APPENDIX A

FILED

April 26, 2024

DOUGLAS T. SHIMA
CLERK OF APPELLATE COURTS

IN THE SUPREME COURT OF THE STATE OF KANSAS

ORDER

The court denies all petitions for review filed in the following cases and notes any responses and replies.

No. 123,622, *State of Kansas v. Tommy J. May*

No. 124,524, *State of Kansas v. Shawn P. O'Brien*

No. 124,533, *State of Kansas v. Justin Todd Rey*

No. 124,875, *State of Kansas v. Amber Nicole Alexander*

No. 124,887, *State of Kansas v. Shawn Michael Puett*

No. 125,086, *State of Kansas v. Timothy E. Kellner*

No. 125,202, *State of Kansas v. Darlene Antionette Gihon*

No. 125,270, *State of Kansas v. Bryce P. Hanks*

No. 125,388, *State of Kansas v. Steven Kyle Brainard*

No. 125,551, *In the Matter of N.W.*

No. 125,590, *Steve Kelley Moyer v. State of Kansas*

No. 125,742, *State of Kansas v. Larry Dee Beireis*

No. 125,763, *State of Kansas v. Albert C. Whitaker III*

No. 125,772, *State of Kansas v. Logan Mueli*

No. 125,777, *State of Kansas v. Victor J. Cardona-Rivera*

No. 126,085, *In the Matter of the Care and Treatment of Robert Davis Jr.*

Dated this 26th day of April 2024.

FOR THE COURT

Marla Luckert

MARLA LUCKERT, Chief Justice

NOT DESIGNATED FOR PUBLICATION

No. 123,622

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

TOMMY J. MAY,
Appellant.

MEMORANDUM OPINION

Appeal from Douglas District Court; JAMES R. MCCABRIA, judge. Oral argument held on November 14, 2023. Opinion filed December 22, 2023. Affirmed.

Jessica R. Kunen, of Lawrence, for appellant.

Jon Simpson, senior assistant district attorney, *Suzanne Valdez*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

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

PER CURIAM: On July 2, 2018, Tommy J. May participated in a crime spree in Lawrence, Kansas. He shot two people at his apartment complex before driving away in his car. A police officer pursued May through the streets of Lawrence before he crashed his car into a fire hydrant. While trying to drive away from the crash site, May struck the police officer, causing him to roll over the hood of May's vehicle. The police eventually apprehended May and found a bag of methamphetamine in his car.

Following an 8-day jury trial, May was convicted of 10 crimes including attempted first-degree murder, attempted second-degree murder, aggravated battery of a law enforcement officer, and possession of methamphetamine. The district court imposed a controlling sentence of 679 months' imprisonment. On appeal, May claims the district court committed several instructional and evidentiary errors and erroneously denied his motion for new trial. Finding no reversible error, we affirm the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Abbreviated summary of the facts

On July 2, 2018, May was in his apartment in Lawrence with Marzetta Yarbrough. May and Yarbrough began to physically fight, during which May acquired a gun. The fight ended near May's front door and resulted in May shooting Yarbrough once in the chin and shoulder. Just outside May's apartment, on the stairs leading up to the front door, May saw a neighbor, Jeremy Jones, and shot him on the backside of his shoulder. May then fled his apartment.

May entered his vehicle and left the area. Sergeant Robert Neff with the Lawrence Police Department spotted May driving and started following him. While driving, May crashed into a fire hydrant. Neff parked behind May, got out of this patrol car, and began shouting commands to May. Eventually, May reversed his vehicle directly towards Neff, hitting Neff's patrol car. May stopped reversing and began to drive forward directly at Neff. Neff realized that he could not evade May's vehicle and began shooting at May. May hit Neff, causing him to roll over the hood of May's vehicle.

May left the area where he hit Neff and continued driving. Soon after, May ran his vehicle into a detached garage, got out of his car, and fled the scene. May was eventually

apprehended by the police while trying to climb over a fence. A subsequent search of May's car revealed a bag of methamphetamine.

The State charged May with 10 counts: (1) attempted first-degree murder against Yarbrough; (2) attempted second-degree murder against Jones; (3) aggravated battery against a law enforcement officer; (4) possession of methamphetamine; (5) criminal possession of a firearm by a felon; (6) fleeing or attempting to elude a police officer; (7) interference with law enforcement; and (8) three counts of criminal damage to property. The district court held an eight-day jury trial beginning on December 9, 2019.

Pretrial motion and ruling

Before trial, on December 2, 2019, the State filed a motion in limine seeking to exclude evidence of the victims' and witnesses' drug usage or drug dealings "on any date other than the date of the alleged offenses." The motion also sought to exclude evidence of May's "cancer diagnosis or treatments." May responded that evidence of his diagnosis was relevant to explain why he had oxycodone in his apartment. It was also relevant to show what May "could physically do and comprehend." May argued that witness drug use was relevant to undermine the credibility of witness testimony. In a pretrial hearing on the issue, the district court ruled that witnesses should be warned to avoid discussion of drug transactions other than "what happened that day as part of this transaction." But the district court left the door open so that if "issues . . . happen during trial, we'll deal with them." As to May's medical conditions, on the morning of trial, the district judge ruled that "May can certainly testify as to his own physical feelings and thoughts, and can testify that he had prescription medication and what that medication was. But I don't see where it's necessary to tie that into the basis for the underlying diagnosis of cancer."

Marzetta Yarbrough's testimony

At trial, Yarbrough testified first for the State. Yarbrough used to live with Steven Sweighart next door to May until 2017. On the day of the shooting, she stopped by May's apartment to ask for a ride home. May invited Yarbrough inside, where she saw he was using methamphetamine. Yarbrough left the apartment when she saw an acquaintance pull up outside. This led Yarbrough to the neighboring apartment where Jones and others were located. The group asked Yarbrough whether she was carrying methamphetamine, which prompted them to ask if Yarbrough would buy some from May.

Yarbrough returned to May's apartment to buy the drugs, and May agreed to sell them. May had Yarbrough distribute a portion of his methamphetamine and, after doing so, Yarbrough left and went back to the neighbor's apartment. After dropping off the methamphetamine next door and receiving money to pay May, Yarbrough went back to May's apartment to pay him and to collect a bag of groceries and her purse that she had left there. Upon returning, Yarbrough found that May was "[e]xtremely different" and was "very upset, angry." May started yelling at Yarbrough about the drug transaction and the amount of methamphetamine that Yarbrough took.

After a brief time and without calming down, May pulled a gun from behind his back and hit Yarbrough over the head with it, causing blood to "spurt[] out." Yarbrough did not bring a gun with her and did not try to grab May's gun. May continued screaming and began kicking and hitting Yarbrough. Yarbrough screamed which made May angrier, and he responded with, "'You bitch, you call yourself dry-snitching. I'm gonna have to finish you off now.'" Yarbrough clarified that "dry-snitching" referred to "informing people that events are going on without directly saying it" and that May considered her screaming dry-snitching. May turned away from Yarbrough for a second and she ran for the front door, but as she reached the front door, May shot her. Yarbrough made it out the door and crawled into some bushes near the apartment. While crawling, Yarbrough heard

Jones say something to May, and saw that Jones was facing away from May's door, before she heard another gunshot. Soon after, Yarbrough recalls medical personnel finding her and eventually waking up in a hospital.

Jeremy Jones' testimony

Jones generally corroborated Yarbrough's testimony about having Yarbrough purchase methamphetamine from May. Jones heard a nearby gunshot after Yarbrough left, so he went outside to investigate. Yarbrough was outside trying to stop the bleeding from what appeared to be her neck. May was also standing outside and Jones asked if May had shot Yarbrough. May and Jones "exchanged a few more words" and Jones turned away to check on Yarbrough when he was shot from behind. After Jones was shot, May "[w]alked over [him]" and remembers May speaking to him but does not remember the substance. Eventually, May walked back into his apartment, came back outside, got into his car, and left the area. Jones denied having any tools or knives in his hands at the time of the shooting. Because of the gunshot, Jones became paraplegic.

Regina Sailor's testimony

Regina Sailor was in Jones' house when Yarbrough came up to her and asked for a ride. After Yarbrough left, Sailor heard screaming and then a gunshot. Sailor entered the kitchen where she could see outside through the open front door. Jones was standing outside with May, and May "had his gun extended." Sailor saw the gunshot and saw Jones fall. At the time, Jones was turning away from May. After seeing May shoot Jones, Sailor ran back into Jones' apartment and hid. Sailor denied ever seeing Jones with a gun or knife at any point that day. When Sailor came back outside, Jones had not moved.

Micki Ryan's testimony

Micki Ryan was also next door with Jones and Sailor at the time of the shooting. When Yarbrough arrived, Ryan heard her ask Sailor for a ride, and Ryan also confirmed that she and Jones asked Yarbrough to buy methamphetamine from May. After Yarbrough went back inside May's apartment, Ryan heard a gunshot, and she ran to the front door. Ryan saw May and Jones standing outside. Jones accused May of shooting Yarbrough and May responded by saying, "'Motherfucker always trying to fight for somebody.'" Jones then turned away from May and May shot him. Jones had nothing in his hands. Ryan first ran to Jones and eventually ran back inside to call 911. May walked "back towards where [Yarbrough] was" and eventually went back inside, came back outside, got into his vehicle, and left.

Adama Deen's testimony

Adama Deen lived in an apartment away from the shooting. Deen was in his apartment when May knocked on his window. Deen let May into the building, at which point May said that he had "shot some people." Deen told May to leave, and May complied. May did not appear injured or bloodied and did not mention being injured, shot, or robbed.

Sergeant Robert Neff's, Jacob Weakland's, and Coery Turner's testimony

Neff was dispatched to May's apartment in response to the shooting. Neff was in a marked patrol car with a light bar and "police" written on the side. While waiting at a stoplight, Neff saw a vehicle and a man, now known to be May, matching the description of the shooting suspect. As May turned past Neff, May stared at Neff "pretty hard," which Neff found to be unusual. As Neff began to follow May, May made a "kind of quick abrupt left turn from the straight lane" and accelerated "to a very high rate of

speed." It looked like May was running away. Neff estimated that May was going about 60 miles per hour in a 30-mile-per-hour zone.

Neff turned on his lights and siren as May continued speeding away in a manner consistent with "running away from [Neff]." Eventually, May took a right turn "but he was going much too fast," and he crashed into a fire hydrant. May's vehicle was stuck on the fire hydrant, and Neff parked directly behind him around 30 feet back. When Neff parked, the siren automatically turned off, but his lights remained on. Neff exited his patrol car and started shouting commands to May such as "show me your hands" and to turn the car off. Neff was wearing a clearly identifiable law enforcement uniform at the time. May responded to Neff's commands with what sounded like "I'm trying" while rocking back and forth trying to get his vehicle unstuck.

Suddenly, May's vehicle became unstuck and May, in "full reverse," crashed his car into Neff's patrol car, glanced off it, and continued backing up right towards Neff. Neff testified that May was "coming directly at [him]." Neff evaded the car and May eventually stopped reversing. May then "put it back into drive and then drove forward, turned right, and drove directly at [Neff]." Neff testified that May turned to point his vehicle directly at him before accelerating at high speed. Neff started shooting his firearm into May's windshield but May ran into Neff causing him to roll over the hood of May's car. May did not stop and instead accelerated away. Neff's patrol camera captured some of the incident, but because Neff was positioned behind his vehicle when May drove at him, the camera did not capture that portion.

Jacob Weakland, a homeowner near where May crashed his vehicle into the fire hydrant, saw the two vehicles, heard Neff shouting at May, saw May reverse his car into Neff's car, heard the sound of gunshots, and heard the sound of tires "screech[ing]" away. Corey Turner, who was driving his car near the scene, also testified. Turner saw Neff standing outside his vehicle and heard him commanding May to get out of his vehicle.

Even though Turner was in his car a block away, he could hear Neff's commands to May. Turner saw May reverse directly at Neff and his patrol car.

Officer Ryan Robinson's and Officer Kelsey Pence's testimony

Ryan Robinson, a Lawrence police officer, searched for May on foot after May had fled his vehicle after hitting Neff. Robinson saw someone now known to be May hiding in a bush in front of a house, prompting Robinson to shine a light on the person and announce, "'Police, show me your hands.'" When the light hit May, he "took off running." Robinson chased May across a yard and again yelled, "'Police,'" but May continued running and attempted to climb a fence. As Robinson got closer to May, May appeared to be exhausted and dropped down from the fence. Robinson then arrested May. May first told Robinson that his name was James Mason. Robinson observed that May had "some scrapes" on his arm but was otherwise uninjured.

Kelsey Pence, another Lawrence police officer, arrived on the scene after Robinson had arrested May. Pence did not notice "any obvious injuries" on May, but noted a spot of blood on his shirt about the size of a coin.

Michael Jordan's testimony

Michael Jordan, a friend of May at the time of the shooting, testified for the State. A few weeks to a month before the shooting, Jordan saw May with a handgun, which was sometimes left with Jordan at his apartment. May had told Jordan a few weeks before the shooting that he had "shot his bed." Jordan testified that he and May would get high and that he gave May methamphetamine.

Jordan had two conversations with May about what happened on July 2, 2018. In the first conversation, May told Jordan that Yarbrough had gone to May's apartment to

"get high" and "for a ride." May thought that Yarbrough stole drugs from him, which prompted him to grab his gun and shoot Yarbrough. May told Jordan, "'I was pretty much tired, I'm pretty much tired of people trying to get over on me, and I shot the bitch.'" When Jones came outside, he asked why May shot Yarbrough, and May responded by shooting Jones in the back. May commented that he should have killed both Yarbrough and Jones. May did not tell Jordan anything about being robbed by Yarbrough. May also told Jordan that he "backed up to try and run the police over or something like that."

In the second conversation, May told Jordan a different story about Yarbrough having a gun and shooting him, but by that time Jordan speculated that May was only "[t]rying to save his ass." May never complained to Jordan about having trouble hearing and Jordan never had trouble communicating with May.

State's other evidence

Investigators found two shell casings at the apartments, one in May's apartment near the front door and one near the stairs leading into May's apartment. No other casings or bullets were found. A bullet hole was found in May's comforter on his bed, but no bullet was found and the sheets beneath the comforter were whole and not disturbed. Investigators concluded that the hole in the comforter was unrelated to the shooting of Jones and Yarbrough. The pooling of blood around where Jones was located by emergency services indicated that Jones had bled while "stationary or motionless."

Footage from Neff's dashboard camera showed that May threw an object out of his car window. That object was discovered to be a pistol, and testing confirmed that the two rounds found at May's apartment came from the pistol. An empty holster fitting the gun was found in May's apartment. No evidence of blood or tissue was found in May's vehicle. A subsequent search of May's car revealed a bag of methamphetamine.

May's testimony

Yarbrough knocked on May's door and immediately asked for money to help sell drugs. May refused. Yarbrough then asked May if she could have some pills that she saw lying on a table, and May again refused. Yarbrough then asked to use the bathroom and May inferred that she would use drugs inside, so May did not let her, but offered that she could sit in his car. Yarbrough went to the car and May sat back down in his apartment.

May eventually sat on his bed to put on his shoes when Yarbrough walked into his bedroom. Yarbrough had a pink scarf in her hand and "made a reference to the money and those pills that [May] had." When May told her that she would not get anything from him, she unwrapped a handgun out of her scarf and shot him, grazing his arm, and shooting a hole in his bed. May grabbed the gun and hit Yarbrough on the head with it. Yarbrough ran past May into the living room and towards her bag that she had left there. Yarbrough threw the bag at May, and May positioned himself so that a table was between him and Yarbrough, but Yarbrough moved around the table and started "fighting" May. May tried to knock Yarbrough out with the pistol and hit her two more times with it. Eventually, Yarbrough stopped attacking May and got on her knees, prompting May to go find a towel to clean up her blood because she was "bleeding profusely."

As May turned to get a towel for Yarbrough, she jumped up and ran to the door. May ran after her and tried to hold the door closed because she had started yelling for Jones. At that point, May recognized that he had actually seen Jones with the same gun that was now in May's hand. Yarbrough "manhandled" May out of the way and "[t]he gun went off, you know, and it, you know, that's how she was managed to be shot in this unusual place." May did not intend to shoot Yarbrough and instead did so accidentally.

Yarbrough ran outside. May ran back into his apartment to grab his keys so he could flee, and when he got back to the door, he saw Jones through tunnel vision running

at him from steps leading to May's apartment. Jones raised his arms to May and yelled at him for shooting Yarbrough. Jones had something in his hands, and May could not recall what, but he assumed it was a gun, so "[May] shot first." The reason Jones got shot from behind was that he turned to run when he saw that May was about to shoot him.

May eventually got into his vehicle and drove away. May drove to Deen's apartment because he needed help getting to the hospital due to his gunshot injury, but he quickly left. Back in his vehicle, May "accelerated" and headed to a hospital. May ran into the fire hydrant because of the gunshot wound on his arm and because he could not see. At that point, May threw the gun out the window because he got "some of [his] wits about [him]self." May thought that he heard a homeowner yell at him to get out of his yard. May did not see any law enforcement officers or flashing lights. Eventually, May got the car unstuck and hit Neff's patrol car that had parked behind him.

May heard footsteps around his car, and Neff started shooting at him, so he ducked his head beneath his dashboard. May, still hiding under the dashboard, put the car in drive and accelerated. Nobody was in front of May at that time. May continued driving away from the gunshots and with his head ducked down until he hit a detached garage. May fled on foot. May admitted running from Robinson, but claimed Robinson did not identify himself until after May had started running.

Upon his arrest, May identified himself as James Mason. May denied that the methamphetamine found in his car was his, and instead he "[had] some idea" how it got there because a "guy" he dropped off and Yarbrough had both been in May's vehicle that day. May admitted owning the holster in his closet and claimed that he got it "from a female who had been in [his] apartment four or five months prior to that."

Verdict and posttrial proceedings

After the evidence was presented, the district court instructed the jury and the parties presented their closing arguments. The jury found May guilty on all 10 counts. May filed a motion for new trial on several grounds. After an evidentiary hearing, the district court denied May's motion for new trial. The district court imposed a controlling sentence of 679 months' imprisonment. May timely appealed the district court's judgment.

DID THE DISTRICT COURT ERR IN FAILING TO INSTRUCT THE JURY ON SELF-DEFENSE ON THE ATTEMPTED MURDER OF YARBROUGH?

May claims that the district court erred in failing to instruct the jury on self-defense on the attempted murder of Yarbrough. The State counters that May failed to preserve his claim and invited the alleged instructional error, that the claim fails on its merits, and that any error was harmless.

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, the reviewing court considers whether the instruction was legally and factually appropriate, reviewing the entire record de novo. In determining whether an instruction was factually appropriate, courts must determine whether there was sufficient evidence, viewed in the light most favorable to the requesting party, that would have supported the instruction. 313 Kan. at 254-55.

If a party fails to object to the instruction or failure to give an instruction before the jury retires to consider its verdict, then the reviewing court shall review for clear error. K.S.A. 2022 Supp. 22-3414(3). "The 'failure to give an instruction is clearly erroneous only if the appellate court reaches a firm conviction that, had the instruction been given, there was a real possibility the jury would have returned a different verdict.'" *State v. Goens*, 317 Kan. __, 535 P.3d 1116, 1118 (2023).

Invited error

The State argues that May invited this particular instructional error and each of the instructional errors that he raises on appeal. This court reviews de novo whether the doctrine of invited error applies. *State v. Stoll*, 312 Kan. 726, 735, 480 P.3d 158 (2021). A litigant may not invite an error and then complain of the error on appeal. *State v. Green*, 315 Kan. 178, 183, 505 P.3d 377 (2022). In the context of jury instructions, a mere failure to request an instruction does not trigger invited error. The doctrine's application turns on whether the instruction would have been given or omitted but for an affirmative request to the court for the outcome later challenged on appeal. The ultimate question is whether the record reflects the defense's action in fact induced the court to make the claimed error. *State v. Roberts*, 314 Kan. 835, 846, 503 P.3d 227 (2022).

May concedes that he did not request a self-defense instruction as it pertains to Yarbrough. May requested and received a self-defense instruction—but only as to shooting Jones. At the instruction conference, May's counsel stated that May's defense to shooting Yarbrough was that the gun fired accidentally when May and Yarbrough were struggling: "My client indicated it was an accident, didn't intend to do that . . . ." May did not argue the shooting was self-defense. But under these facts, May's failure to request a self-defense instruction for shooting Yarbrough does not amount to an affirmative request inducing the district court into action. Thus, May did not invite this claimed error.

Legal appropriateness

Turning to the merits, May argues on appeal that he was entitled to a self-defense instruction as to shooting Yarbrough because even though he claimed to shoot Yarbrough accidentally, he may rely on inconsistent defenses such as accident and self-defense. The State concedes that May is correct that he may rely on inconsistent defenses. Even so, the State claims the district court had no obligation to sua sponte instruct on self-defense because May did not rely on a theory of self-defense against Yarbrough.

May points out on appeal that there was some evidence at trial to support a self-defense instruction as to the shooting of Yarbrough. May testified that when Yarbrough returned to his apartment a second time that morning, she revealed a handgun and shot him, grazing his arm, and shooting a hole in his bed. Even then, May testified that he grabbed the gun from Yarbrough and hit her on the head with it. They continued to fight, and May hit Yarbrough on the head with the gun two more times. May then went to find a towel for Yarbrough to help clean up the blood, and Yarbrough jumped up and ran for the door. May and Yarbrough struggled again at the door when, according to May, the gun fired accidentally and wounded Yarbrough.

The State cites *State v. Sappington*, 285 Kan. 158, 165, 169 P.3d 1096 (2007), where the Kansas Supreme Court found that a district court need not sua sponte instruct the jury on every possible theory of defense, even if some evidence supports a specific defense, when the defendant did not rely on that defense at trial. The *Sappington* court held that "imposing a defense upon a defendant which is arguably inconsistent with the one upon which he completely relies—by providing the jury a defense instruction that neither party requests—is akin to denying the defendant the meaningful opportunity to present his chosen theory of defense." 285 Kan. at 165. The *Sappington* court concluded that, "[a]ccordingly, at present we can see no valid reason to require district courts to instruct juries on every possible theory of defense for which some evidence has been

presented when the defendant has not relied upon that defense." 285 Kan. at 165; see also *State v. White*, 55 Kan. App. 2d 196, 206-07, 410 P.3d 153 (2017) (finding that jury instruction inconsistent with theory of defense is not legally appropriate).

May is correct that under Kansas law, a defendant may present and rely on inconsistent defenses. *State v. Shehan*, 242 Kan. 127, 130, 744 P.2d 824 (1987). But May does not point to where in the record, during trial, he relied on a theory of self-defense against Yarbrough. May does not refute the State's assertion that "[n]ever did [May's] counsel argue—as he did concerning Jones' shooting—that May shot Yarbrough in self-defense." May's only record citation attempting to show that he relied on a theory of self-defense is to a hearing on his motion for new trial.

The State argues that May's theory of accidentally shooting Yarbrough is inconsistent with intentionally pulling the trigger in self-defense. See *State v. Bellinger*, 47 Kan. App. 2d 776, 785, 278 P.3d 975 (2012) (finding that a claim of an accidental shooting undermined an assertion that the shooting was intentionally done in self-defense). The State's focus on the moment of the shooting is well-taken because May was charged with attempted first-degree murder for shooting Yarbrough, not for the fight that proceeded the shooting. So, to have a claim of self-defense, May would need to somewhere implicate that if he shot Yarbrough intentionally, it was in self-defense. But May does not do that. Instead, May claimed exclusively that he shot Yarbrough by accident.

Under *Sappington*, the mere availability of inconsistent defenses does not require the district court to sua sponte instruct the jury on a theory of defense that the defendant did not rely on at trial—even if some evidence supports that defense. *Sappington*, 285 Kan. at 165. In fact, imposing a defense upon a defendant that is inconsistent with the defense that the defendant relies on is akin to denying the defendant the opportunity to choose their theory of defense at trial. 285 Kan. at 165. Under the circumstances here, a

jury instruction on self-defense as to the shooting of Yarbrough would not have been legally appropriate. The district court did not err by failing to give the instruction.

We hasten to add that even if the self-defense instruction were legally appropriate, its omission was not clear error. The overwhelming evidence supported Yarbrough's testimony that she never had a gun and did not shoot at May in the apartment. Investigators found two shell casings at the apartment complex, one in May's apartment near the front door and one near the stairs leading to May's apartment. These shell casings were from the single shot May fired at Yarbrough and the single shot May fired at Jones. No other casings or bullets were found in the area. A bullet hole was found in May's comforter on his bed, but no bullet was found and the sheets beneath the comforter were whole and not disturbed. Investigators concluded that the hole in the comforter was unrelated to the shooting of Yarbrough and Jones.

Several witnesses refuted May's testimony that he had been grazed in the arm when Yarbrough shot at him. Deen testified that May did not appear to be injured or bloodied when May stopped at his apartment after the shooting. Robinson did not observe any serious injuries when he arrested May, nor did Pence notice any obvious injuries when she arrived at the scene of the arrest. Jordan testified at trial that May admitted to him that he shot Yarbrough and Jones because he was tired of people taking advantage of him, and May did not tell Jordan anything about being robbed by Yarbrough. We are not firmly convinced there is a real possibility the jury would have returned a different verdict had the district court instructed the jury on self-defense for the Yarbrough shooting. *Goens*, 535 P.3d at 1118.

DID THE DISTRICT COURT ERR IN FAILING TO INSTRUCT THE JURY ON THE LESSER OFFENSE OF ATTEMPTED VOLUNTARY MANSLAUGHTER ON THE ATTEMPTED FIRST-DEGREE MURDER OF YARBROUGH?

May next claims the district court erred in failing to instruct the jury on the lesser offense of attempted voluntary manslaughter on the attempted murder of Yarbrough. For this instruction to be appropriate, the evidence would need to show that May knowingly attempted to kill Yarbrough either: "Upon a sudden quarrel or in the heat of passion; or . . . upon an unreasonable but honest belief that circumstances existed that justified use of deadly force . . . ." K.S.A. 2018 Supp. 21-5404. May concedes that he did not request an attempted voluntary manslaughter instruction below and that this court should review for clear error. K.S.A. 2022 Supp. 22-3414(3).

The State again claims that May invited the error he now challenges. At the instruction conference, the district court appeared open to the possibility of instructing the jury on attempted voluntary manslaughter on the Yarbrough shooting and asked the parties to address the point. The State argued the instruction was not supported by the evidence. The following exchange then occurred between the court and defense counsel:

> "THE COURT: All right. So, Mr. Conwell, argument on attempted voluntary manslaughter?
>
> "MR. CONWELL: As to whether it should be included, Judge?
>
> "THE COURT: Yes, sir.
>
> "MR. CONWELL: I don't think it should be included.
>
> "THE COURT: All right. I agree."

This is not a situation where defense counsel merely failed to request an instruction on voluntary manslaughter. Here, defense counsel affirmatively argued that the instruction should not be given. And the record reflects that defense counsel's request induced the district court, at least in part, to make what is now a claimed error on appeal. The district court was open to instructing the jury on voluntary manslaughter and asked

the parties to state their positions. After defense counsel affirmatively argued that the instruction should not be included, the district court stated, "All right. I agree." The district court instructed the jury as defense counsel requested.

In the context of jury instructions, the application of the invited error doctrine turns on whether the instruction would have been given or omitted but for an affirmative request to the court for the outcome later challenged on appeal. The ultimate question is whether the record reflects the defense's action in fact induced the court to make the claimed error. *Roberts*, 314 Kan. at 846. In *Roberts*, the court found from the record that "defense counsel merely failed to request the alternative felony-murder instructions." 314 Kan. at 847. May's counsel did more than just fail to request a voluntary manslaughter instruction—he told the district court the instruction should not be included and the court agreed. We find his actions meet the invited error test in *Roberts*.

Alternatively, even if a voluntary manslaughter instruction would have been legally and factually appropriate here, we agree with the State that the district court's failure to sua sponte give the instruction was not clear error, in large part because of the skip rule. Under the skip rule: "'When a lesser included offense has been the subject of an instruction, and the jury convicts of the greater offense, error resulting from failure to give an instruction on another still lesser included offense is cured.'" *State v. Gentry*, 310 Kan. 715, 729, 449 P.3d 429 (2019). Our Supreme Court has clarified that the skip rule is not a rule but "'a logical deduction that may be drawn from jury verdicts in certain cases.'" 310 Kan. at 729. Appellate courts should not apply the deduction automatically or mechanically. Rather, it is "'one factor, among many, to be considered as part of the applicable harmlessness test.'" 301 Kan. at 729. May does not address the skip rule or respond to the State's argument and thus waived argument on the matter. *State v. Bailey*, 313 Kan. 895, 900, 491 P.3d 1256 (2021).

The State points to the overwhelming evidence refuting May's version of events. Much of that evidence is addressed above and need not be reasserted here. And then turning to the skip rule, the jury was instructed to consider attempted second-degree murder of Yarbrough only if it did not agree that May was guilty of attempted first-degree murder. But the jury unanimously found May guilty of attempted first-degree murder of Yarbrough. So if the jury never reached the lesser offense of attempted second-degree murder of Yarbrough, we can logically deduce that the jury would not have reached the even lesser offense of attempted voluntary manslaughter. Based on the record presented and the logical deduction that may be drawn from the verdicts, we are not firmly convinced there is a real possibility the jury would have returned a different verdict had the district court instructed the jury on attempted voluntary manslaughter.

WERE PRIOR CRIMES AND CIVIL WRONGS ADMITTED IN VIOLATION OF K.S.A. 60-455 AND DID THE CAUTIONARY INSTRUCTION FAIL TO REMEDY THE IMPROPER ADMISSION OF THIS EVIDENCE?

May next claims the district court violated K.S.A. 60-455 by allowing Jordan to testify that May used methamphetamine, sold oxycodone, and possessed weapons. May also claims the district court should have included in its limiting instruction a clause specifying for which charges the evidence applied.

Preservation

Before reaching the merits, the State claims that May did not preserve this issue for appeal because he did not contemporaneously object to the testimony that he now challenges. May claims instead that he did preserve the issue because he objected after the close of evidence at a "belated K.S.A. 60-455 hearing."

May concedes that he did not object to testimony of the bad acts that he now challenges. It is well established in Kansas that a party must contemporaneously object,

specifically renew a pretrial objection, or maintain a standing objection at the time the evidence is admitted to preserve the issue for appeal. K.S.A. 60-406; *State v. Inkelaar*, 293 Kan. 414, 421, 264 P.3d 81 (2011), *overruled on other grounds by State v. Dunn*, 304 Kan. 773, 375 P. 3d 332 (2016).

May instead argues that he preserved this issue by objecting after the close of evidence. To support that proposition, May cites *State v. Barber*, 302 Kan. 367, 372-74, 353 P.3d 1108 (2015). But *Barber* contradicts May's claim. In that case, Barber challenged on appeal evidence admitted that he claimed violated K.S.A. 60-455. Two witnesses testified to adduce the challenged evidence below, Melissa Conner and Jolene Brown. But Barber only made a contemporaneous objection to Brown's testimony and not Conner's. As a result, he did not challenge Conner's testimony on appeal. The Kansas Supreme Court surmised that Barber's failure to challenge Conner's testimony stemmed from his failure to contemporaneously object to it during the trial. 302 Kan. at 372-73. Otherwise, the court held that Barber's contemporaneous continuation of his pretrial objection to Brown's testimony was sufficient to preserve it for appeal. 302 Kan. at 373-74. So contrary to May's claim, nothing in *Barber* suggests that lodging an objection after the close of evidence is sufficient for preservation purposes. Indeed, the court's discussion on the lack of objection to Connor's testimony supports the State's position, not May's. Thus, May has not preserved the evidentiary issue for appeal.

As for the instruction issue, the district court gave a limiting instruction under K.S.A. 60-455 at the close of the evidence. But May claims for the first time on appeal that because all the evidence was not relevant to every crime, the district court should have included in its limiting instruction a clause specifying for which charges the evidence applied. Because this is an unpreserved instructional issue, we review for clear error. K.S.A. 2022 Supp. 22-3414(3).

May cites *State v. Breeden*, 297 Kan. 567, 583-84, 304 P.3d 660 (2013), to support his claim. There, the court considered whether the failure to give a limiting instruction in accordance with K.S.A. 2012 Supp. 60-455 was reversible error. But *Breeden* is not at all similar to the facts of May's case, and indeed, appears contrary to his claim. In *Breeden*, the district court gave no instruction at all, which the court found to be assumed error, but not reversible error under a clear error analysis. 297 Kan. at 583-85. Here, May concedes that the district court gave a limiting instruction, albeit without following a PIK comment to specify which crimes the K.S.A. 2022 Supp. 60-455 evidence applies. *Breeden* does not speak to whether the failure to adhere to the PIK comment is reversible error.

Turning to the evidence in dispute, May concedes that it was admitted to prove his possession of a weapon and possession of methamphetamine charges. A review of the evidence does not reveal how Jordan's testimony of May's drug use, pill sales, or gun ownership speaks to any element of any other charge. There is no room for confusion. Because the evidence May complains about has limited application to single charges, there is no chance that the failure to specify the charges in the limiting instruction affected the verdict. May has not shown clear error. See *Breeden*, 297 Kan. at 585.

DID THE DISTRICT COURT IMPROPERLY EXCLUDE EVIDENCE?

May next claims the district court erred by limiting his testimony about his medical conditions and the drug habits and violent tendencies of witnesses. May also claims the district court's instructions to the jury to disregard his testimony was prejudicial and erroneous. Because May's claims implicate his constitutional right to present a defense to the charges against him, we review the issue de novo. *State v. White*, 316 Kan. 208, 212, 514 P.3d 368 (2022).

Testimony about medical conditions

Before trial, the State filed a motion in limine to exclude evidence of the victims' and witnesses' drug usage or drug dealings, and May's cancer diagnosis or treatments. As for the evidence of May's medical conditions, the district judge ultimately ruled that "May can certainly testify as to his own physical feelings and thoughts, and can testify that he had prescription medication and what that medication was. But I don't see where it's necessary to tie that into the basis for the underlying diagnosis of cancer."

During trial, May testified that he saw Jones as if through a tunnel because of post-traumatic stress disorder (PTSD). After the State's objection, and outside the jury's presence, the district judge reminded May that he could "talk about what [he] saw, what [he] perceived, what [he] w[as] experiencing. But I don't want to connect it to any diagnosis beyond—beyond that." Later, when asked to describe his tunnel vision, May responded that he saw like a fish and then said, "the Judge say [*sic*] that I can't mention the post traumatic stress syndrome." The district court called a recess and admonished May for connecting his tunnel vision to a medical diagnosis in the same sentence that he acknowledged that he was ordered against that kind of testimony. The judge then called the jury back in and addressed them with the following:

> "Ladies and gentlemen, we're going to resume testimony here in a moment, but I want to address the last comment that you heard Mr. May indicate, and the reason for the Court calling the recess as Mr. May said the Judge has told him he can't mention certain things. And as I told in you [*sic*] orientation, there [are] rules of evidence and ruling[s] have been made and this Court has pronounced them, and I am just assuring that everybody is following along with the Court's order. So I am specifically directing you to disregard any comment Mr. May testified to about PTSD."

Still later, the district court again, outside the hearing of the jury, warned May to avoid testimony connecting his perceptions to a medical diagnosis. Soon after, the district

court reminded counsel to avoid questions of medical diagnosis while stating that it would allow some leeway for leading questions to accommodate its order. Finally, the district court called counsel to the bench a different time and allowed testimony of May's tunnel vision so long as it was limited to what he was personally experiencing and not linked to a medical diagnosis.

May argues that the district court erred by limiting his testimony about his medical conditions including his cancer diagnosis and PTSD. He also argues that the district court's admonishments, reminders, and instructions were erroneous and prejudicial. Although May focuses much of his argument on his inability to discuss his cancer diagnosis, each of the instances he cites where the district court limited his testimony concerned tunnel vision and his PTSD diagnosis. May does not cite to the record where and how his testimony about his cancer was limited. For that reason, May waives argument on the matter. *State v. Salary*, 309 Kan. 479, 481, 437 P.3d 953 (2019).

In response to May's arguments, the State cites *State v. McFadden*, 34 Kan. App. 2d 473, 478, 122 P.3d 384 (2005). McFadden was prohibited at trial from testifying about a medical condition that was not readily apparent to a lay person. On appeal, this court affirmed the district court's exclusion of the medical evidence because McFadden was trying to testify to medical effects that were beyond the common knowledge of a lay person. 34 Kan. App. 2d at 478. The court ruled that "lay witnesses are not competent to provide reliable testimony about medical matters beyond the common knowledge of lay persons, or those that are not readily apparent such as medical diagnosis or the effects of possible medical conditions." 34 Kan. App. 2d at 478.

May cites *State v. Kline*, No. 109,900, 2014 WL 5312862, at *5 (Kan. App. 2014) (unpublished opinion), in which this court held that the victim's testimony about the effects of a concussion, broken teeth, and bruises suffered from being hit with a bat were not prohibited because they were not outside the knowledge of a lay person. But May's

reliance on *Kline* is misplaced. The victim testified to personal experiences well within the knowledge of a lay person. For example, a lay person should know, as in *Kline*, that being hit in the head with a bat can lead to a concussion, bruising, and broken teeth. But May's situation is different. It is not readily apparent or within the knowledge of a lay person that PTSD can cause tunnel vision. The district court also did not limit May's ability to talk about what he experienced. May could testify that he had tunnel vision and how it affected him, he simply could not connect his tunnel vision to his PTSD diagnosis.

May's case is more similar to *McFadden* where May has nonobvious conditions like PTSD and cancer, and he attempted to explain not just what he experienced, but that his experiences result from a nonobvious medical diagnosis. It is that secondary causation that the district court limited, and it did so because that causation is beyond the common knowledge of a lay person. Thus, the district court's decision to limit May's testimony was in accordance with the holdings in both *McFadden* and *Kline*. The district court did not err in limiting testimony of May's medical conditions.

Evidence of drug use and violent tendencies

May complains generally that the district court erred by limiting evidence of the witnesses' drug usage and violent tendencies. Before the trial, the State filed a motion in limine to exclude evidence of the victims' and witnesses' drug usage or drug dealings "on any date other than the date of the alleged offenses." In a pretrial hearing, the district court ruled that witnesses should be warned to avoid discussion of drug transactions other than "what happened that day as part of this transaction." But the district court left the door open so that if "issues . . . happen during trial, we'll deal with them."

Generally, evidence of a witness' drug usage may be relevant and admissible if it is shown that "'the witness was under their influence at the time of the occurrences as to which he testifies, or at the time of the trial, or that his mind or memory or powers of

observation were affected by the habit.'" *State v. Osby*, 246 Kan. 621, 624, 793 P.2d 243 (1990). Likewise, evidence of a witness' prior violent nature may be admissible to show the defendant's state of mind when encountering the witness. *State v. Walters*, 284 Kan. 1, 11-12, 159 P.3d 174 (2007). May argues generally on appeal that the district court erred by limiting evidence of the witnesses' drug usage and violent tendencies at his trial.

But May's brief cites only a single instance where the district court limited evidence of witness drug use. May testified to the following about his neighbors:

> "[COUNSEL:] Was there a lot of traffic going in and out of that apartment?
> "[MAY:] In and out. All night. Day and night, yeah.
> "[COUNSEL:] At some time did [the neighbor] move out of that apartment? That you know of?
> "[MAY:] Well, no. Most of the time he was barricaded in a room, you know, I didn't know—"

At that point, the State objected to speculation and hearsay. The objection was sustained. May claims that this was evidence of drug dealings and that it was relevant to show his perceptions of Yarbrough and Jones. Otherwise, May argues that the overall ruling to limit this type of testimony was prohibitive to May's defense.

May fails to establish error. The above testimony about his neighbors' comings and goings was not excluded because it was about drug activity. Instead, the State's objection was sustained based on speculation and hearsay. And May's assertion that the district court excluded all evidence about witnesses' drug usage misinterprets the record. At the pretrial hearing, the district court simply ruled that witnesses should be warned to avoid discussion of drug transactions other than "what happened that day as part of this transaction." But the district court left the door open so that if "issues . . . happen during trial, we'll deal with them." May had the chance to proffer this type of evidence at trial, but he did not take the court up on its offer to reconsider the issue at trial. Finally, other

evidence already established May's point that his neighbors used drugs. For example, most of the witnesses to the shootings admitted trying to buy or use methamphetamine from May. Other evidence established that Jones was violent. May testified that Jones had robbed him at gunpoint and knocked some people out in his apartment. May fails to show how he was prejudiced by any evidentiary ruling on this subject.

Limiting instruction

May also claims the district court's instructions to the jury to disregard his testimony about PTSD was erroneous. We disagree. The district court assured the jury that May's comment about being prohibited from testifying about PTSD was merely the result of the rules of evidence. At no point did the district court insinuate that May willingly violated the court's order. When the district court admonished May to follow the court's rulings, it was outside the presence of the jury and did not prejudice May.

DID THE DISTRICT COURT ERR BY ALLOWING THE STATE TO ENDORSE JORDAN AS A WITNESS ON THE LAST DAY OF THE STATE'S CASE-IN-CHIEF?

May next argues that the State's request to endorse Jordan as a witness on the last day of the State's case-in-chief denied May his right to a fair trial under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Kansas discovery statutes. The State argues that May failed to preserve this issue by objecting to the endorsement at trial. May objected at trial on the grounds that it was a "last minute" endorsement, so the issue was preserved to the extent of May's trial objection. But May did not base his objection on any constitutional grounds or refer to a violation of the discovery statutes. A party may not object at trial on one ground and then argue a different ground on appeal. *State v. George*, 311 Kan. 693, 701, 466 P.3d 469 (2020).

A trial court has broad discretionary power to allow a late endorsement of a witness. *State v. Shelby*, 277 Kan. 668, 674, 89 P.3d 558 (2004). "The purpose of the

endorsement requirement is to prevent surprise to the defendant and to give the defendant an opportunity to interview and examine the witnesses for the prosecution in advance of trial." 277 Kan. at 674. This court reviews for an abuse of discretion, and the test is whether the defendant's rights were unfairly prejudiced by the endorsement. *State v. Costa*, 228 Kan. 308, 315, 613 P.2d 1359 (1980). The party asserting the district court abused its discretion bears the burden of showing such abuse of discretion. *State v. Keys*, 315 Kan. 690, 708, 510 P.3d 706 (2022).

May claims that the State's late endorsement of Jordan was prejudicial because he had no opportunity to prepare for Jordan's testimony. The State disagrees and cites to the record to show that May was not surprised by the late endorsement. May had originally subpoenaed Jordan to testify as his own witness until he read a police report where Jordan spoke negatively of him. After the State endorsed Jordan, and May objected, the following exchange occurred regarding the potential endorsement:

> "[DEFENSE COUNSEL]: I have [Jordan's] report, Judge, so, um, I think it's last minute. I can't tell you that I didn't have—have his statement. I did issue a subpoena. Later decided that that—wasn't going to call him, so that's why I didn't do an order to convey, Judge. So I guess for the record I am going to object as a last minute endorsement.
>
> "THE COURT: But as far as unfair surprise or anything?
>
> "[DEFENSE COUNSEL]: Well, I'm not going to tell the Court—I have, I had his statement that he made, so . . . .
>
> "THE COURT: All right. I will note [defense counsel's] objection, but given the circumstances as I have heard them, I will allow the State's endorsement."

May never claimed unfair surprise below because he acknowledged that he had received a report including "[Jordan's] statement" that ostensibly summarized what Jordan's testimony would entail. Indeed, the district judge specifically asked if May objected due to unfair surprise, and May, through counsel, responded that he could not.

While May argues that he could have been better prepared for Jordan's testimony with a timelier endorsement, he does not show with any citation to the record that he was unprepared. To put it plainly, May conceded through counsel below that he was not surprised by the endorsement or what Jordan would testify about. Nothing in the record shows that May was unfairly prejudiced by the last-minute endorsement. May fails to show that the district court abused its discretion by allowing the endorsement.

WAS THE JURY INSTRUCTION ON CRIMINAL POSSESSION OF A WEAPON BY A CONVICTED FELON CLEARLY ERRONEOUS?

May next claims that the jury instruction defining the charge of criminal possession of a weapon by a convicted felon improperly included the criminal intent of recklessness. May argues that the instruction denied his right to have the jury determine his guilt beyond a reasonable doubt in violation of the Fourteenth Amendment. The State responds that the instruction was legally appropriate and any error was not reversible.

May concedes that he did not object to the instruction below. But not only did May not object to the instruction below, his proposed instruction on criminal possession of a weapon stated: "The State must prove that the defendant committed the crime intentionally, knowingly or recklessly." This is the exact language May now complains about on appeal. May later requested and received a stipulation so that the jury need not hear the nature of his convicted felon status. But as for the language in the instruction defining the culpable mental state for the crime, May received the language he requested. Thus, May either invited this claimed error or we review the instruction for clear error. K.S.A. 2022 Supp. 22-3414(3). We will review it for clear error. An instruction is clearly erroneous only if the appellate court is firmly convinced there is a real possibility that the jury would have returned a different verdict but for the error. *Goens*, 535 P.3d at 1118.

May was charged with the criminal possession of a weapon under K.S.A. 2018 Supp. 21-6304(a)(2), which provides that a person criminally possesses a weapon when:

> "(2) within the preceding five years has been convicted of a felony, other than those specified in subsection (a)(3)(A), under the laws of Kansas or a crime under a law of another jurisdiction which is substantially the same as such felony, has been released from imprisonment for a felony or was adjudicated as a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of a felony, and was not found to have been in possession of a firearm at the time of the commission of the crime."

The jury instruction on the charge stated that the State must prove that May committed the crime intentionally, knowingly, or recklessly. But possession was defined in part as having knowledge or intent to have control over an item or knowingly keeping some item in a place where the person has some measure of access and right of control. K.S.A. 2018 Supp. 21-5111(v). May asserts that because possession required either intent or knowledge, the district court erred by including recklessness in the instruction.

The State cites *State v. Howard*, 51 Kan. App. 2d 28, 45, 339 P.3d 809 (2014), which discusses the fact that the criminal possession of a firearm statute does not prescribe the mental state a defendant must have to be guilty of the crime. As a result, the State argues that the crime can be committed when the defendant either intentionally, knowingly, or recklessly engaged in the prohibited conduct of possessing a firearm. Thus, the State asserts that the district court's instruction was legally appropriate.

We observe that in 2022, the Kansas Legislature modified the statutory definition of "possession" at K.S.A. 2022 Supp. 21-5111(v) to include only the culpable mental state of "knowingly." L. 2022, ch. 76, § 1. As a result, the Notes on Use for the most current PIK instruction on criminal possession of a firearm states that after July 1, 2022, only the culpable mental state of "knowingly" is needed with the instruction. See PIK

Crim. 4th 63.040 (2022 Supp.). May does not explain how statutory revisions that became effective after the date his crimes were committed caused the jury instruction the district court gave at his trial to be legally inappropriate.

But even if the district court's instruction at May's trial may have been legally inappropriate, the district court did not commit clear error. Overwhelming evidence shows that May intentionally or knowingly possessed a weapon while almost no evidence was introduced showing that May recklessly possessed a weapon. For example, Robert Jacobs, a police officer, testified that he found a handgun in the location that video footage shows May throwing a dark object out of his car. May admitting keeping the gun in his possession after the shooting and throwing it out the window of his car after he crashed. Jordan testified that May owned and possessed a gun and that May told him that he shot his own bed with it several weeks before the shooting. May told Jordan that Yarbrough had stolen drugs from him, which prompted him to grab his gun and shoot Yarbrough. The jury also necessarily rejected May's explanation that the gun was not his and that he took it from Yarbrough. We are not firmly convinced there is a real possibility that the verdict on the charge of criminal possession of a weapon by a convicted felon would have been different but for the possible instructional error.

DID THE DISTRICT COURT FAIL TO PROPERLY DEFINE KNOWINGLY IN INSTRUCTING THE JURY ON THE CHARGE OF AGGRAVATED BATTERY AGAINST A POLICE OFFICER?

May next argues that the district court failed to properly define knowingly in instructing the jury on the charge of aggravated battery against a police officer. The State agrees that the instruction was erroneous but argues it was not reversible error. May concedes that he did not object to the instruction below and that this court should review for clear error. K.S.A. 2022 Supp. 22-3414(3).

The parties do not dispute that the instruction was legally inappropriate. The instruction stated that "[a] defendant acts knowingly when the defendant is aware of the nature of his conduct that the State complains about *or* that his conduct was reasonably certain to cause the result complained about by the State." (Emphasis added.) But K.S.A. 2018 Supp. 21-5202(i) required both prongs, so the instruction should have included an "and" not an "or" between the clauses. See *State v. Thomas*, 311 Kan. 905, 908-09, 468 P.3d 323 (2020) (finding that knowingly requires both prongs, and an instruction allowing a conviction on just one prong is erroneous).

As to whether the error was harmless, May focuses on his own testimony without citation to the record. May concedes that he was aware of the nature of his conduct that the State complained of, and instead argues that the State could have convicted him even if he did not know that his actions were reasonably certain to cause harm. May argues that under his version of events, he did not see or know that he was about to hit Neff with his car, so the jury could have believed him and found him not guilty.

But the jury's conviction on all counts shows that they did not believe May's version of events. And other evidence refutes May's claim. Neff testified that May stared at him before he began to follow May. May sped up and took abrupt turns as if to evade Neff after Neff started following him. When Neff stopped, the patrol car's lights were on and the siren had been on during the chase. Neff yelled instructions to May and May responded to those instructions by saying, "'I'm trying.'" May admitted he heard someone shouting commands at him. The dash cam footage corroborated Neff's testimony. Neff testified that May drove right at him and angled his car towards him. Jordan testified that May had told him after the fact that he had backed up "to try to run the police over." Other witnesses saw Neff, the patrol car's lights, and heard Neff yelling instructions to May. The evidence was overwhelming that May knew that his actions toward Neff could cause harm and that his conduct was knowingly committed. We are not firmly convinced

there is a real possibility that the verdict on the charge of aggravated battery of a law enforcement officer would have been different but for the instructional error.

DID THE DISTRICT COURT ERR IN DENYING THE MOTION FOR NEW TRIAL BASED ON DISTRICT COURT ERRORS AND NEWLY DISCOVERED EVIDENCE?

May claims the district court erred in denying his motion for new trial. May raises three issues as part of this claim: (1) the district court improperly limited May's ability to testify, (2) a newly discovered witness supported May's defense and the district court erred in finding this witness was not credible, and (3) the State engaged in prosecutorial misconduct. The State responds that the district court properly denied May a new trial.

"The court on motion of a defendant may grant a new trial to the defendant if required in the interest of justice." K.S.A. 2022 Supp. 22-3501(1). An appellate court reviews the district court's decision on a motion for new trial for an abuse of discretion. *State v. Davidson*, 315 Kan. 725, 728, 510 P.3d 701 (2022).

Limitations on May's testimony

May first reasserts his claim that he was prevented from testifying about his mental state or to the witnesses' drug activity. This claim has been addressed above and need not be readdressed here. In sum, the district court did not prohibit May from testifying about his medical conditions, including his feelings, experiences, and things that he personally perceived. He was simply not allowed to connect those things with a medical diagnosis when the causation was outside the common knowledge of a lay person. And the lone testimony that May claims to have actually tried to proffer at trial on his neighbors' drug activity was not excluded on the basis of the district court's pretrial order about drug evidence and was instead excluded because it was speculative and hearsay. May's assertion that the district court excluded all evidence about witnesses'

drug usage misinterprets the record. Evidence was presented at trial to establish May's point that his neighbors used drugs and participated in drug transactions.

Newly discovered evidence

May next claims the district court erred in denying his motion for new trial based on newly discovered evidence. At the hearing on the motion, Cordero Riley testified that Jones had told him after the trial that Yarbrough and Jones were trying to rob May when the shooting occurred. The district court found that Riley's testimony was not credible.

To establish the right to a new trial based on newly discovered evidence, a criminal defendant must establish: (1) that the newly discovered evidence could not have been produced at trial with reasonable diligence; and (2) that the newly discovered evidence is of such materiality that it would likely produce a different result upon retrial. *State v. Lyman*, 311 Kan. 1, 17, 455 P.3d 393 (2020). In deciding whether new evidence is material, the district court must assess the credibility of the evidence. The appellate court will not reassess the district court's credibility determination. 311 Kan. at 17.

May's entire argument on appeal is that the district court erred in finding Riley's testimony incredible. But this court will not reassess the district court's credibility determination of a witness' testimony on a motion for new trial. 311 Kan. at 17. May fails to show the district court erred in denying the motion based on new evidence.

Prosecutorial misconduct

May argues that he should have received a new trial because of prosecutorial misconduct or error during his cross-examination at trial. The appellate court uses a two-step process to evaluate claims of prosecutorial error: error and prejudice. *State v. Sieg*, 315 Kan. 526, 535, 509 P.3d 535 (2022).

"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).

As the basis for his claim, May focuses on the following exchange between he and the State during his cross-examination:

"[THE STATE:] You weren't wearing an arm brace either, were you?
"[MAY:] Why would I need an arm brace.
"[THE STATE:] Weren't you wearing one in court last week?
"[MAY:] I just had a heart attack.
"[THE STATE:] So you were wearing an arm brace?
"[MAY:] I had a pacemaker put in my chest. To keep me from raising my arm and pulling the wires out of my heart.
"[THE STATE:] So the answer is, yes, you were wearing an arm brace last week, correct?
"[MAY:] Yes.
"[THE STATE:] Okay. But you just had to get in that bit about having a heart attack, correct?
"[MAY:] No, you asked me.
"[THE STATE:] I didn't ask you anything about a heart attack, sir, did I? Yes or no, sir. Did I ask you about a heart attack?
"[MAY:] No, no, you didn't.
"[THE STATE:] I asked you about an arm brace, didn't I?

"[MAY:] Yes.

"[THE STATE:] But you had to slip that in about a heart attack, correct?

"[MAY:] I mentioned I had a heart attack is the reason that I was wearing the brace.

"[THE STATE:] But you want to appeal to the sympathies of the jury, don't you?

"[MAY:] No, no, sir. I'm not looking for your sympathy.

"[THE STATE:] Well, you sure talked about your problems a whole lot, haven't you?

"[MAY:] I have them."

May argues that the prosecutor placed his own opinion before the jury as to May's credibility, which was both error and prejudicial. The only case that May cites to support his argument is *State v. Bradford*, 219 Kan. 336, 548 P.2d 812 (1976). In *Bradford*, the prosecutor stated during closing argument that a blood test was run, the results of which supported the State's argument at trial. But no such blood test results had ever been admitted into evidence. The *Bradford* court found that the prosecution's comments concerned evidence not in the record and they were improper. 219 Kan. at 339-40. *Bradford* does not support May's argument here.

The State cites an unpublished opinion, but one that is factually more similar to the current circumstances. In *State v. Peterson*, No. 89,752, 2004 WL 2796395, at *3 (Kan. App. 2004) (unpublished opinion), the prosecutor questioned Peterson during cross-examination whether the presence of his crying baby in the courtroom was intended to gain the sympathies of the jury. The panel in *Peterson* found that this questioning was "not out-of-bounds" and that the State "should be able to explore whether a defendant is trying to play to the jury's emotions." 2004 WL 2796395, at *3.

Contrary to the panel's analysis in *Peterson*, we find the prosecutor's comments here were out-of-bounds. May only mentioned his heart attack in direct response to the prosecutor's question about why he was wearing an arm brace. The record does not reflect that May was trying to slip in the information about a heart attack to gain the sympathy of the jury, and the prosecutor had no reason to accuse May of doing so. But

the record does not show that May was prejudiced by this isolated questioning over the course of an eight-day jury trial. We find there is no reasonable possibility that the error contributed to the verdict in light of the entire record. As a result, we conclude the district court did not err in denying a new trial based on prosecutorial misconduct.

WAS MAY DENIED A FAIR TRIAL BASED ON CUMULATIVE ERROR?

Finally, May argues that he was denied a fair trial based on cumulative error. The State responds that no errors combined to deprive May of a fair trial.

"Cumulative error analysis aggregates all errors and assesses whether their cumulative effect is such that they cannot be determined to be harmless, even though individually those errors are harmless." *State v. Carr*, 314 Kan. 615, 721, 502 P.3d 546 (2022). Cumulative errors may require reversal when the totality of the circumstances establish that the defendant was substantially prejudiced by the errors and denied a fair trial. In assessing the cumulative effect of errors during trial, appellate courts examine the errors in context, consider how they were dealt with, the nature and number of errors and whether they were interrelated, and the strength of the evidence. If any of the errors being aggregated are constitutional, the party benefiting from the error must establish beyond a reasonable doubt that the cumulative effect did not affect the outcome. *State v. Alfaro-Valleda*, 314 Kan. 526, 551-52, 502 P.3d 66 (2022).

We have identified with certainty only one error committed in May's trial, that being the agreed-upon error that the district court failed to properly define "knowingly" in instructing the jury on the charge of aggravated battery of a law enforcement officer, but we found this was not clear error. We have also stated in this opinion that even if other jury instructions may have been erroneous, the instructions were not clearly erroneous. We observe the Kansas Supreme Court has questioned whether unpreserved instructional

errors should be included in a cumulative error analysis, but the court has expressly left that issue undecided. *State v. Couch*, 317 Kan. 566, 597-98, 533 P.3d 630 (2023).

But even if we aggregate all the potential instructional errors identified in this opinion and consider them together as part of a cumulative error analysis, we find that May was not denied a fair trial based on cumulative error. In reaching this conclusion, we again highlight the evidence presented at May's trial. The physical evidence dispelled May's version about how the shootings happened at the apartment complex. Investigators found only two shell casings at the apartment complex, one in May's apartment near the front door and one near the stairs leading to May's apartment. These shell casings were from the single shot May fired at Yarbrough and the single shot May fired at Jones. A bullet hole was found in May's comforter on his bed, but no bullet was found and the sheets beneath the comforter were whole and not disturbed. Investigators concluded that the hole in the comforter was unrelated to the shooting of Yarbrough and Jones.

Several witnesses refuted May's testimony that he had been grazed in the arm when Yarbrough shot at him. Deen testified that May did not appear to be injured or bloodied when May stopped at his apartment after the shooting. Robinson did not observe any serious injuries when he arrested May, nor did Pence notice any obvious injuries when she arrived at the scene of the arrest. Jordan testified at trial that May admitted to him that he shot Yarbrough and Jones because he was tired of people taking advantage of him, and May did not tell Jordan about being robbed by Yarbrough.

Several witnesses corroborated the aggravated battery charge that May knowingly struck Neff with his car, and some of this evidence was recorded on the dash cam video. The evidence was overwhelming that May knowingly possessed a weapon and also that he possessed methamphetamine. The record establishes that May was not substantially prejudiced by any instructional errors that may have been committed in his trial. A

defendant is entitled to receive a fair trial but not a perfect one, for there are not perfect trials. *State v. Lumley*, 266 Kan. 939, 962, 976 P.2d 486 (1999). May received a fair trial.

Affirmed.