in instructing the jury on the culpable mental state for the crime.

DID THE REASONABLE DOUBT INSTRUCTION LOWER THE BURDEN TO A LESSER STANDARD THAN BEYOND A REASONABLE DOUBT, CAUSING STRUCTURAL ERROR?

Next, Beasley claims that the reasonable doubt jury instruction lowered the State's burden of proof to a lesser standard than beyond a reasonable doubt, causing structural error. Courts have held that an error with a reasonable doubt instruction that results in a burden less than beyond a reasonable doubt is structural error because prejudice is presumed, requiring reversal without any regard to harmlessness. *Sullivan v. Louisiana*, 508 U.S. 275, 278-80, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993); *Miller v. State*, 298 Kan. 921, 935-36, 318 P.3d 155 (2014). The State contends that the district court did not err in instructing the jury on the burden of proof.

K.S.A. 21-5108(a) states: "In all criminal proceedings, the state has the burden to prove beyond a reasonable doubt that a defendant is guilty of a crime. This standard requires the prosecution to prove beyond a reasonable doubt each required element of a crime." Jury instruction No. 2 on the State's burden of proof below read in part: "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." Beasley argues for the first time on appeal that "no reasonable doubt" is a lower standard than "beyond a reasonable doubt."

Beasley claims the instruction used by the district court was legally inappropriate. The instruction is found at PIK Crim. 4th 51.010 (2020 Supp.). As we stated, the use of PIK instructions is strongly recommended for district courts. *Bernhardt*, 304 Kan. at 470.

The State points to *State v. Kornelson*, 311 Kan. 711, 721-22, 466 P.3d 892 (2020), where our Supreme Court held that a district court's jury instruction that states: "'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,'" is legally appropriate and does not prevent the jury from exercising its nullification power. The State reminds us that the Court of Appeals is duty bound to follow Kansas Supreme Court precedent unless there is some indication that it is departing from its previous position. *State v. Rodriguez*, 305 Kan. 1139, 1144, 390 P.3d 903 (2017). But the issue in *Kornelson* was whether the district court's jury instruction undermined the jury's nullification power, not whether the instruction lowered the State's burden of proof to a lesser standard than beyond a reasonable doubt. So *Kornelson* is not on point.

Although not cited by either party, a case that is more on point is *State v. Curtis*, 217 Kan. 717, 724-25, 538 P.2d 1383 (1975). In that case, the defendant argued that the district court unduly restricted defense counsel in closing argument by not permitting counsel to use the phrase "beyond a reasonable doubt" concerning the State's burden of establishing the defendant's guilt. Instead, the district court allowed counsel to tell the jury that the State had the burden of proving that no reasonable doubt existed in the minds of the jurors. Our Supreme Court rejected the defendant's claim of error, and held:

"We discern no practical difference in the effect or meaning of the terminology in question. Telling the jury that it cannot convict if a reasonable doubt remains as to any of the claims made by the state conveys the same meaning as to burden of proof as requiring proof beyond a reasonable doubt." 217 Kan. at 725.

Based on *Curtis*, we hold the jury instruction used by the district court was legally appropriate. Beasley makes a distinction without a meaningful difference when he claims that "no reasonable doubt" is a lower standard than "beyond a reasonable doubt." Thus, the district court did not err in instructing the jury on reasonable doubt.

DID THE STATE COMMIT PROSECUTORIAL ERROR DURING CLOSING ARGUMENT?

Next, Beasley claims the State reversibly erred during closing argument by misstating the law. The State contends that the prosecutor's remarks in question did not misstate the law, and alternatively, any error was harmless beyond a reasonable doubt.

"To determine whether prosecutorial error has occurred, the appellate court must decide whether the prosecutorial acts complained of fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial. If error is found, the appellate court must next determine whether the error prejudiced the defendant's due process rights to a fair trial. In evaluating prejudice, we simply adopt the traditional constitutional harmlessness inquiry demanded by *Chapman* [*v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)]. In other words, prosecutorial error is harmless if the State can demonstrate 'beyond a reasonable doubt that the error complained of will not or 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.' [Citation omitted.]" *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016).

During closing arguments, the State's counsel said the following:

"Next, within five years of a misdemeanor conviction for domestic violence offense, this is going to go back to you, it's just a piece of paper, State's Exhibit 51, it shows that on January 17, 2017, the defendant was found guilty of domestic battery in the City of Wichita Municipal Court, and if you look at the very bottom of this form, this piece of paper, there's a little—it's a stamp, I believe, that the judge put on there finding that it was a domestic violence offense."

Beasley claims that the prosecutor's remarks were a misstatement of the law because the stamp on the journal entry, by itself, was not sufficient to show that the definition of domestic violence in K.S.A. 2019 Supp. 21-6301(a)(18) was met. But Beasley's argument ignores that the prosecutor did not reference the domestic violence stamp in isolation. Instead, the prosecutor described both the journal entry and the stamp. As explained above, the journal entry showed that the conviction was for bodily harm, which includes physical force, and that a domestic violence offense designation was made. So taken together, the evidence supports the domestic violence offense element even if the State had to prove that Beasley knew that the domestic battery was a domestic violence offense under the K.S.A. 2019 Supp. 21-6301(m)(1) definition. Thus, the State did not misstate either the law or the evidence. Because the prosecutor did not commit error, we need not address whether Beasley was prejudiced by the remarks.

DOES CUMULATIVE TRIAL ERROR REQUIRE REVERSAL?

Finally, Beasley claims that the cumulative effect of the errors alleged above deprived him of a fair trial. The State argues there were no trial errors, so Beasley is entitled to no relief based on cumulative error.

Cumulative trial errors, when considered together, may require reversal of the defendant's conviction when the totality of the circumstances establish that the defendant was substantially prejudiced by the errors and denied a fair trial. *State v. Alfaro-Valleda*, 314 Kan. 526, 551, 502 P.3d 66 (2022). The cumulative error rule does not apply when there are no trial errors or only a single error. *State v. Gallegos*, 313 Kan. 262, 277, 485 P.3d 622 (2021).

The only potential error we have identified was the district court's failure to sua sponte instruct the jury on the definition of domestic violence in K.S.A. 2019 Supp. 21-6301(m)(1), but we found the claim was unpreserved and there was no clear error. Our Supreme Court has held that "[u]npreserved instructional issues that are not clearly erroneous may not be aggregated in a cumulative error analysis because K.S.A. 2022 Supp. 22-3414(3) limits a party's ability to claim them as error." *State v. Waldschmidt*, 318 Kan. 633, Syl. ¶ 9, 2024 WL 1590398, at *1 (2024). Thus, Beasley has established no trial errors that may be aggregated in a cumulative error analysis. The cumulative error rule does not apply when there are no trial errors. *Gallegos*, 313 Kan. at 277.

Affirmed.

(547 P.3d 556)

No. 126,314

MARQUISE JOHNSON, *Appellant*, v. BASS PRO OUTDOOR WORLD, LLC, FABBRICA D'ARMI PIETRO BERETTA, S.P.A., and BERETTA U.S.A. CORP., *Appellees.*

SYLLABUS BY THE COURT

1. SUMMARY JUDGMENT—*Review of Trial Court's Ruling of Summary Judgment De Novo—Appellate Review.* Appellate courts review a trial court's ruling on a motion for summary judgment de novo, meaning we are unconstrained by the lower court's ruling because we are in the same position as the lower court. We must view the facts in the light most favorable to the party opposing summary judgment. If reasonable minds could disagree about the conclusions to be drawn from the evidence—if there is a genuine issue about a material fact—summary judgment is inappropriate.

2. PRODUCTS LIABILITY—*Protection of Lawful Commerce in Arms Act – Precludes Civil Actions against Manufacturers and Sellers of Firearms – Qualified Civil Liability Action.* The Protection of Lawful Commerce in Arms Act precludes civil actions for damages against manufacturers and sellers of firearms "resulting from the criminal or unlawful misuse of" a firearm. That type of action is known as a "qualified civil liability action" in the Act. 15 U.S.C. § 7902(a); 15 U.S.C. § 7903(4), (5)(A).

3. STATUTES—*Express Preemption Provision in Federal Protection of Lawful Commerce in Arms Act—Determination of Scope of Preemption.* When a federal statute contains an express preemption provision like the one used in the Protection of Lawful Commerce in Arms Act, we look to the plain language of that provision to determine the scope of the preemption. That is the best evidence of congressional intent.

4. SAME—*Scope of Express Preemption Provision in Federal Statute—Interpretation of Language—Two Principles.* An analysis of the scope of any express preemption provision in a federal statute must begin with the text. The interpretation of that language is guided by two principles about the nature of that preemption: (1) the presumption against preemption of the historic police powers of the states and (2) Congress' purpose in enacting the legislation.

5. SAME—*To Resolve Text of Ambiguous Federal Statute—Courts Rely on Principles of Federalism*. When a federal statute's text is ambiguous, courts can rely on the basic principles of federalism to resolve any ambiguity in a way that does not broadly intrude on the police power of the states.

6. PRODUCT LIABILITY—*Qualified Civil Liability Actions May Not Be Brought in Federal or State Court under Federal Arms Act.* The Protection of Lawful Commerce in Arms Act provides that qualified civil liability actions "may not be brought in any Federal or State court." 15 U.S.C. § 7902(a). This provision expressly preempts state tort actions that are included in the definition of "qualified civil liability actions." The scope of the preemption is determined by the plain language of that definition and the exceptions listed in 15 U.S.C. § 7903(5).

7. CRIMINAL LAW—*Culpable Mental State of at Least Recklessness an Essential Element of Every Crime under Statute.* Generally, a culpable mental state of at least recklessness is an essential element of every crime. K.S.A. 21-5202(a). Where the statute defining the crime does not prescribe a culpable mental state, one is nevertheless required unless the definition of the crime "plainly dispenses with any mental element."

8. SAME—*Culpable Mental State Discussed in K.S.A. 21-5202(g).* "If the definition of a crime prescribes a culpable mental state with regard to a particular element or elements of that crime, the prescribed culpable mental state shall be required only as to specified element or elements, and a culpable mental state shall not be required as to any other element of the crime unless otherwise provided." K.S.A. 21-5202(g).

Appeal from Lyon District Court; MERLIN G. WHEELER, judge. Oral argument held November 14, 2023. Opinion filed May 3, 2024. Reversed and remanded.

David R. Morantz, Lynn R. Johnson, and *Richard L. Budden*, of Shamberg, Johnson & Bergman, Chartered, of Kansas City, Missouri; *Erin Davis,* pro hac vice, of Brady United Against Gun Violence; and *Michael C. Helbert*, of Helbert & Allemang, of Emporia, for appellant.

Daniel J. Buller, of Foulston Siefkin LLP, of Overland Park, *David E. Rogers*, of the same firm, of Wichita, and *Craig A. Livingston*, pro hac vice, of Livingston Law Firm, P.C., of Walnut Creek, California, for appellees.

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

HILL, J.: Summary judgment motions are one way for parties in civil disputes to avoid an expensive and unnecessary trial. But such motions are not a substitute for a trial. If the undisputed facts and the controlling law compel summary judgment, then the motion should be granted. If a judge, however, feels compelled to grant a summary judgment motion on facts the judge finds to be true, then the motion should be denied because a summary judgment motion is not a fact-finding procedure. Hearing such motions

is not a time to weigh evidence. That function is left for the jury to perform.

This is an interlocutory appeal by Marquise Johnson of an order granting summary judgment. The order dismissed his product defect lawsuit against a gun seller, the distributer, and the manufacturer of the pistol used in shooting him. In doing so, the court relied on provisions of the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-7903. Johnson contends that the court was in error by replacing the jury and finding facts. We agree and reverse.

We begin with the facts. Then, to resolve this dispute, we must delve into the concept of federalism. That legal doctrine controls how state and federal laws mesh so there are clear lines of authority and control. We then consider the Act itself, analyzing two key subdivisions of the law. Finally, we examine the arguments of the parties and explain why we think the district court prematurely granted summary judgment.

Firearms are dangerous to life and limb.

Shortly after turning 21, Andre Lewis went to the Bass Pro Outdoor World in Olathe, Kansas, and bought a Beretta APX 9mm pistol. This was his first gun purchase, but Lewis was no stranger to guns. From an early age, Lewis had handled shotguns and rifles. He had also fired Glock and Hi-Point pistols as well as various revolvers. In middle school, Lewis attended a Hunter's Safety Course. He received his first hunting rifle when he was 18. Lewis bought the APX pistol for self-protection and stored the gun under the driver's seat of his car. Several warnings about the safe operation of his specific pistol came with his purchase.

Lewis ignored several warnings.

Lewis received the Beretta APX Pistol User Manual during his purchase of the firearm. The manual cautioned users that a live cartridge of ammunition could remain in the firing chamber even if the magazine is removed. In particular, the manual provided: "WARNING: Always visually inspect the firing chamber to ensure that it is empty. The chamber is empty when no cartridge is

visible when looking from the ejection port into the open chamber." Lewis did not, however, read the user manual and did not know the difference between the APX pistol and other guns that he had previously handled.

Lewis also received Bass Pro Shop's "10 Commandments of Safe Gun Handling" during his purchase of the firearm. He only spent a few minutes reviewing the safety sheet before certifying that he read and understood its contents.

Besides the user manual and commandments, two warnings were stamped directly on the gun: "READ MANUAL BEFORE USE" and "FIRES WITHOUT MAGAZINE."

The APX pistol also has a unique feature known as the "striker deactivation button," which Lewis could have pressed to safely release the striker before disassembly.

If all other warnings remained unheeded, at the very least Lewis' experience and training with firearms should have prevented this incident. Lewis knew the danger of pointing a gun at another person. Lewis knew to treat every firearm as if it were loaded. Lewis knew how to pull the slide of the pistol back to visually inspect the firing chamber to check for a live round.

Inattention and inadvertence lead to a lost limb.

While driving his football teammates home from a team dinner, Andre Lewis pulled the pistol out from under his seat. His teammate, Marquise Johnson, who sat in the front passenger seat, asked to see the gun. While stopped at a stoplight, Lewis removed the magazine and handed the gun to Johnson. Johnson briefly looked at the gun and, as he passed it back to Lewis, asked Lewis if he knew how to clean the gun. Lewis boasted that he knew how to disassemble the gun in "2.2 seconds." Lewis disassembled the gun to prove his claim.

Lewis believed the gun was unloaded. That was a mistake. He did not know the gun could fire after the magazine was removed. He also assumed the pistol worked just like the Glock pistols he had handled before. Believing the pistol worked just like the Glock pistol, Lewis thought he needed to pull the trigger to remove the slide.

Lewis pointed the barrel of the pistol at Johnson and pulled the trigger. The bullet that remained in the chamber of the gun discharged and struck Johnson's legs. Lewis immediately drove to the hospital while he and his teammates applied pressure to the wound. Lewis' inattention and inadvertence resulted in the amputation of Johnson's left leg above the knee.

After an investigation, no criminal charges were filed against Lewis.

Following the incident, the Emporia Police Department ruled that the shooting was an accident. The Lyon County Attorney's Office investigated the incident and was unable to "find sufficient facts to support a conclusion of reckless behavior as defined by our statute." Further determining that the behavior "does not appear to meet the legal definition of disregarding a substantial and unjustifiable risk or result." The prosecutors also determined Lewis had not violated the criminal discharge of a firearm on a public road statute because his actions were not those which "the legislature contemplated in enacting the statute." Lewis was never charged with the criminal discharge of a firearm.

Johnson seeks damages.

Johnson sued Lewis, the shooter; Fabbrica d'Armi Pietro Beretta S.p.A., the designer and manufacturer of the gun; Beretta U.S.A. Corp., the importer and distributer of the gun; and Bass Pro Outdoor World, LLC, the retailer of the gun. Johnson's theory of the case was that the gun was unreasonably dangerous because it lacked reasonable safety features commonly available such as magazine disconnect safety to prevent the gun from firing after the magazine has been removed and a loaded chamber indicator to alert the user that a round of ammunition is in the chamber.

Beretta U.S.A. and Bass Pro moved for summary judgment under the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-7903, which precludes a civil action for damages against manufacturers and sellers of firearms "resulting from the criminal or unlawful misuse of" a firearm. 15 U.S.C. § 7903(5)(A). The district court granted the motion. This court granted Johnson's application for interlocutory review.

The district court granted summary judgment to some defendants.

The district court concluded Lewis was reckless as a matter of a law. The court stated that there was only an objective standard and Lewis' subjective beliefs were not relevant. The court reasoned that firearms carry "certain unavoidable risks." Lewis did not read the operator's manual or heed the warning printed on the gun. He had experience and training. If Lewis had followed the safe gun handling commandments, the injury would not have occurred. He pointed the gun directly at Johnson. He intentionally pulled the trigger without any certainty whether there was a cartridge in the chamber. He failed to use the button on the gun permitting dismantling without pulling the trigger. He chose to dismantle the gun merely to prove that he could while operating a motor vehicle.

The court ruled whether Lewis pulled back the slide of the gun to find out if there was a cartridge in the chamber was controverted but was not a material fact:

"It is true that there are contradictory statements regarding whether he visually checked for a live cartridge, but the difference is, again, immaterial in my view. I find that this factual dispute does not rise to the level of a material issue. Whether he checked or not, the fact is undisputed that there was a live cartridge in the chamber of the firearm which discharged when Lewis pulled the trigger."

The court found as fact that Lewis intentionally removed the magazine to disarm the gun, that he did not know the gun could fire with the magazine removed, and that he believed the gun was unloaded. But these circumstances were not sufficient to raise a genuine issue of material fact to preclude summary judgment.

We are not constrained by the district court's ruling.

Appellate courts review a trial court's ruling on a motion for summary judgment de novo, meaning we are unconstrained by the lower court's ruling because we are in the same position as the lower court. We must view the facts in the light most favorable to the party opposing summary judgment. If reasonable minds could disagree about the conclusions to be drawn from the evidence—if there is a genuine issue about a material fact—summary judgment

is inappropriate. *H.B. v. M.J.*, 315 Kan. 310, 313, 508 P.3d 368 (2022).

Finally, a disputed question of fact which is immaterial to the issue does not preclude summary judgment. *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 934, 296 P.3d 1106, *cert. denied* 571 U.S. 826 (2013).

We offer observations about the federal law.

The Protection of Lawful Commerce in Arms Act precludes civil actions for damages against manufacturers and sellers of firearms "resulting from the criminal or unlawful misuse of" a firearm. That type of action is known as a "qualified civil liability action" in the Act. 15 U.S.C. § 7902(a); 15 U.S.C. § 7903(4), (5)(A).

There is, however, a product defect exception for actions for physical injury "resulting directly from a defect in design or manufacture" of a firearm. But this exception does not apply when "the discharge of the [firearm] was caused by a volitional act that constituted a criminal offense." 15 U.S.C. § 7903(5)(A)(v).

The parties adopt opposite positions before us.

Arguing that his lawsuit should be revived, Johnson contends the accidental discharge of a firearm is not a volitional, criminal act or unlawful misuse of a firearm as a matter of law. Thus, in his view, the defendants are not shielded by the Act. He also argues that the district court did not resolve the material facts and all inferences that could be drawn from the evidence in Johnson's favor as required on a motion for summary judgment.

Highly summarized, Lewis argues that:

(1) Federalism commands courts to narrowly construe the Act.

(2) Only claims solely caused by criminal acts are prohibited.

(3) All the potentially relevant criminal statutes require at least a mens rea of recklessness. Lewis did not consciously disregard a risk.

(4) The discharge of the gun was not a volitional act because Lewis did not intend the gun to discharge when he pulled the trigger.

The defendants contend Congress intended the Act to cover lawsuits like this one where the firearm functioned as designed. The gun here was designed to fire a chambered cartridge when the trigger is pulled. Any reasonable person would have appreciated the risk of a discharge upon pulling the trigger. Lewis ignored safe gun handling rules, the user's manual, and warnings stamped on the gun. Lewis admitted he did not pull the slide back to check the chamber for a live cartridge. Lewis' recklessness was overwhelming. Both the act of pointing the gun in Johnson's direction and the act of pulling the trigger were volitional. And, finally, the Act expressly preempts state tort law. We begin with preemption.

The scope of preemption is determined by the text of the law.

Johnson contends federalism commands courts to narrowly construe the Act.

Article VI of the United States Constitution provides that the laws of the United States "shall be the supreme Law of the Land." Art. VI, cl. 2. State law that conflicts with federal law is without effect. But there is a presumption that the historic powers of the states are not to be superseded by federal law unless it is "'the clear and manifest purpose of Congress.'" Accordingly, Congress' intent is paramount. Congress' intent may be "'explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" In the absence of an express congressional command, state law is preempted if that law conflicts with federal law or if federal law thoroughly occupies a legislative field. *Cipollone v. Liggett Grp., Inc*., 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992).

When Congress has included a provision explicitly addressing preemption that provides a reliable indicator of congressional intent, there is no need to infer congressional intent to preempt state law from the substantive provisions of the legislation. "Such reasoning is a variant of the familiar principle of *expression unius est exclusio alterius:* Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Cipollone*, 505 U.S. at 517; see *Soto v. Bushmaster Firearms Int'l, LLC*, 331 Conn. 53, 138, 202 A.3d 262 (2019) (finding no indication in the text of the Act that Congress

intended to restrict the power of the states to regulate wrongful advertising). Translating the Latin and the canon of construction simply means to express or include one thing implies the exclusion of the other.

In other words, when a statute contains an express preemption provision like the one used here, we look to the plain language of that provision to determine the scope of the preemption. That is the best evidence of Congress' intent. See *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp*., 537 U.S. 51, 62-63, 123 S. Ct. 518, 154 L. Ed. 2d 466 (2002).

Even though our analysis of the scope of an express preemption provision must begin with the text, the interpretation of that language is guided by two principles about the nature of preemption: (1) the presumption against preemption of the historic police powers of the states and (2) Congress' purpose in enacting the legislation. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484-86, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996).

When the provision's text is ambiguous, courts can rely on the basic principles of federalism to resolve the ambiguity in a way that does not broadly intrude on the police power of the states. See *Bond v. United States*, 572 U.S. 844, 859-60, 134 S. Ct. 2077, 189 L. Ed. 2d 1 (2014).

The Act provides that qualified civil liability actions "may not be brought in any Federal or State court." 15 U.S.C. § 7902(a). This provision expressly preempts state tort actions that are included in the definition of "qualified civil liability actions." The scope of the preemption is determined by the plain language of that definition and the exceptions listed in 15 U.S.C. § 7903(5). See *Delana v. CED Sales, Inc*., 486 S.W.3d 316, 324 (Mo. 2016); *Estate of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 387-88 (Alaska 2013).

"Resulting from" does not mean "solely caused by."

Under the Act, manufacturers and sellers of firearms are not subject to civil actions for damages "*resulting from* the criminal or unlawful misuse of" a firearm. That type of action is a "qualified civil liability action." (Emphasis added.) 15 U.S.C. § 7902(a); 15 U.S.C. § 7903(4), (5)(A). Johnson contends "resulting from"

means "solely caused by" criminal or unlawful misuse, to give effect to Congress' stated intent for enacting the Act in 15 U.S.C. § 7901.

Black's Law Dictionary defines the verb "result" as: "[t]o be a physical, logical, or legal consequence; to proceed as an outcome or conclusion <much good will result from this>." Black's Law Dictionary 1573 (11th ed. 2019).

Congress stated one of its purposes for the Act was:

"To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm *solely caused by* the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended." (Emphasis added.) 15 U.S.C. § 7901(b)(1).

We consider that language to be significant. "'A preamble, purpose clause, or recital is a permissible indicator of meaning.'" *Bittner v. United States*, 598 U.S. 85, 99 n.6, 143 S. Ct. 713, 215 L. Ed. 2d 1 (2023). But "[w]hen Congress includes particular language in one section of a statute but omits it from a neighbor, we normally understand that difference in language to convey a difference in meaning." *Bittner*, 598 U.S. at 94. Congress may enact a more general statute than necessary to accomplish its purpose. See *H.J. Inc. v. Nw. Bell Tel. Co*., 492 U.S. 229, 248, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989) (Congress' purpose in enacting RICO was the perceived need to combat organized crime. But Congress chose to enact a more general statute which was not limited to organized crime.).

We note that several other courts when considering similar arguments have declined to elevate the Act's preamble over the substantive language in 15 U.S.C. § 7903(5)(A). See *Travieso v. Glock Inc*., 526 F. Supp. 3d 533, 543 (D. Ariz. 2021); *Delana*, 486 S.W.3d at 321-22; *Coxe*, 295 P.3d at 386-87. To interpret "resulting from" as "solely caused by" would render redundant many—if not all—of the exceptions listed in the statute. Congress chose to exclude only certain types of tort actions from the broader definition of qualified civil liability action. This reasoning is impeccable. Thus, we conclude that "resulting from" does not mean "solely caused by."

K.S.A. 2022 Supp. 21-6308(a)(3)(B) does not require a culpable mental state, so this is a qualified civil liability action prohibited by the Act.

In considering whether Lewis' conduct violated a criminal statute, the district court first concluded that there was "no question" Lewis violated K.S.A. 2022 Supp. 21-6308(a)(3)(B) (criminal discharge of a firearm upon a public road) because that statute did not require any specific mental state as an element of the crime. We question that holding because we think a deeper analysis is called for. When considering the crime of criminal discharge of a firearm upon a public road, the "notes on use" in the appropriate PIK instructions say that "the court must determine whether a culpable mental state is required." PIK Crim. 4th 63.070.

Generally, a culpable mental state of at least recklessness is an essential element of every crime. K.S.A. 21-5202(a). Where the statute defining the crime does not prescribe a culpable mental state, one is nevertheless required unless the definition of the crime "plainly dispenses with any mental element." K.S.A. 21-5202(d).

But when the statute defining the crime contains alternative ways of committing the crime, some ways contain mental culpability language and other ways do not, then courts must follow the directions in K.S.A. 21-5202(g) and pick and choose:

"If the definition of a crime prescribes a culpable mental state with regard to a particular element or elements of that crime, the prescribed culpable mental state shall be required only as to specified element or elements, and a culpable mental state shall not be required as to any other element of the crime unless otherwise provided." K.S.A. 21-5202(g).

For example, in *State v. Dinkel,* 314 Kan. 146, 158, 495 P.3d 402 (2021), the court applied K.S.A. 2020 Supp. 21-5202(g) to the rape statute and concluded that because the statute included a mental state in some of the various means of committing rape but did not include a mental state for rape of a child, there was no mental culpability requirement for rape of a child. The construction of the rape statute sets out the elements:

"'(a) Rape is:
(1) Knowingly engaging in sexual intercourse with a victim who does not consent to the sexual intercourse under any of the following circumstances:
(A) When the victim is overcome by force or fear; or
(B) when the victim is unconscious or physically powerless;
(2) Knowingly engaging in sexual intercourse with a victim when thevictim is incapable of giving consent because of mental deficiency or disease, or when the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance, which condition was known by the offender or was reasonably apparent to the offender;
(3) sexual intercourse with a child who is under 14 years of age;
(4) sexual intercourse with a victim when the victim's consent was obtained through a knowing misrepresentation made by the offender that the sexual intercourse was a medically or therapeutically necessary procedure; or
(5) sexual intercourse with a victim when the victim's consent was obtained through a knowing misrepresentation made by the offender that the sexual intercourse was a legally required procedure within the scope of the offender's authority.' K.S.A. 2020 Supp. 21-5503." *Dinkel*, 314 Kan. at 156.

Note subsection (3) has no mental culpability requirement.

In a similar way, the criminal discharge of a firearm statute lists several ways of committing the named crime. Only subsection (a)(3)(B) omits a mental culpability element. The criminal discharge of a firearm statute reads:

"(a) Criminal discharge of a firearm is the:
(1) *Reckless* and unauthorized discharge of any firearm:
(A) At a dwelling, building or structure in which there is a human being whether the person discharging the firearm knows or has reason to know that there is a human being present;
(B) at a motor vehicle, aircraft, watercraft, train, locomotive, railroad car, caboose, rail-mounted work equipment or rolling stock or other means of conveyance of persons or property in which there is a human being whether the person discharging the firearm knows or has reason to know that there is a human being present;
(2) *reckless* and unauthorized discharge of any firearm at a dwelling in which there is no human being; or
(3) discharge of any firearm:
(A) Upon any land or nonnavigable body of water of another, without having obtained permission of the owner or person in possession of such land; or

> (B) *upon or from any public road, public road right-of-way or railroad right-of-way except as otherwise authorized by law."* (Emphasis added.) K.S.A. 2022 Supp. 21-6308.

Clearly, the criminal discharge of a firearm statute imposes a mental culpability requirement on some ways of committing criminal discharge of a firearm but not on criminal discharge of a firearm upon a public road. Therefore, under K.S.A. 21-5202(g), there is no mental culpability requirement for criminal discharge of a firearm upon a public road. It is also evident from reading the statute as a whole that the Legislature intended to criminalize any discharge of a firearm upon a public road, unless it met one of the enumerated exceptions or was otherwise authorized by law.

Aside from the omission of the term "reckless," the Legislature treated subsection (a)(3) differently than the other subsections in other ways. Subsection (a)(3) does not apply to several categories of persons such as law enforcement officers, members of the armed services, private detectives, the state fire marshal, and the Attorney General while engaged in duties of employment. See K.S.A. 2022 Supp. 21-6308(d). And violation of subsection (a)(3) is a class C misdemeanor, while violation of one of the other subsections constitutes a felony. K.S.A. 2022 Supp. 21-6308(b).

To sum up, we hold that because Lewis discharged a firearm upon or from a public road, he violated the plain language of the criminal statute. The prosecutor's discretionary decision not to charge him with the crime does not alter what happened. Johnson's claim results from the criminal and unlawful misuse of a firearm and is therefore a qualified civil liability action as contemplated by the Act. There are no material disputed facts related to this issue.

Was the discharge of the gun caused by a volitional act as a matter of law?

The district court ruled the term "volitional act" in the product defect exception added an element of intent. The court cited *Thomas v. Benchmark Ins*., 285 Kan. 918, 179 P.3d 421 (2008). The court concluded that Lewis' action of pointing the gun at Johnson and pulling the trigger was an intentional act that included an inherent risk of injury. The court then inferred that Lewis intended

to cause injury due to the nature of Lewis' reckless and improper handling of the firearm. Therefore, the product defect exception did not apply.

We move to the question of whether this was a volitional act.

As stated above, a suit is not excluded under the Act if the action results "directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where *the discharge of the product was caused by a volitional act that constituted a criminal offense*, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage." (Emphasis added.) 15 U.S.C. § 7903(5)(A)(v).

Having already determined the discharge of the gun on a public road constituted a criminal offense, the issue is whether "the discharge" of the gun "was caused by a volitional act."

Both parties agree the district court incorrectly relied on *Thomas*. We agree. This is a question of statutory interpretation of the Act. Johnson contends the discharge of the gun was not a volitional act because, viewing the facts and inferences in the light most favorable to him, Lewis did not intend the gun to discharge when he pulled the trigger nor did he intend to cause injury. Defendants contend the term "volitional" modifies "act."

There is no question here that Lewis chose to pull the trigger. But there is also no question Lewis did not choose or intend for the gun to discharge when he pulled that trigger. A volitional act is one that a person willfully takes regardless of the consequences. Both the act of pointing the gun in Johnson's direction and the act of pulling the trigger were volitional acts. If, for example, Lewis had accidentally dropped the gun and it discharged, that would not be a volitional act.

Several courts have addressed the interpretation of the so-called "exception to the exception." Some judges have taken the expansive view that any volitional act in the causal chain that constitutes a criminal offense suffices to bar the plaintiff's claim. In *Ryan v. Hughes-Ortiz*, 81 Mass. App. Ct. 90, 93, 959 N.E.2d 1000 (2012), Milot accidentally shot himself while trying to put a gun

back in its container. Milot's possession of the firearm was a criminal offense in violation of 18 U.S.C. § 922(g)(1) because he had been convicted of a felony. In upholding a grant of summary judgment, the appeals court held, "[T]he relevant volitional act that caused the gun's discharge was Milot's unlawful possession of the Glock pistol. Milot's volitional act constituted a criminal offense and the design defect exception is therefore not applicable." *Ryan*, 81 Mass. App. Ct. at 100.

Other courts have reviewed the exception to the exception in order to give effect to the statute.

In *Gustafson v. Springfield, Inc.,* 282 A.3d 739, 740 (Pa. Super. 2022), *rev. granted* April 18, 2023, a deeply divided opinion, a 14-year-old boy obtained a semiautomatic handgun. The boy removed the handgun's magazine and believed the gun was unloaded. The boy pulled the trigger and the gun discharged. The boy's friend was shot and killed. Interpreting the product defect exception, one opinion commented that the exception to the product defect exception rendered the product defect exception "toothless, because *all* criminal offenses require a *volitional* act." 282 A.3d at 743. The opinion concluded the product defect exception will never apply. 282 A.3d at 744.

The plain language of the product defect exception can support the expansive view. The term "volitional" modifies the term "act." Interpreting the phrase "was caused by a volitional act that constituted a criminal offense" to mean *any* cause in the causal chain, gives effect to the last phrase in the exception stating that "then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage." (Emphasis added.) 15 U.S.C. § 7903(5)(A)(v). This interpretation, however, would swallow the product defect exception entirely.

Some judges have ruled more narrowly that pointing a gun in the direction of a person and pulling the trigger are volitional acts sufficient to bar a product defect suit even though the discharge of the gun was not intended. In *Travieso v. Glock Inc*., 526 F. Supp. 3d 533, 536 (D. Ariz. 2021), while travelling home from a youth camping trip in a church leader's vehicle, a 14-year-old girl who

was in the vehicle came into possession of a handgun. The handgun discharged and Travieso was hit in the back. The court granted the defendant's motion to dismiss, concluding that the girl took multiple volitional actions that constituted criminal offenses including taking possession of the gun and pulling the trigger while the gun was pointed at another person. 526 F. Supp. 3d at 548.

In *Adames v. Sheahan*, 233 Ill. 2d 276, 280-82, 909 N.E.2d 742 (2009), a 13-year-old boy, Billy, was playing with his father's service weapon. Billy took the magazine out of the gun, pretended he was firing the gun, and pulled the trigger. The gun discharged. His friend, Josh, was hit in the stomach. In affirming summary judgment, the appeals court held, "[E]ven if Billy did not intend to shoot Josh, Billy did choose and determine to point the Beretta at Josh and did choose and determine to pull the trigger. Although Billy did not intend the consequences of his act, his act nonetheless was a volitional act." 233 Ill. 2d at 314.

Some courts have ruled that lawsuit was not barred.

In contrast, other judges have determined the "exception to the exception" is more limited. One of the *Gustafson* opinions stated the *discharge* of the gun had to be volitional:

"In typical circumstances, the intentional act of pulling a trigger is effectively identical to intentionally firing the gun, regardless of whether the resulting injury was intended. However, the factual averments of the Gustafsons suggest otherwise, as they contend that while the Juvenile Delinquent's pulling of the trigger was volitional, the firing of the gun was not, because he believed that the firearm was not loaded when the magazine was disengaged. I do not think the relevant criminal act of discharging the gun was volitional, even if it was criminal in nature. This is the essence of the product defect claims at issue: whether the gun could have been made safer such that a person in the Juvenile Delinquent's position would have been deterred from pulling the trigger when he, in fact, did not intend for the gun to discharge. . . .

. . . .

". . . Here, based upon the factual averments contained in their complaint, there is an atypical disconnect in the chain of causation between pulling the trigger and discharging the weapon that is not present in archetypal criminal use or misuse of a firearm cases that Congress sought to address in the caveat to the product-defect exception. In my view, this distinction is factual, not legal." *Gustafson*, 282 A.3d at 760-61.

In the more refined view, it was the discharge of the firearm that is the focus of the analysis.

In *Heikkila v. Kahr Firearms Group*, No. 1:20-CV-02705-MDB, 2022 WL 17960555, at *1 (D. Colo. 2022) (unpublished opinion), the plaintiff had a gun holstered to his belt as he went to use a movie theatre bathroom. While pulling up his pants, the gun discharged and struck him in the abdomen. The court found that whether the discharge was caused by a volitional act that constituted a criminal offense turned on facts that were still in dispute. While application of the Act only required that the claim result from criminal or unlawful misuse, the product defect exception hinged on whether the volitional criminal offense caused the actual discharge of the product. 2022 WL 17960555, at *12.

In *Chavez v. Glock, Inc.,* 207 Cal. App. 4th 1283, 1290, 144 Cal. Rptr. 3d 326 (2012), a police officer was shot in the back with his service weapon by his three-year-old son. The appellate court reversed a grant of summary judgment under the product defect exception to the Act. The defendants had argued the discharge of the gun was caused by plaintiff's volitional criminal acts of leaving the loaded pistol unsecured in his truck and placing his son in the backseat of his truck without being secured in a car seat. The appellate court concluded the causal connection was lacking:

"By specifically linking the actual act of discharge to the criminal offense, as it did, we do not believe Congress intended, as Glock and Revolver Club argue, to allow any unlawful act in the causal chain, however remote from the actual firing of the weapon, to defeat the exclusion. Indeed, to construe the exclusion as expansively as do Glock and Revolver Club, would effectively eliminate the exception for product design defect claims expressly provided by Congress." 207 Cal. App. 4th at 1317-18.

It appears to us that the *Gustafson*, *Travieso*, and *Adames* cases are most like this case because they were accidental shootings that involved a person pulling the trigger of a gun. The act of pulling the trigger is not a remote act from the actual firing of the weapon in the causal chain like the criminal act was in *Chavez*. But this case presents a factual circumstance not found in the other cases. Lewis pulled the trigger to disassemble the gun, which apparently is required to disassemble the type of gun Lewis was more familiar with. Thus, the essence of Johnson's product defect

claim is whether the gun should have been made safer to prevent this type of mistake. We therefore focus on the discharge of the pistol.

The divergent opinions on this matter signal that the statute is ambiguous. The "exception to the exception" is not written in a straight-forward manner. If it is ambiguous, it must be reconciled with Congress' intent. The language cannot be interpreted so broadly that it would swallow the product defect exception entirely, as some judges have suggested.

As stated above, "'[a] preamble, purpose clause, or recital is a permissible indicator of meaning.'" *Bittner*, 598 U.S. at 99 n.6. "When Congress includes particular language in one section of a statute but omits it from a neighbor, we normally understand that difference in language to convey a difference in meaning." *Bittner*, 598 U.S. at 94. When the provision's text is ambiguous, courts can rely on the basic principles of federalism to resolve the ambiguity in a way that does not broadly intrude on the police power of the States. See *Bond*, 572 U.S. at 859-60.

Congress used different language in the product defect exception than it did in the general definition of "qualified civil liability action." Therefore, the two phrases must mean something different. A qualified civil liability action is a claim "resulting from the criminal or unlawful misuse of" a firearm. 15 U.S.C. § 7902(a); 15 U.S.C. § 7903(4), (5)(A). In contrast, the product defect exception does not apply when "the discharge of the [firearm] was caused by a volitional act that constituted a criminal offense." 15 U.S.C. § 7903(5)(A)(v).

Congress stated it was concerned about stopping civil actions that had been commenced against the gun industry that were "based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States." 15 U.S.C. § 7901(a)(7). As defendants' counsel explained, before the enactment of the Act, suits were instituted against the firearms industry to attempt to make the industry bear the expense of gun violence. Congress also found that the manufacture and sale of firearms in the United States were already heavily regulated. 15 U.S.C. § 7901(a)(4). But Congress chose to exempt product defect suits

from the Act. Product defect claims are well established under common law.

The product defect exception to the Act allows claims against gun companies for accidental shootings resulting directly from design defects. The "exception to the exception" excludes those claims where the discharge of the gun was intentional. This makes sense because design mechanisms devised to prevent accidental shootings would not prevent intentional shootings. The middle ground between the two ends is unsettled. The presumption against preemption can be used to resolve this question in favor of Johnson's interpretation. Lewis did not intend for the gun to discharge when he pulled the trigger. The shooting was not a volitional act, it was accidental.

Lewis' conduct was not reckless as a matter of law; that is a disputed material fact.

The next issue we must address is whether it was appropriate at the summary judgment stage for the trial court to determine Lewis' recklessness as a matter of law. A jury could find Lewis was reckless, but that was not the only reasonable conclusion that could be drawn from the evidence. At the summary judgment stage, the court needed to view the evidence in the light most favorable to Johnson. We question whether the district court did that.

In Kansas, "[a] person acts 'recklessly' or is 'reckless,' when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." K.S.A. 21-5202(j).

A person can disregard a substantial and unjustifiable *risk* that the circumstances exist without knowing that the circumstances exist. See *State v. Pattillo*, 311 Kan. 995, 1003-04, 469 P.3d 1250 (2020). When discussing reckless criminal discharge of a firearm under K.S.A. 2017 Supp. 21-6308(a)(1)(B), a panel of this court noted that "[t]he focus in this statute is not to punish someone for intending harm to a person, but to punish someone for the risky action of recklessly firing a gun. Harm to a person need not be

intended, in fact the offender need not know a person is there." *State v. Reynolds*, No. 124,238, 2023 WL 6323141, at *13 (Kan. App. 2023) (unpublished opinion).

A person may *recklessly* cause great bodily harm or disfigurement to another person even when the person intentionally performed the act that caused the injury. *State v. Trefethen*, No. 119,981, 2021 WL 1433246, at *6 (Kan. App. 2021) (unpublished opinion), *rev. denied* 314 Kan. 859 (2021). The fact that the shooting was accidental is not dispositive. "A person may be *involved in an accident* that results from reckless conduct." *State v. Doll*, No. 124,147, 2022 WL 17729716, at *5 (Kan. App. 2022) (unpublished opinion), *rev. denied* 317 Kan. 847 (2023). Or there can be an accidental and innocent shooting with no reckless conduct. See *State v. McKinney*, 59 Kan. App. 2d 345, 351, 481 P.3d 806 (2021), *rev. denied* 313 Kan. 1046 (2021).

The determination of recklessness is a fact-based inquiry. "One piece of evidence 'cannot be plucked out of the record and examined in a vacuum'" to determine whether an inference of recklessness is appropriate under circumstances. *State v. Henson*, 287 Kan. 574, 588, 197 P.3d 456 (2008). Facts that can support or dispute a finding of recklessness in a case involving an accidental shooting include whether the shooter: (1) removed the magazine; (2) pulled the slide back to eject a chambered bullet; (3) checked that a live round was not left in the chamber; (4) pointed the gun in the direction of a person; (5) pulled the trigger; (6) was familiar with guns and gun safety; and (6) was intoxicated. See *State v. Weigel*, No. 113,540, 2016 WL 4161326, at *9 (Kan. App. 2016) (unpublished opinion); *State v. Harner*, No. 110605, 2015 WL 4879012, at *9-10 (Kan. App. 2015) (unpublished opinion).

Here, the district court was too quick to grant summary judgment on the recklessness issue. The question of whether Lewis pulled back the slide to eject the chambered round was a material disputed fact. That Lewis intentionally removed the magazine to disarm the gun and that he did not know the gun could fire with the magazine removed were material facts that supported Johnson's position that Lewis was not reckless. The district court did not view the evidence and all inferences that could be drawn from the evidence in the light most favorable to Johnson.

We will not rule on the lower court's evidentiary ruling.

Johnson contends the district court improperly struck certain testimony as inadmissible. The testimony would be admissible at trial as lay opinion causation testimony.

This focuses on the district court's striking of certain testimony. In his response to the defendants' summary judgment motion, Johnson alleged these facts:

"16. If anyone from Bass Pro had discussed with defendant Lewis the safety options of a loaded chamber indicator or magazine disconnect safety on the Beretta APX pistol or any other pistol, defendant Lewis would have considered purchasing a gun with those safety features.

"17. If the Beretta APX had a loaded chamber indicator on it, it would have indicated that there was a round in the chamber even when the magazine was out.

"18. If defendant Lewis had seen a loaded chamber indicator signaling the Beretta APX pistol was still loaded after removing the magazine, he would not have pulled the trigger to try to take the pistol apart, preventing Plaintiff's injuries.

"19. If the Beretta APX pistol had a magazine disconnect safety on it, it would have been unable to fire without the magazine in it."

The district court made an ad hoc comment about the admissibility of this testimony, ruling:

"Plaintiff's Fact Nos. 16 [through] 19 are also accurate recitations from the record, and they relate to Lewis' subjective beliefs as to the actions he might have taken. They would be inadmissible as conjecture, but more importantly do not raise issues of material fact. The Court would concede that they may explain why Lewis decided to pull the trigger, but do not controvert the fact that he intentionally did so."

This evidentiary issue is not properly before us. Johnson sought and was granted interlocutory appeal under K.S.A. 2023 Supp. 60-2102(c) because the applicability of the Act was a controlling question of law.

Generally, our task in an interlocutory appeal is to answer certified questions rather than to rule on the propriety of all rulings of the district court. But we will exercise pendent or supplemental interlocutory jurisdiction if a certified issue is "inextricably intertwined" with other issues that do not meet K.S.A. 2023 Supp. 60-2102's criteria for an interlocutory appeal. The exception aims to

allow meaningful review of the certified issue and promote judicial economy. *City of Neodesha v. BP Corp. N. Am.,* 295 Kan. 298, 312, 287 P.3d 214 (2012).

Johnson offers us no explanation why this evidentiary question is "inextricably intertwined" with the question of the applicability of the Act. He merely makes that assertion.

The statements concern the causation for his product defect allegations and do not raise issues of material fact on the question of the applicability of the Act. This evidentiary issue is not inextricably intertwined with the question certified for interlocutory appeal. We will not consider the issue.

CONCLUSION

Tragedy struck one night in a car in Emporia, Kansas. Youthful bravado combined with ignorance of his pistol led a young man to shoot his friend with tragic consequences. As a result, his friend lost part of his leg. Seeking justice, that young man sued, claiming a perceived product defect. The district court granted summary judgment after making some factual determinations it was not yet legally entitled to make. Factual inferences are to be made in favor of the party against whom summary judgment is sought. The district court here failed to do so. Simply put, the district court was premature in granting the summary judgment. We reverse and remand for further proceedings.

Reversed and remanded.

* * *

CLINE, J., dissenting: Although I agree with the majority's conclusion that Marquise Johnson's claim is a qualified civil liability action under the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-7903, I respectfully dissent from its conclusion that his claim is protected by the Act's product defect exception. I also disagree with its conclusion that the district court erred in determining Lewis was reckless as a matter of law. I believe the material uncontroverted facts show Lewis acted recklessly, and his discharge of the firearm was a volitional act. For

these reasons, I do not believe the product defect exception applies. Johnson's claim is barred by the Act, and I would affirm the district court's decision granting summary judgment on this basis.

Lewis' behavior was legally reckless.

Summary judgment is proper when there are no material controverted facts, and the movant is entitled to judgment as a matter of law. K.S.A. 2023 Supp. 60-256(c). To avoid summary judgment on this issue, Johnson had the burden to affirmatively show the evidence established a material question of fact about whether Lewis' actions were reckless. I disagree with the majority's conclusion that he met this burden. Even viewing the evidence in the light most favorable to Johnson—as we are required to do—I would find he failed to establish a material factual dispute that must be resolved by a jury. *McCaffree Financial Corp. v. Nunnink*, 18 Kan. App. 2d 40, 56, 847 P.2d 1321 (1993). And based on the uncontroverted material facts, I believe the district court correctly concluded as a matter of law that Lewis acted recklessly.

The district court thoroughly analyzed the uncontroverted and controverted facts, sorting out which were material when making its determination. Since I find the district court's analysis articulate and persuasive, I quote it in full here:

"When dealing with firearms, there are certain unavoidable risks. That is why we have a multitude of warnings, even independent of actual operating instructions, regarding the safe handling of firearms. Some of these are expressed in Exhibit E to the Firearm Seller's brief, which include the Bass Pro Shop 'Ten Commandments of Safe Gun Handling.' There is no disputed fact that Lewis signed and received this document and the information contained therein. Had he followed these admonitions, notwithstanding any alleged defect in failure to provide one or more safety devices, this tragic event would likely not have happened. This was not a firearm handed to Lewis; rather, it was one he had purchased, loaded, and kept in his vehicle. He was not engaged in the act of cleaning the firearm, which might have led to his assumption based on prior use of a Glock brand firearm that he needed to pull the trigger to dismantle the gun, but rather he was demonstrating his familiarity with its operation and his ability to dismantle it all in response to the question of whether or not he knew how to do so. Lewis was not asked to make the demonstration, but chose to do so for no apparent reason other than to prove that he could. All of which occurred while operating a motor vehicle with other occupants.

"Assessment of the risks by a reasonable person as required by our criminal code involves all the known risks. For this reason, the Court notes that the acts

just described were accomplished following some type of concealed carry class, which Lewis did not formally complete, as well as his receipt of the operating manual for this firearm which he did not read based upon an assumption that he knew how to operate it because he had used other brands of firearms.

"During his attempted dismantling of the APX pistol, Lewis had it pointed directly at the plaintiff in violation of Commandment Number 1 in Firearm Sellers' Exhibit E. His conduct also violated several other commandments in Exhibit E as well. There is a reason why they are called 'commandments' and not merely guidelines to be followed. That is because of the inherent risks associated with the discharge of the firearm.

"Plaintiff suggests that statements about Lewis checking for a chambered cartridge demonstrate a genuine issue of material fact sufficient to avoid grant of summary judgment. His conduct in this regard is the result of three possible scenarios, all of which start with the fact that Lewis knew the firearm was loaded in discussing these scenarios. The first possible scenario is that Lewis failed to look for the chambered cartridge. The second possible scenario is that he looked, but failed to see the chambered cartridge. And the third possible scenario is that he intended to fire the pistol; however, this last scenario can be disregarded because there is no evidence to support it.

"But notwithstanding either of the first two scenarios, the fact that the firearm discharged when he pulled the trigger is an undeniable fact. Whether he looked and did not see, or just did not look is truly immaterial to the fact that he pulled the trigger without any certainty as to whether a cartridge was in the chamber. In other words, neither of the first two scenarios make any difference to the outcome.

"In assessing recklessness, it must be remembered that Lewis did not read the operator's manual, which would have disclosed that there was no need to pull the trigger to dismantle the pistol, nor did Lewis heed the warning printed on the side of the firearm ['FIRES WITHOUT[] MAGAZINE'] or utilize the safety button ['Striker Deactivation Button'] which allowed the removal of the slide without the need to pull the trigger.

"The Court finds it is without question that Lewis consciously disregarded known, substantial, and unjustifiable risks arising from the circumstances apparent in this case. Similarly, there is no question that Lewis knew what possible result might follow if he mishandled a gun, especially given his claimed prior experience and training. The only real question that remains is whether his disregard for risk was a gross deviation from the standard of care. The Court finds, without hesitation, that it was for the reasons discussed above."

I agree with the district court's reasoning that Lewis' failure to learn how his gun operated before pointing it at Johnson and pulling the trigger was legally reckless. I do not believe reasonable minds could differ on whether Lewis consciously disregarded substantial and unjustifiable risks created by his conduct and his disregard was a gross deviation from the standard of care which a reasonable person would exercise. K.S.A. 21-5202(j). A jury

would have no more evidence before it to decide this issue than the district court and, as the court explained, the only area of controversy is immaterial. As a result, I agree with its conclusion that Lewis' actions violated several criminal statutes which include recklessness as an element, such as battery, K.S.A. 21-5413(a); aggravated battery, K.S.A. 21-5413(b)(2)(A); unlawful discharge of a firearm in a city, K.S.A. 21-6308a(a); and endangerment, K.S.A. 21-5429(a).

That said, my disagreement with the majority over whether Lewis acted recklessly may ultimately be immaterial. The majority correctly found that Johnson's claimed damages arose from the criminal discharge of a firearm from a public roadway in violation of K.S.A. 2022 Supp. 21-6308(a)(3)(B), which is enough to consider Johnson's lawsuit to be a qualified civil liability action prohibited under the Act. 15 U.S.C. § 7902(a); 15 U.S.C. § 7903(4), (5)(A). Even so, I voice my disagreement with the majority's conclusion on the issue of Lewis' recklessness because I believe it encourages firearms users to turn a blind eye or remain ignorant to the risks inherent in handling those weapons, which would be a troubling result.

The Act's product defect exception does not apply to Lewis' volitional actions.

As the majority notes, a finding that Johnson's lawsuit is a qualified civil liability action does not end the inquiry. While the Act generally precludes such suits, it contains a limited exception for product defect claims like Johnson's. If a qualified civil liability action results "directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner," it is allowed to proceed unless "the discharge of the product was caused by a volitional act that constituted a criminal offense." 15 U.S.C. § 7903(5)(A)(v). I would answer the question of whether Lewis' conduct falls within this "exception to the exception" differently than the majority.

Since Lewis did not intend for the gun to discharge when he pulled the trigger, the majority finds the shooting was accidental and not a volitional act under 15 U.S.C. § 7903(5)(A)(v). But the Act does not say the *discharge* must be volitional—only the act

causing the discharge must be volitional. No one claims Lewis accidentally pulled the trigger—they claim he accidentally discharged the gun.

While the *consequences* of pulling the trigger may have been accidental, Lewis' act of pulling the trigger was not. Since Lewis meant to pull the trigger—the action that caused the discharge—I would find the discharge of the gun was caused by a volitional act. And because I agree that Lewis' discharge of the gun under these circumstances constituted a criminal act, I would find Johnson's claims are still barred by the Act.

I agree with the majority's reasoning that the *Travieso* and *Adames* cases are most like this case because they addressed accidental shootings that involved a person pulling the trigger of a gun. See *Travieso v. Glock Inc*., 526 F. Supp. 3d 533, 543 (D. Ariz. 2021); *Adames v. Sheahan*, 233 Ill. 2d 276, 280-82, 909 N.E.2d 742 (2009). And I find their reasoning in determining that the volitional act exception to the product defect exception applied in those situations to be persuasive.

As here, the plaintiff in *Adames* contended the shooting was not volitional because the shooter did not intend to fire the gun. Since the Act does not define "volitional" the Illinois Supreme Court looked to dictionary definitions. It noted Black's Law Dictionary defined the word "volition" as: "'1. The ability to make a choice or determine something. 2. The act of making a choice or determining something. 3. The choice or determination that someone makes.'" 233 Ill. 2d at 314 (quoting Black's Law Dictionary 1605 [8th ed. 2004]). And it noted Webster's defines "volition" as "'the act of willing or choosing: the act of deciding (as on a course of action or an end to be striven for): the exercise of the will'" and "volitional" as "'of, relating to, or of the nature of volition: possessing or exercising volition.'" 233 Ill. 2d at 314 (quoting Webster's Third New International Dictionary 2562 [1993]). Based on these definitions, the Illinois court found that even though the shooter did not intend the consequences of his act, his act was still volitional because the shooter chose to point the gun at the victim and chose to pull the trigger. 233 Ill. 2d at 314. Lewis acted the same way here.

Unlike the majority, I do not believe this interpretation "swallow[s] the product defect exception entirely." 64 Kan. App. 2d at 231. The Act is designed to impose accountability on the user, not the manufacturer or seller, for criminal or unlawful use of the firearm. Indeed, one of the purposes of the Act is: "To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended." 15 U.S.C. § 7901(b)(1). While it carves out a limited exception for "death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product," it still requires the firearm to have been "used as intended or in a reasonably foreseeable manner" to qualify for the exception and it excludes actions "where the discharge of the product was caused by a volitional act that constituted a criminal offense." 15 U.S.C. § 7903(5)(A)(v). Thus, lawsuits seeking to redress injuries even in situations where the use of the firearm was criminal or unlawful are allowed if no one chose to pull the trigger. For example, in situations where a criminal only meant to waive a gun around during a crime or where someone unlawfully carried a gun into a prohibited place like a school or government building but it accidentally discharged without an intentional trigger pull due to a design or manufacturer defect. On the other hand, if we allow claims like Johnson's to proceed, we would open the door to suits against manufacturers and sellers for the exact type of behavior the Act was designed to prohibit.

I do not see the ambiguity in the volitional act exception to the product defect exception that the majority does. As such, I see no need to resort to canons of construction like the federal preemption doctrine which the majority uses to narrow the scope of this exception.

Like the majority, the *Travieso* plaintiff also relied on the federal preemption doctrine to advocate for a narrow interpretation of the scope of the Act. But the federal court in Arizona found the usefulness of this canon of construction to be limited in this situation:

"[U]nlike the federalism canon, the presumption against preemption is a *presumption*, *not a 'clear statement'* rule. It helps govern the Court's choice between two plausible constructions of a statute, but does not override the unambiguous intent of Congress as revealed by the text and framework of the law. *Altria Group, Inc. v. Good*, 555 U.S. 70, 77, 129 S. Ct. 538, 172 L. Ed. 2d 398 (2008) (applying the presumption against preemption 'when the text of a pre-emption clause is susceptible of more than one plausible reading'); see also *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449, 125 S. Ct. 1788, 161 L. Ed. 2d 687 (2005).

"Here the PLCAA contains a clear statement of Congress's intent to preempt the states. 28 U.S.C. § 3702. As such, the role of the Court is merely to construe the scope of that preemption in light of the congressional purpose of the statute as revealed by the text and statutory framework. *Altria Group*, 555 U.S. at 77; *Bates*, 544 U.S. at 449; *Medtronic*[*, Inc. v. Lohr*], 518 U.S. [470,]485-86[, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996)]; *Cipollone*[*v. Liggett Group*], 505 U.S. [504,]530 n.27[, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992)]; *Gade*[*v. National Solid Wastes Management Ass'n*], 505 U.S. [88,]111[, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992)]. While the Court will factor the presumption against preemption of the states into its analysis, *Medtronic*, 518 U.S. at 485, 116 S. Ct. 2240, the presumption is merely one factor in the Court's analysis. It will not override the intended purpose of Congress revealed by the text and framework of the PLCAA. *Altria Group*, 555 U.S. at 77." *Travieso*, 526 F. Supp. 3d at 541.

In reviewing the text and framework of the Act, I would find a fair reading shows that Congress intended to exclude claims like Johnson's from the scope of the Act's product defect exception. The volitional act exception excludes situations were "the discharge of the product was caused by a volitional act that constituted a criminal offense." 15 U.S.C. § 7903(5)(A)(v). By requiring the discharge to be volitional, the majority's interpretation rearranges the Act's language by reading the word volitional to modify the word discharge. But that is not what the Act says: it is only the act—here, Lewis pulling the trigger with the gun pointed at Johnson—that must be volitional (and criminal). I therefore do not think the exclusion in this exception extends to an accidental discharge caused by a purposeful trigger pull. Whether Lewis intended the consequences of his actions is irrelevant because he intended to take the actions that caused those consequences.

Conclusion

The responsibility for firearm safety rests at the feet of the user. Like other dangerous tools, blatant disregard of safety practices can have devastating consequences—like they did here. I

fear the majority's decision erodes the individual responsibility mandate of firearm use and Congress' public policy choices which prompted the Act. Stretching the volitional act exception to include situations where the gun functioned as it was designed to perform when the user purposefully and here, criminally, pulled the trigger would abrogate the Act's purpose and the boundaries carefully drawn by the Act's language. I would affirm the district court's summary judgment decision finding Johnson's claim is barred by the Act.