APPENDIX

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 115,387

[Filed October 25, 2019]

STATE OF KANSAS,	)
Appellee,	)
	)
v.	)
	)
TIMOTHY C. BOETTGER,	)
Appellant.	)
	)

SYLLABUS BY THE COURT

1.

The freedom of speech referred to in the First Amendment to the United States Constitution does not include a freedom to disregard restrictions on certain well-defined and narrowly limited categories of speech that the government may regulate and, in some circumstances, punish. A true threat falls within one category of speech the government may punish.

2.

True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a

particular individual or group of individuals. The speaker need not intend to commit violence.

3.

The portion of K.S.A. 2018 Supp. 21-5415(a)(1) allowing for a conviction if a threat of violence is made in reckless disregard for causing fear is unconstitutionally overbroad because it punishes conduct that may be constitutionally protected under some circumstances.

Review of the judgment of the Court of Appeals in an unpublished opinion filed June 23, 2017. Appeal from the Douglas District Court; RICHARD M. SMITH, judge. Opinion filed October 25, 2019. Judgment of the Court of Appeals affirming the district court is reversed. Judgment of the district court is reversed.

Clayton J. Perkins, of Capital Appellate Defender Office, argued the cause and was on the brief for appellant.

Kate Duncan Butler, assistant district attorney, argued the cause, and *Charles E. Branson*, district attorney, and *Derek Schmidt*, attorney general, were with her on the brief for appellee.

The opinion of the court was delivered by

LUCKERT, J.: The First Amendment to the United States Constitution prohibits the government from abridging our freedom of speech. But that freedom of speech is not without limits. The United States Supreme Court has recognized certain well-defined and narrowly limited categories of speech that the

government may restrict and even criminally punish. One such category is that of a true threat. This appeal raises questions about what constitutes a true threat and, more specifically, whether the only way to make a true threat is to actually intend to cause fear. Timothy C. Boettger raises these questions by challenging the constitutionality of a provision in the Kansas criminal threat statute, K.S.A. 2018 Supp. 21-5415(a)(1), that allows for a criminal conviction if a person makes a threat in reckless disregard of causing fear. We hold this reckless disregard provision is unconstitutionally overbroad, and we reverse Boettger's conviction because it is based solely on that unconstitutional provision.

FACTUAL AND PROCEDURAL BACKGROUND

A jury convicted Boettger of one count of criminal threat for statements he made to Cody Bonham. Boettger frequented the convenience store where Bonham worked and often spoke with Bonham and another employee, Neil Iles.

On the night of the incident, Boettger came into the store and bought a cup of coffee. He spoke to Iles for a few minutes near the cash register. He told Iles he was upset because he had found his daughter's dog in a ditch. The dog had died from a gunshot wound, and Boettger was angry the sheriff's department had not investigated. Iles recalled Boettger saying "these people . . . might find themselves dead in a ditch somewhere." Iles thought Boettger was referring to the shooter. Based on past conversations, Iles knew Boettger often had an intense way of speaking and a tendency to get upset. Iles thought Boettger was no more upset than he

had been in other situations, and Iles perceived Boettger's reaction as a general complaint about the sheriff's department's inaction.

Boettger walked out of the store but soon came back. At that time, Bonham was stocking a shelf in the aisle nearest to the door. Boettger and Bonham were well-acquainted, having visited between 600 and 800 times over the course of the previous four years. Boettger also knew Bonham's family. He had dated Bonham's aunt and he had known Bonham's father since high school. Boettger knew Bonham's father was a detective in the Douglas County Sheriff's Office.

Like Iles, Bonham knew Boettger had an intense way of speaking about certain subjects. But on this occasion, Bonham felt Boettger was unusually intense as he told Bonham about being upset because of what happened to his daughter's dog and the sheriff's department's failure to investigate. Boettger clenched his fists, and he was visibly shaking. Bonham further testified that Boettger spoke as he approached, saying, "You're the man I'm looking for." According to Bonham, Boettger continued by saying "he had some friends up in the Paseo area in Kansas City that don't mess around, and that I was going to end up finding my dad in a ditch." Boettger ended the conversation by saying, "'You remember that.'" Iles saw Boettger speaking with Bonham but could not hear their conversation.

After Boettger left, Iles noticed that Bonham appeared to be distraught. Bonham relayed what happened and called his father to tell him about the incident. Bonham drafted an email to record the details of his conversation with Boettger and called the police

to report the incident. At trial, Boettger admitted he knew Bonham's father was a member of the sheriff's department but denied threatening to harm him. He asserted Bonham was mistaken about what he said. Boettger denied mentioning friends from the Paseo area, saying instead that he had referred to friends in North Kansas City. Boettger generally claimed he had no intent to threaten anyone and did not mean Bonham or his family any harm. He felt he was on good terms with the family based on his past interactions and relationship with Bonham's father and aunt.

The district court instructed the jury a conviction required finding that Boettger "threatened to commit violence and communicated the threat with reckless disregard of the risk of causing fear in Cody Bonham." The jury convicted Boettger of one count of reckless criminal threat under K.S.A. 2016 Supp. 21-5415(a)(1). Boettger timely appealed, raising five arguments. The Court of Appeals rejected his arguments and affirmed his conviction and sentence. See *State v. Boettger*, No. 115,387, 2017 WL 2709790, at *1 (Kan. App. 2017) (unpublished opinion).

Boettger timely petitioned for review, raising the same five arguments he had made before the Court of Appeals. This court granted review but only on three of the issues: (1) whether the reckless form of criminal threat under K.S.A. 2018 Supp. 21-5415(a)(1) is unconstitutionally overbroad; (2) whether the reckless threat provision is unconstitutionally vague; and (3) whether the jury instruction on the elements of reckless criminal threat was clearly erroneous.

ANALYSIS

The three issues before this court all relate to Kansas' criminal threat statute, K.S.A. 2018 Supp. 21-5415(a). There, the Legislature defined "criminal threat" to include a threat to "(1) [c]ommit violence communicated with intent to place another in fear . . . or in reckless disregard of the risk of causing such fear." Boettger's arguments are specific to the last portion of this definition—a threat made in reckless disregard of the risk of causing fear.

In his first two arguments, Boettger asserts the reckless criminal threat provision is both unconstitutionally overbroad and vague. Issues about the constitutionality of a statute present questions of law over which this court has unlimited review. *State v. Whitesell*, 270 Kan. 259, 268, 13 P.3d 887 (2000) (overbreadth and vagueness). Boettger carries the burden to establish the statute is unconstitutional. See *State v. Williams*, 299 Kan. 911, 920, 329 P.3d 400 (2014).

Before addressing Boettger's arguments, we must consider whether he has preserved his constitutional challenges for appellate review. Generally, a party cannot raise an issue for the first time on appeal, and Boettger did not present the arguments to the district court. See *Williams*, 299 Kan. at 929. Even so, Boettger argued to the Court of Appeals that both his overbreadth and vagueness challenges fell within recognized exceptions to the preservation rule. He specifically pointed to exceptions allowing a party to raise a constitutional argument for the first time on appeal if it presents a question of law or if

consideration of it is necessary to prevent the denial of a fundamental right. See *State v. Herbel*, 296 Kan. 1101, 1116, 299 P.3d 292 (2013). The Court of Appeals accepted those justifications. See *Boettger*, 2017 WL 2709790, at *2, 5. It also concluded Boettger had standing to raise the argument that K.S.A. 2018 Supp. 21-5415(a)(1) makes unlawful constitutionally protected conduct even though he has not asserted that he himself was engaged in a protected activity. See *Williams*, 299 Kan. at 919 (holding a litigant has standing to assert overbreadth challenge that seeks to protect First Amendment rights of third parties).

The State did not cross-petition for review to ask us to consider either of these holdings. When a party does not cross-petition for review on an issue decided adversely to that party by the Court of Appeals, we deem it as settled on review. *Ullery v. Othick*, 304 Kan. 405, 415, 372 P.3d 1135 (2016) (Court of Appeals holding not included in petition or cross-petition for review not before this court); see Supreme Court Rule 8.03(h)(1) (2018 Kan. S. Ct. R. 56).

We, therefore, consider his constitutional challenges to the statute.

ISSUE 1: *K.S.A. 2018 Supp. 21-5415(a)(1) is unconstitutionally overbroad.*

Boettger first argues the reckless form of criminal threat criminalizes speech protected under the First Amendment to the United States Constitution and is therefore overbroad. "[A]n overbroad statute makes conduct punishable which under some circumstances is constitutionally protected." *Whitesell*, 270 Kan. 259,

Syl. ¶ 6. A party arguing a statute is overbroad must show "(1) the protected activity is a significant part of the law's target, and (2) there exists no satisfactory method of severing" constitutional applications of the law from unconstitutional ones. 270 Kan. 259, Syl. ¶ 6; see *Dissmeyer v. State*, 292 Kan. 37, 40-41, 249 P.3d 444 (2011); see also, e.g., *Houston v. Hill*, 482 U.S. 451, 459, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987) (A statute "that make[s] unlawful a substantial amount of constitutionally protected conduct may be held facially invalid".); *Grayned v. City of Rockford*, 408 U.S. 104, 114, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) (A statute may be overbroad "if in its reach it prohibits constitutionally protected conduct.").

To determine whether the reckless disregard provision is overbroad, we must consider the scope of speech protected by the First Amendment.

1.1 *First Amendment protections*

The First Amendment to the United States Constitution provides: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. This free speech protection extends to state laws through the Equal Protection Clause of the Fourteenth Amendment. See *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95-96, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972). "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit expression of an idea simply because society itself finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989).

"From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992). These limited classes consist of "well-defined and narrowly limited" speech or expressive conduct that has "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S. Ct. 766, 86 L. Ed. 1031 (1942). Classes of speech the government may punish include obscenity, defamation, fighting words, incitement to imminent breach of the peace, and "true threats." See *Virginia v. Black*, 538 U.S. 343, 359, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003); *R.A.V.*, 505 U.S. at 383. The United States Supreme Court has "recognized that 'the freedom of speech' referred to by the First Amendment does not include a freedom to disregard these traditional limitations." 505 U.S. at 383.

Even though governmental restrictions on these categories of speech may be constitutional, they can also go too far and result in an infringement of First Amendment rights. The United States Supreme Court dealt with such a situation in *R.A.V.*, 505 U.S. 377.

R.A.V., a minor, was convicted of violating St. Paul, Minnesota's Bias-Motivated Crime Ordinance. The ordinance prohibited displaying a symbol if one knows or has reason to know it "arouses anger, alarm or resentment in others on the basis of race, color, creed,

religion or gender." The United States Supreme Court accepted the Minnesota Supreme Court's determination that the ordinance applied only to fighting words, as defined in *Chaplinsky*, 315 U.S. at 572 ("Fighting words" are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."). And *Chaplinsky* held that the category of fighting words is one classification that "'is not in any proper sense communication of information or opinion safeguarded by the Constitution.'" 315 U.S. at 572 (quoting *Cantwell v. State of Connecticut*, 310 U.S. 296, 310, 60 S. Ct. 900, 84 L. Ed. 1213 [1940]). Even so, the Court held the ordinance violated the First Amendment because it regulated the content of the speech—that is, it prohibited speech "solely on the basis of the subjects the speech addresses." *R.A.V.*, 505 U.S. at 381.

The *R.A.V.* Court recognized that some United States Supreme Court decisions could be read as holding that fighting words were categorically unprotected by the First Amendment. 505 U.S. at 383; see, e.g., *Chaplinsky*, 315 U.S. at 571-72 ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."). But the Court noted that these statements must be read in context and, in context, they were meant only as a "shorthand." 505 U.S. at 383. That shorthand, the Court explained, should not be taken to mean that all prohibitions against fighting words, obscenity, or libel are constitutional because the Court's holding must be limited to the specific circumstances of a case. Outside those circumstances,

a restriction targeting one of those categories of speech may be unconstitutional and will be if it discriminates based on content. Thus, for example, "the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government." 505 U.S. at 383-84. The *R.A.V.* Court recognized that "the prohibition against content discrimination that we assert the First Amendment requires is not absolute," and it then discussed several exceptions. 505 U.S. at 387-90. Ultimately, the discrimination does not violate the Constitution if "the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." 505 U.S. at 390.

1.2 *True-threat doctrine*

The United States Supreme Court has explained that the same tension can arise when the government attempts to criminalize "true threats." In *Watts v. United States*, 394 U.S. 705, 707, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969), the United States Supreme Court thus held that "a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech." In that case, an 18-year-old protesting at a public rally after having received his draft classification was charged with knowingly and willfully threatening the President of the United States. The young man had said, "'If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.'" 394 U.S. at 706. The United States Supreme Court explained the statement was

political hyperbole and not a "true 'threat.'" 394 U.S. at 708.

The true-threat doctrine mentioned in *Watts* is the focus of this case. The United States Supreme Court more fully explored the doctrine in *Black*, 538 U.S. 343. There, the Court again used the term "true threat" to differentiate between protected and unprotected speech, defining the term in a sentence that has become the focus of much of Boettger's and the State's arguments. It stated: "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." 538 U.S. at 359. The speaker need not intend to commit violence. "Rather, a prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'" 538 U.S. at 360.

1.3 *Boettger's contentions—matters of first impression*

Boettger essentially contends that under *Virginia v. Black's* definition of "true threat" set out above, he can be found guilty of making a true threat—one the First Amendment does not protect—only if he possessed the subjective intent to both (1) utter threatening words and (2) cause another to fear the possibility of violence. He further argues K.S.A. 2018 Supp. 21-5415(a)(1) is overbroad because it encompasses more than a true threat and could punish someone for uttering distasteful words that are not a true threat by

punishing someone who speaks "in reckless disregard of the risk of causing such fear" of violence.

This court has never considered whether a conviction for recklessly making a threat can be a true threat or instead violates the First Amendment. Although not asking the question in this way, in 2001 (two years before the decision in *Black*), a panel of the Court of Appeals rejected arguments that a previous version of the criminal threat statute violated the First Amendment because it was overbroad and vague. *State v. Cope*, 29 Kan. App. 2d 481, 29 P.3d 974 (2001), *rev'd on other grounds* 273 Kan. 642, 44 P.3d 1224 (2002). The statute as it read in 2001 allowed a conviction based on someone making a threat in reckless disregard of causing an evacuation of a building, place of assembly, or facility of transportation. See 29 Kan. App. 2d at 483-84.

The *Cope* panel reached its ruling, in part, by relying on *State v. Bourke*, 237 Neb. 121, 122, 464 N.W.2d 805 (1991), *disapproved on other grounds* by *State v. Warner*, 290 Neb. 954, 863 N.W.2d 196 (2015). In turn, the State now cites *Bourke* in support of its argument that Kansas' current statute is constitutional. But *Bourke* provides limited guidance.

There, the Nebraska Supreme Court considered the constitutionality of a statute very similar to Kansas' 2001 version of the criminal threat statute. A criminal defendant argued at trial that the reckless disregard provision was both unconstitutionally vague and overbroad. The Nebraska trial court found the reckless disregard provision of the Nebraska statute unconstitutionally vague. On appeal from that ruling

the question before the Nebraska Supreme Court was thus vagueness—not overbreadth. See 237 Neb. at 122. As a result, the Nebraska decision did not support that portion of *Cope* dealing with the overbreadth issue, only the panel's vagueness analysis. The *Cope* panel also cited several Kansas cases dealing generally with an issue about overbreadth. But the precedential value of these cases was limited because none of them dealt with the criminal threat statute or discussed the true-threat doctrine. The State attempts to mitigate this by pointing out that post-*Black* the Nebraska Supreme Court reaffirmed *Bourke*. See *State v. Nelson*, 274 Neb. 304, 311, 739 N.W.2d 199 (2007). Again, however, the Nebraska Supreme Court in *Bourke* considered an issue related to whether the statute was vague, not whether it was overbroad. And it did not discuss the true-threat doctrine. As a result, these authorities provide no guidance on whether a recklessly made statement of violence may constitutionally constitute a true threat. And neither does *Cope*. We thus find no Kansas authority deciding whether someone who utters a threat of violence in reckless disregard of causing fear has uttered a true threat.

Nor has the United States Supreme Court explicitly decided the question. According to Justice Thomas, the lack of a decision by that Court on the issue "throws everyone from appellate judges to everyday Facebook users into a state of uncertainty." *Elonis v. United States*, 575 U.S. __, 135 S. Ct. 2001, 2018, 192 L. Ed. 2d 1 (2015) (Thomas, J., dissenting). Indeed, as we will detail, post-*Black* courts determining the type of intent necessary to qualify as a true threat have reached differing results. A more detailed discussion of the

Virginia v. Black decision places those differing views in context.

1.4 Virginia v. Black

Barry Black and others were separately convicted of violating a Virginia statute that made it illegal to burn a cross "with the intent of intimidating any person or group of persons." Va. Code Ann. § 18.2-423 (1996). The statute added that "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." Va. Code Ann. § 18.2-423. The Virginia Supreme Court held the statute was facially unconstitutional for two reasons: (1) It "selectively chooses only cross burning because of its distinctive message" and was "analytically indistinguishable from the ordinance found unconstitutional in *R.A.V.*, [505 U.S. 377]", and (2) the prima facie evidence provision of the statute "enhanced [the] probability of prosecution" and was thus overbroad because it "chills the expression of protected speech." *Black v. Commonwealth of Virginia*, 262 Va. 764, 774, 777, 553 S.E.2d 738 (2001), *aff'd in part, vacated in part* 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003).

The case was appealed and reached the United States Supreme Court, where the nine justices wrote five opinions. A majority of the Court—formed through multiple opinions—disagreed with the Virginia Supreme Court's first holding that the statute was indistinguishable from the ordinance found unconstitutional in *R.A.V.* A plurality of the Court—consisting of Justice O'Connor, who authored the opinion, joined by Chief Justice Rehnquist, Justice

Stevens, and Justice Breyer—reviewed "cross burning's long and pernicious history as a signal of impending violence." 538 U.S. at 363. Because of that history, Justice O'Connor wrote: "The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation." 538 U.S. at 363. She categorized the cross burning as a true threat, as had the Virginia Supreme Court.

Justice O'Connor, however, disagreed with the Virginia Court's application of *R.A.V.* to hold that the cross-burning statute was unconstitutional because it discriminated on the basis of content and viewpoint. *Black*, 262 Va. at 771-76. She concluded the Virginia statute fell within an exception discussed in *R.A.V.* under which "the First Amendment permits content discrimination 'based on the very reasons why the particular class of speech at issue . . . is proscribable.'" *Black*, 538 U.S. at 362 (quoting *R.A.V.*, 505 U.S. at 393). That very reason, according to Justice O'Connor, was because the statute prohibited a true threat. And it did not single out "'disfavored topics'" or differentiate conduct based on the "victim's race, gender, or religion, or because of the victim's 'political affiliation, union membership, or homosexuality.'" 538 U.S. at 362.

Justice Stevens concurred, writing that an intent to intimidate "qualifies as the kind of threat that is unprotected by the First Amendment." 538 U.S. at 368 (Stevens, J., concurring). And Justice Scalia agreed that "a State may, without infringing the First Amendment, prohibit cross burning carried out with the intent to intimidate." 528 U.S. at 368 (Scalia, J.,

concurring in part, concurring in the judgment in part, and dissenting in part); see also 538 U.S. at 388 (Thomas, J., dissenting) ("Although I agree with the majority's conclusion that it is constitutionally permissible to 'ban . . . cross burning carried out with the intent to intimidate,' [citation omitted] I believe that the majority errs in imputing an expressive component to the activity in question[.]").

The remaining justices disagreed. In an opinion written by Justice Souter joined by Justices Kennedy and Ginsburg, they agreed with the Virginia Supreme Court that the statute was unconstitutional and could not be saved by any *R.A.V.* exception. 538 U.S. at 380 (Souter, J., concurring in the judgment in part and dissenting in part). But the Court's differences of opinion did not end there.

Justice O'Connor, having disagreed with the Virginia Supreme Court's first holding, turned to its second holding—that the statute was overbroad because of the prima facie evidence provision providing that "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." Va. Code Ann. § 18.2-423. The plurality observed that cross burning can occur for reasons other than intimidation. "[S]ometimes the cross burning is a statement of ideology, a symbol of group solidarity. It is a ritual used at Klan gatherings, and it is used to represent the Klan itself. Thus, '[b]urning a cross at a political rally would almost certainly be protected expression.'" *Black*, 538 U.S. at 365-66 (quoting *R.A.V.*, 505 U.S. at 402 n.4 [White, J., concurring in judgment], and citing *Brandenburg v. Ohio*, 395 U.S. 444, 445, 89

S. Ct. 1827, 23 L. Ed. 2d 430 [1969]). The plurality opinion concluded: "The prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut." 538 U.S. at 367. Although Justice Souter did not join this portion of the plurality opinion, he expressed similar concerns. See 538 U.S. at 384-87.

Justices Scalia and Thomas neither joined in this portion of the plurality opinion nor expressed similar concerns. Instead, they disagreed with the plurality's conclusion the prima facie evidence provision made the statute unconstitutional. 538 U.S. at 368-79.

1.5 Black's *guidance*

Black did not directly address whether the First Amendment tolerates a conviction for making a threat even though there was no intent to cause fear. Even so, the decision explains the intent necessary to have a true threat prosecuted without violating the First Amendment's protections. The explanation begins with the passage defining a "true threat." Again, the Court said:

> "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. See *Watts v. United States*, [394 U.S.] at 708 ('political hyberbole' is not a true threat); *R.A.V. v. City of St. Paul*, 505 U.S., at 388. The speaker need not actually intend to

> carry out the threat. Rather, a prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'" 538 U.S. at 359-60.

A majority of the Court (the four members of the plurality, plus Justice Scalia) explicitly agreed on this statement. See 538 U.S. at 368 (Scalia, J., joining Parts I-III of Justice O'Connor's opinion).

Here, in rejecting Boettger's arguments, the panel seemingly focused on the second portion of the first sentence in which the Court referred to "an intent to commit an act of unlawful violence to a particular individual or group of individuals." It held the *Black* Court's use of the word "'intent' is a shorthand method for referring to the need for a *mens rea* higher than accidental or negligent conduct." *Boettger*, 2017 WL 2709790, at *4. The panel also concluded that the *Black* Court "did not rule on what level of mens rea is necessary in a criminal threat statute," in part because the Virginia statute required subjective intent and the "constitutional necessity of that provision was never at issue." *Boettger*, 2017 WL 2709790, at *4.

Although the panel did not cite cases from other jurisdictions, several courts have reached similar conclusions. See *United States v. Clemens*, 738 F.3d 1, 10 (1st Cir. 2013) (interpreting *Black*'s reference to "those statements where the 'speaker means to communicate a serious expression of an intent to commit an act of unlawful violence'" as "only requir[ing] the speaker to 'intend to make the

communication,' not the threat." [quoting *Black*, 538 U.S. at 359; *United States v. Elonis*, 730 F.3d 321, 329 (3d Cir. 2013)]), *rev'd and remanded* 575 U.S. ___, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015); *United States v. Martinez*, 736 F.3d 981, 986-87 (11th Cir. 2013) ("*Black* did not import a subjective-intent analysis into the true threats doctrine. Rather, *Black* was primarily a case about the overbreadth of a specific statute—not whether all threats are determined by a subjective or objective analysis in the abstract."), *vacated and remanded* 575 U.S. ___, 135 S. Ct. 2798 (2015); *United States v. Jeffries*, 692 F.3d 473, 479-80 (6th Cir. 2012) ("[*Black*] says nothing about imposing a subjective standard on other threat-prohibiting statutes, and indeed had no occasion to do so: the Virginia law itself required subjective 'intent.' The problem in *Black* thus did not turn on subjective versus objective standards for construing threats. It turned on overbreadth—that the statute lacked any standard at all."); *United States v. White*, 670 F.3d 498, 508 (4th Cir. 2012) ("A careful reading of the requirements of § 875[c], together with the definition from *Black,* does not, in our opinion, lead to the conclusion that *Black* introduced a specific-intent-to-threaten requirement into § 875[c] and thus overruled our circuit's jurisprudence, as well as the jurisprudence of most other circuits, which find § 875[c] to be a general intent crime and therefore require application of an objective test in determining whether a true threat was transmitted."); *United States v. Nicklas*, 713 F.3d 435, 439-40 (8th Cir. 2013) (adopting Sixth Circuit's reasoning in *Jeffries*, 692 F.3d at 479-80); *State v. Taupier*, 330 Conn. 149, 170-71, 193 A.3d 1 (2018), *cert. denied* 139 S. Ct. 1188 (2019) (*Black* does "not support the proposition a speaker constitutionally

may be punished *only* when he has a specific intent to intimidate"; "[T]he plurality in *Black* was focused more on the Virginia cross burning statute's failure to differentiate between different levels of intent than on the specific *mens rea* that is constitutionally required before a person may be punished for threatening speech.").

We disagree with these courts' reading of *Black*. Many of these decisions follow the reasoning of *Elonis*, 730 F.3d 321, which the United States Supreme Court reversed. *Elonis v. United States*, 575 U.S. ___, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015). Plus, there are several other reasons we do not dismiss the guidance provided by what we view as a plain reading of *Black*.

Much of that guidance can be found in the sentence defining a true threat: "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Black*, 538 U.S. at 359. The sentence has ambiguity. But the interpretation by the panel and other courts taking the same view ignores the first part of the sentence—that the speaker must "mean" to communicate a serious expression of an intent to commit violence. As a transitive verb, "mean" is defined as: "To have as a purpose or an intention; intend; To design, intend, or destine for a certain purpose or end." American Heritage Dictionary of the English Language 1088-89 (5th ed. 2011); see Webster's Third New Int'l Dictionary 1398 (1993) ("to have in the mind [especially] as a purpose or intention"; "to have an intended purpose").

Given this, we agree with the Tenth Circuit Court of Appeals' holding that this sentence "requir[es] more than a purpose to communicate just the threatening words. It is requiring that the speaker want the recipient to believe that the speaker intends to act violently." *United States v. Heineman*, 767 F.3d 970, 978 (10th Cir. 2014). The Tenth Circuit found more support for this position in a later sentence in the same paragraph in which Justice O'Connor applied the true-threat definition to intimidation: "'Intimidation *in the constitutionally proscribable sense of the word* is a type of true threat, where a speaker directs a threat to a person or group of persons with the *intent of placing the victim in fear of bodily harm or death*.'" 767 F.3d at 978 (quoting *Black*, 538 U.S. at 360, and adding emphases). Based on these passages, the Tenth Circuit "read *Black* as establishing that a defendant can be constitutionally convicted of making a true threat only if the defendant *intended* the recipient of the threat to feel threatened." 767 F.3d at 978.

Responding to those courts that read *Black* as only conveying that the speaker had to intend to utter the words, the Tenth Circuit observed that the *Black* Court had made clear the speaker uttering the threat need not actually intend to commit violence. *Heineman*, 767 F.3d at 978. The Tenth Circuit concluded these statements by the Court would be meaningless if a true threat was not defined to require the intent to threaten:

> "The proposition that the speaker need not intend to carry out the threat is a helpful qualification if there is a requirement that the

> defendant intend the victim to feel threatened. . . . But no such qualification is called for if the preceding sentence means that the only requisite mens rea is that the defendant 'knowingly says the words.' . . . Once it is established that the sole requisite intent is to say the (threatening) words, no reasonable person (juror) would then need to be informed that the defendant need not intend to carry out the threat. If there is no requirement that the defendant intend the victim to feel threatened, it would be bizarre to argue that the defendant must still intend to carry out the threat." 767 F.3d at 980-81.

Likewise, the Ninth Circuit Court of Appeals determined that a "natural reading" of *Black*'s definition of true threats "embraces not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language to *threaten* the victim." *United States v. Cassel*, 408 F.3d 622, 631 (9th Cir. 2005); see *United States v. Bagdasarian*, 652 F.3d 1113, 1116-18 (9th Cir. 2011). The *Cassel* court examined each of the separate opinions in *Black* and concluded that "eight Justices agreed that intent to intimidate is necessary and that the government must prove it in order to secure a conviction." 408 F.3d at 632 (citing *Black*, 538 U.S. at 359-60, 364-65, 367 [O'Connor, J., plurality]; 538 U.S. at 368 [Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part]; 538 U.S. at 385, 387 [Souter, J., concurring in the judgment in part and dissenting in part]); see also Schauer, *Intentions, Conventions, and the First*

Amendment, 55 Sup. Ct. Rev. 197, 217 (2003) ("[I]t is plain that . . . the *Black* majority . . . believed that the First Amendment imposed upon Virginia a requirement that the threatener have specifically intended to intimidate."); Gilbert, *Mocking George: Political Satire as 'True Threat' in the Age of Global Terrorism*, 58 U. Miami L. Rev. 843, 883-84 (2004) ("[C]ross burning is proscribable as a true threat where it is done with the intention of intimidating. Where, however, cross burning is not done to intimidate . . . its use is protected under the First Amendment, even where the effect of the cross burning is to intimidate."); cf. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J.L. & Pub. Pol'y 283, 317-18 (2001) (arguing, before *Black*, for a subjective intent requirement, and observing that "First Amendment law often requires proof of a specific state of mind before finding a speaker liable or allowing a criminal conviction of the speaker").

Further, although the panel and other courts are correct in stating that *Black* was dealing with a statute that clearly required the cross burning to occur "with the intent of intimidating," the *Black* plurality, in the context of its overbreadth analysis, discussed what had to be proven in order for there to be a true threat. This discussion became more general than the specific statute before the Court. Significantly, Justice O'Connor stated: "The prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut." 538 U.S. at 367.

This language, in particular, suggests the members of the Court joining Justice O'Connor's opinion went beyond recognizing that intent was part of the statutory elements of the Virginia statute. They also recognized that intent to intimidate must exist in order to distinguish cross burning as a means of protected expression under the First Amendment from cross burning as a threat of impending violence unprotected by the First Amendment. See 538 U.S. at 368 (Stevens, J., concurring) (An intent to intimidate "qualifies as the kind of threat that is unprotected by the First Amendment.").

In other words, the plurality's overbreadth analysis was "predicated on the understanding that the First Amendment requires the speaker to intend to place the recipient in fear." *Heineman*, 767 F.3d at 978. And, as the *Cassel* court concluded:

> "The Court's insistence on intent to threaten as the *sine qua non* of a constitutionally punishable threat is especially clear from its ultimate holding that the Virginia statute was unconstitutional precisely because the element of intent was effectively eliminated by the statute's provision rendering any burning of a cross on the property of another 'prima facie evidence of an intent to intimidate.'" 408 F.3d at 631.

The Tenth Circuit also pointed out that Justice O'Connor wrote that the prima facie evidence provision "'does not distinguish between a cross burning done with the purpose of creating anger or resentment and a cross burning done with the purpose of threatening or

intimidating a victim.'" *Black*, 538 U.S. at 366. The Tenth Circuit then asked: "But how could that be a First Amendment problem if the First Amendment is indifferent to whether the speaker had an intent to threaten?" *Heineman*, 767 F.3d at 978-79. It then answered: "The First Amendment overbreadth doctrine does not say simply that laws restricting speech should not prohibit too much speech. It says that laws restricting speech should not prohibit too much speech *that is protected by the First Amendment*." 767 F.3d at 979. And Justice O'Connor's discussion makes clear "'the element of intent [is] the determinative factor separating protected expression from unprotected criminal behavior.'" *Cassel*, 408 F.3d at 632 (referring to statements in *Black*, 538 U.S. at 365, that "'same act' 'may mean that a person is engaging in constitutionally proscribable intimidation [or] only that the person is engaged in core political speech'" and "'a burning cross is not always intended to intimidate'").

Although Justice O'Connor's opinion only represented the position of four Justices, Justice Souter's opinion made similar points when discussing the prima facie evidence provision. He likewise noted that cross burning can be consistent with an intent to intimidate or with an "intent to make an ideological statement free of any aim to threaten." He referred to the intent to intimidate as "proscribable and punishable intent" and the other as permissible intent. *Black*, 538 U.S. at 385-86 (Souter, J., concurring in the judgment in part and dissenting in part). Both Justice O'Connor's and Justice Souter's opinions highlight that, if the First Amendment did not impose a specific intent requirement, "Virginia's statutory presumption

was superfluous to the requirements of the Constitution, and thus incapable of being unconstitutional in the way that the majority understood it." Schauer, 55 Sup. Ct. Rev. at 217.

We conclude a majority of the *Black* Court determined an intent to intimidate was constitutionally, not just statutorily, required. "Intimidation *in the constitutionally proscribable sense of the word* is a type of true threat, where a speaker directs a threat to a person or group of persons *with the intent of placing the victim in fear* of bodily harm or death." (Emphases added.) *Black*, 538 U.S. at 360.

Further, although *Black* addressed intimidation, its analysis applies equally to K.S.A. 2018 Supp. 21-5415(a)(1). The statute draws no distinction based on the means through which fear is caused. The plain meaning of the conduct prohibited by K.S.A. 2018 Supp. 21-5415(a)(1)—causing fear—is indistinguishable from the intimidation provision at issue in *Black*.

1.6 *Recklessness*

The Court of Appeals panel, however, rejected Boettger's argument that the *Black* Court's various references to "intent" eliminated the possibility of a true threat being made with a reckless disregard for causing fear of violence. The panel concluded *Black* left open the possibility of the culpable mental state being recklessness. The panel then turned to a discussion of Kansas law that defines "recklessness" as a culpable mental state that means a person who acts recklessly is *aware* of the nature of his or her conduct. 2017 WL

2709790, at *4-5 (quoting K.S.A. 2016 Supp. 21-5202[a], [b], [j] and citing Kansas cases). These Kansas authorities, according to the panel, aligned with the following statement from Justice Alito's concurring and dissenting opinion in *Elonis*, 135 S. Ct. 2001: "Someone who acts recklessly with respect to conveying a threat necessarily grasps that he is not engaged in innocent conduct. He is not merely careless. He is aware that others could regard his statements as a threat, but he delivers them anyway." 135 S. Ct. at 2015 (Alito, J., concurring in part and dissenting in part).

The panel held: "Recklessness is sufficient *mens rea* to separate wrongful conduct from otherwise innocent conduct. Accordingly, we find that K.S.A. 2016 Supp. 21-5415(a)(1) does not criminalize constitutionally protected conduct by criminalizing threats to commit violence communicated in reckless disregard of the risk of causing fear in another." *Boettger*, 2017 WL 2709790, at *5.

We do not quarrel with the panel's conclusion that recklessness can differentiate criminal conduct from innocent conduct. But that does not answer whether the statute violates the First Amendment by punishing protected speech. And while Justice Alito argues recklessness satisfies the First Amendment, we have trouble squaring that conclusion with *Black* and *Elonis*.

In *Elonis,* Anthony Douglas Elonis had used social media to post self-styled rap lyrics containing graphically violent language. In the posts he wrote disclaimers saying the lyrics were "fictitious" and not intended to depict real persons. He also stated he was

exercising his First Amendment rights. These posts led him to be charged with five counts of violating 18 U.S.C. § 875(c), which makes it a federal crime to transmit in interstate commerce "any communication containing any threat . . . to injure the person of another." The statute did not set out a required mental state. At trial, Elonis requested a jury instruction that the Government had to prove that he intended to communicate a threat. The trial court rejected this argument and instead instructed the jury under the standard of whether "'a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual.'" 135 S. Ct. at 2007. The United States Supreme Court held this instruction was erroneous. 135 S. Ct. at 2012.

The Court applied a rule of statutory construction providing that the "'mere omission from a criminal enactment of any mention of criminal intent' should not be read 'as dispensing with it.'" 135 S. Ct. at 2009 (quoting *Morissette v. United States*, 342 U.S. 246, 250, 72 S. Ct. 240, 96 L. Ed. 288 [1952]). Instead, the Court would read into the statute "'only that *mens rea* which is necessary to separate wrongful conduct from "otherwise innocent conduct."'" 135 S. Ct. at 2010. And, in the context of the threat statute at issue, "'the crucial element separating legal innocence from wrongful conduct' is the threatening nature of the communication. . . . The mental state requirement must therefore apply to the fact that the communication contains a threat." 135 S. Ct. at 2011. The majority found error because the jury instruction

imposed a negligence standard. It noted the court had "'long been reluctant to infer that a negligence standard was intended in criminal statutes'" because its focus on what a reasonable person would perceive was "inconsistent with 'the conventional requirement for criminal conduct—awareness of some wrongdoing.'" 135 S. Ct. at 2011.

The *Elonis* majority stopped short of answering the question before us about whether a statute must require subjective intent to survive a First Amendment attack. It noted that during oral argument Elonis' attorney had contended that a reckless mental state would not be sufficient. But because the parties had not briefed the question, the majority refused to address it. And it specifically stated it was not addressing any First Amendment issues. 135 S. Ct. at 2012.

Justice Alito took the majority to task for not answering whether reckless conduct could make a true theat. He later expressed his view that recklessness should suffice and that applying a reckless mens rea does not violate the First Amendment. 135 S. Ct. at 2013-16 (Alito, J., concurring in part and dissenting in part). His discussion focused on how the recklessness standard applied to Elonis, who had "made sure his wife saw his posts" and, in context, who could blame her for being fearful because "[t]hreats of violence and intimidation are among the most favored weapons of domestic abusers, and the rise of social media has only made those tactics more commonplace." 135 S. Ct. at 2017 (Alito, J., concurring in part and dissenting in part). This context is readily distinguishable from the facts here, as well as those in *Black* and *Watts*.

Justice Alito then recognized and dismissed the possibility of a First Amendment issue:

> "It can be argued that § 875(c), if not limited to threats made with the intent to harm, will chill statements that do not qualify as true threats, *e.g.,* statements that may be literally threatening but are plainly not meant to be taken seriously. We have sometimes cautioned that it is necessary to 'exten[d] a measure of strategic protection' to otherwise unprotected false statements of fact in order to ensure enough "'breathing space"' for protected speech. *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 342, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) (quoting *NAACP v. Button,* 371 U.S. 415, 433, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963)). A similar argument might be made with respect to threats. But we have also held that the law provides adequate breathing space when it requires proof that false statements were made with reckless disregard of their falsity. See *New York Times,* 376 U.S., at 279-280 (civil liability); *Garrison*, 379 U.S., at 74-75 (criminal liability). Requiring proof of recklessness is similarly sufficient here." 135 S. Ct. at 2017 (Alito, J., concurring in part and dissenting in part).

At least two state courts have agreed with Justice Alito's view and others have recognized that recklessness may be a sufficient mens rea for a true threat. See *State v. Taupier*, 330 Conn. 149, 170-71, 193 A.3d 1 (2018), *cert. denied* 139 S. Ct. 1188 (2019) (collecting some post-*Black* cases and holding

recklessness standard constitutional in a true-threat context); *Major v. State*, 301 Ga. 147, 150-51, 800 S.E.2d 348 (2017) (upholding recklessness standard post-*Black*); see also *Commonwealth v. Knox*, 190 A.3d 1146, 1156 (Pa. 2018), *cert. denied* 139 S. Ct. 1547 (2019) (collecting some post-*Black* cases and noting an open question existed about whether recklessness standard can be applied in a true-threat context).

Our reading of *Black* differs, however, and is reflected in Justice Sotomayor's opinion in *Perez v. Florida*, 580 U.S. ___, 137 S. Ct. 853, 855, 197 L. Ed. 2d 480 (2017) (Sotomayor, J., concurring in denial of petition for writ of certiorari):

> "Together, *Watts* and *Black* make clear that to sustain a threat conviction without encroaching upon the First Amendment, States must prove more than the mere utterance of threatening words—*some* level of intent is required. And these two cases strongly suggest that it is not enough that a reasonable person might have understood the words as a threat—a jury must find that the speaker actually intended to convey a threat." 137 S. Ct. at 855.

As we have discussed, we, too, read *Black* as holding that the speaker must actually intend to convey a threat. Acting with an awareness that words may be seen as a threat leaves open the possibility that one is merely uttering protected political speech, even though aware some might hear a threat. Boettger offers examples.

Boettger first argues the protester in *Watts* could have been convicted under the Kansas statute. The protester communicated he would shoot the president; he thus made a threat. See K.S.A. 2018 Supp. 21-5111(ff) (defining "threat"). And he was aware of the risk of causing fear but continued anyway. See K.S.A. 2018 Supp. 21-5202(j) (defining "reckless"). As another example, Boettger poses the situation of a Black Lives Matter protester repeating the lyrics of a well-known police protest song while standing near police officers. He quotes the lyrics as a threat to "'[t]ak[e] out a cop or two.' . . . N.W.A., Fuck tha Police, on Straight Outta Compton (Ruthless/Priority 1989)." Even if the protester did not intend to threaten the police, Boettger argues "[a] person in that situation runs a real risk of a conviction for reckless threat under Kansas' law, despite acting in protest by performing a controversial work of art." Finally, he suggests burning a "cross on private property within the view of a public roadway and other houses, where locals had stopped to watch" as part of a political rally would be an activity about which "the perpetrators would be conscious that it is seen as a threat, and would be acting in disregard of substantial and unjustifiable risk of causing fear." Such an act could be punishable under Kansas law, he argues, even if the protester intended politically protected speech on private property and did not intend to cause fear of violence.

We find these examples persuasive illustrations of ways in which K.S.A. 2018 Supp. 21-5415(a)(1) potentially criminalizes speech protected under the First Amendment.

1.7 *Summary*

Black found specific intent was necessary to convict under the Virginia cross-burning statute at issue in that case. See 538 U.S. at 360. The Court stated "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Black*, 538 U.S. at 360. It strains the plain meaning of the Court's language to conclude that "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals" are not made "with the intent of placing the [particular individual or group of individuals] in fear of bodily harm or death." *Black*, 538 U.S. at 359-60. A person who "*means* to communicate a *serious* expression of an *intent* to commit an act of *unlawful* violence" is aware of the illegality of the violence he or she purportedly *intends* to commit and makes a *serious* expression of that intent, which he or she *meant* to communicate. (Emphasis added.) See *Black*, 538 U.S. at 360. This definition conveys that the conduct is intentional.

Under *Black*, the portion of K.S.A. 2018 Supp. 21-5415(a)(1) allowing for a conviction if a threat of violence is made in reckless disregard for causing fear causes the statute to be unconstitutionally overbroad because it can apply to statements made without the intent to cause fear of violence. See K.S.A. 2018 Supp. 21-5202(h) and (j) (defining "intentionally" and "recklessly" in Kansas criminal statutes). The provision

significantly targets protected activity. And its language provides no basis for distinguishing circumstances where the speech is constitutionally protected from those where the speech does not warrant protection under the First Amendment.

Boettger's conviction for reckless criminal threat must be reversed because it was based solely on the unconstitutional provision. See *Whitesell*, 270 Kan. 259, Syl. ¶ 6 (stating test for overbreadth).

ISSUES 2 and 3: *Our holding renders these issues moot.*

Boettger also argued K.S.A. 2018 Supp. 21-5415(a)(1) was unconstitutionally vague. And he alternatively contended his conviction should be overturned on another basis by arguing the jury instruction for reckless criminal threat was clearly erroneous. We need not reach these issues, however, because we have already granted Boettger the relief he seeks by reversing his conviction.

CONCLUSION

We find the reckless criminal threat provision of K.S.A. 2018 Supp. 21-5415(a)(1) unconstitutionally overbroad. For that reason, we reverse Boettger's conviction, which is based solely on that provision, and vacate his sentence.

Judgment of the Court of Appeals is reversed. Judgment of the district court is reversed.

JOHNSON, J., not participating.

APPENDIX B

NOT DESIGNATED FOR PUBLICATION

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

No. 115,387

[Filed June 23, 2017]

STATE OF KANSAS, *Appellee*,	)
v.	)
TIMOTHY C. BOETTGER, *Appellant.*	)

MEMORANDUM OPINION

Appeal from Douglas District Court; RICHARD M. SMITH, judge. Opinion filed June 23, 2017. Affirmed.

Clayton J. Perkins, of Kansas Appellate Defender Office, for appellant.

Kate Duncan Butler, assistant district attorney, *Charles E. Branson*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before LEBEN, P.J., GARDNER, J., and WALKER, S.J.

GARDNER, J.: Timothy C. Boettger was convicted by a jury of recklessly making a criminal threat. His appeal raises numerous issues, but none require reversal. Accordingly, we affirm.

Factual and Procedural History

Defendant was charged with criminal threat for statements he made to Cody Bonham at the Kwik Shop in Lawrence, Kansas, where Bonham worked. Defendant frequented the Kwik Shop and had a long-standing habit of talking with Bonham and another employee, Neil Iles, while there. Defendant knew Bonham's father was a member of the sheriff's department.

On this occasion, Defendant told Bonham he had found his daughter's dog shot to death in a ditch. Defendant testified he was "very disappointed" that the sheriff's department had not done anything to investigate it. Bonham testified that Defendant is often intense when he talks about certain subjects, but this time he was more intense than usual. He said Defendant seemed angry and was "clenching his fists and visibly shaking a little bit." He testified, "[Defendant] said he had some friends up in the Paseo area in Kansas City that don't mess around, and that I was going to end up finding my dad in a ditch. And the last thing he said, he said, 'You remember that.' And walked out." Bonham called his father, who told him to type up what he could remember about the conversation, and then he called the police to make a report.

Defendant testified he knew Bonham's father was a member of the sheriff's department, but that he did not threaten to harm him. He stated that he did not say "Paseo" to Bonham, but rather, referred to having friends in North Kansas City.

James E. Rumsey was appointed as counsel for Defendant. He became concerned about Defendant's competency after meeting with him and receiving over 200 pages of legal documents Defendant had written. He brought a motion for a competency hearing but did not ask for the evaluation to be done at Larned State Security Hospital or any other specific place. Rumsey stated in the motion that Defendant was angry with him for having filed the motion and wanted to fire him.

On the day set for the hearing on the motion, the district court judge met with Rumsey and the prosecutor in an on-the-record chambers conference without Defendant present. In that conference, the judge stated he had learned that Larned had a waiting list and that persons had to be in custody to "get in line" for an evaluation there. He explained that he planned to revoke Defendant's bond to accomplish this, and Rumsey agreed.

At the hearing, Defendant strenuously objected to having his bond revoked because he had not violated the conditions of his bond. He also stated he wished to go to Haskell Mental Health Facility instead of Larned. The district court judge revoked his bond and committed him to Larned. Defendant spent 68 days in jail before being moved to Larned for 60 days. Defendant was found competent to stand trial and was later convicted by a jury of the reckless form of criminal

threat. This direct appeal asserts that the criminal threat statute is unconstitutional, alleges various trial errors, and challenges the pretrial procedure that landed him in Larned.

I. *Is the Reckless Disregard Provision of the Statute Unconstitutionally Overbroad?*

Jurisdiction and Standard of Review

We first address Defendant's contention that the reckless disregard subsection of K.S.A. 2016 Supp. 21-5415(a)(1) is unconstitutionally overbroad. That subsection provides that criminal threat is any threat to "(1) Commit violence communicated with intent to place another in fear . . . or in reckless disregard of the risk of causing such fear."

Preliminarily, we address our jurisdiction to hear this challenge. Defendant did not raise the issue below but has properly invoked exceptions to the general rule that constitutional issues cannot be raised for the first time on appeal. See *State v. Gomez*, 290 Kan. 858, 862, 235 P.3d 1203 (2010). Defendant's overbreadth challenge argues the reckless threat statute violates the First Amendment's protection of speech, a fundamental right. Resolving the issue is necessary to serve the ends of justice in order to assure that the protected right to speech is preserved. Further, as Defendant argues, this is solely a legal question based on the statutory language and constitutional law. Accordingly, this challenge may be raised for the first time on appeal. *State v. Dukes*, 290 Kan. 485, 488, 231 P.3d 558 (2010); see *State v. Godfrey*, 301 Kan. 1041, 1043-44, 350 P.3d 1068 (2015).

A further requirement for our jurisdiction is that the appellant show he or she has standing. *Gannon v. State*, 298 Kan. 1107, 1122, 319 P.3d 1196 (2014). The general rule is that the plaintiff must show he or she suffered a cognizable injury and show a causal connection between the injury and the challenged conduct. 298 Kan. at 1123. However, when a litigant brings an overbreadth challenge that seeks to protect First Amendment rights under the United States Constitution, standing exists even if the litigant asserts only the rights of third parties. This is because "'the mere existence of the statute could cause a person not before the Court to refrain from engaging in constitutionally protected speech or expression.' [Citations omitted.]" *State v. Williams*, 299 Kan. 911, 918-19, 329 P.3d 400 (2014).

Finding that we have jurisdiction over Defendant's overbreadth challenge, we turn to the substance of his claim, keeping in mind our standard of review. The constitutionality of a statute is a question of law over which this court has unlimited review. *State v. Whitesell*, 270 Kan. 259, 268, 13 P.3d 887 (2000).

Analysis of the Merits of the Overbreadth Challenge

Our analysis of Defendant's constitutional challenges is guided by several general rules. We must presume the law is constitutional, resolve all doubts in favor of validating the law, uphold the law if there is a reasonable way to do so, and strike down the law only if it clearly appears to be unconstitutional. *City of Lincoln Center v. Farmway Co-Op, Inc.*, 298 Kan. 540, 544, 316 P.3d 707 (2013). The burden to establish

unconstitutionality rests on Defendant, as the party bringing the challenge. 298 Kan. at 544.

An overbroad statute makes punishable conduct that is, at least under some circumstances, constitutionally protected. *Dissmeyer v. State*, 292 Kan. 37, Syl. ¶ 2, 249 P.3d 444 (2011). A statute is overbroad when a significant part of its target is protected activity and there exists no satisfactory method of severing the law's constitutional applications from its unconstitutional applications. *State ex rel. Murray v. Palmgren*, 231 Kan. 524, 533, 646 P.2d 1091 (1982). A further consideration is the degree to which the challenged statute encompasses protected conduct in relation to the statute's plainly legitimate sweep. *Whitesell*, 270 Kan. at 271.

"True Threats" Are Not Protected by the First Amendment

The United States Supreme Court recognized "true threats" as a type of speech that is not protected by the First Amendment and, thus, is subject to regulation in *Watts v. United States*, 394 U.S. 705, 707-08, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969). "True threats" encompass statements "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003). A "true threat" is criminally actionable, unprotected free speech. Proscriptions against true threats protect people from the fear of violence and from the disruption that fear engenders. 538 U.S. at 359-60.

We quickly address Defendant's first argument—that the recklessness provision of K.S.A. 2016 Supp. 21-5415(a)(1) encompasses a broad range of politically or socially distasteful statements protected by the First Amendment. However, that argument is unavailing because the law criminalizes only statements that are threats to commit an act of violence, not statements expressing "distasteful" ideas.

Is "Reckless Disregard" Too Broad a Standard?

We next address caselaw evaluating what level of *mens rea* is necessary to avoid overbreadth of criminal threat statutes. Defendant contends the reckless form of criminal threat under K.S.A. 2016 Supp. 21-5415 is unconstitutionally overbroad because it criminalizes protected speech under the First Amendment. He admits that true threats fall outside that protection but argues that true threats require actual intent and not mere recklessness.

One Kansas case addresses an overbreadth challenge to the criminal threat statute. In *State v. Cope*, a panel of this court ruled that the reckless disregard portion of K.S.A. 21-3419, a prior version of the criminal threat statute, was not unconstitutionally overbroad, as it proscribed the use of words with a specific intended outcome. 29 Kan. App. 2d 481, 484, 29 P.3d 974 (2001), *rev'd on other grounds* 273 Kan. 642, 44 P.3d 1224 (2002). That statute defined criminal threat as any threat to "(1) Commit violence communicated with intent to terrorize another . . . or in reckless disregard of the risk of causing such terror." K.S.A. 21-3419.

That law was repealed in 2010 and replaced with the current version, which provides in relevant part that criminal threat is any threat to "(1) Commit violence communicated with intent to place another in fear . . . or in reckless disregard of the risk of causing such fear." K.S.A. 2016 Supp. 21-5415(a)(1). Defendant argues that *Cope* does not apply because the current version of the statute is broader than the prior version—that "causing fear" encompasses more statements than does "causing terror." But Defendant's overbreadth claim is focused on the statute's inclusion of "reckless disregard," and the statute is unchanged in that respect. Defendant cites no authority showing why the statutory change from "reckless disregard of the risk of causing such terror" to "reckless disregard of the risk of causing such fear" renders *Cope* inapplicable here. See *State v. Murray*, 302 Kan. 478, 486, 353 P.3d 1158 (2015) (failing to support a point with pertinent authority or show why it is sound despite a lack of supporting authority or in the face of contrary authority is akin to failing to brief the issue). Defendant also argues that *Cope* is no longer good law because it was decided prior to *Black*. There, the United States Supreme Court examined two cases under Virginia's ban on cross burning. The Virginia law provided:

> "It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. . . .

> "Any such burning of a cross *shall be prima facie evidence of an intent* to intimidate a person or group of persons." (Emphasis added.) Va. Code Ann. § 18.2-423 (Michie 1996).

The Court held the statute unconstitutional because the "prima facie evidence" provision meant that a person could be convicted of cross burnings done to convey a message other than to intimidate or to convey no message at all. It stated: "The provision permits the Commonwealth to arrest, prosecute, and convict a person *based solely on the fact of cross burning* itself. It is apparent that the provision as so interpreted '"would create an unacceptable risk of the suppression of ideas."' [Citations omitted.]" (Emphasis added.) *Black*, 538 U.S. at 365.

Defendant argues that *Black* established that intent is a requirement for a true threat. He implies that any statute using any *mens rea* standard less than intent to threaten encompasses expression beyond true threats and is thus overbroad. But *Black* did not rule on what level of *mens rea* is necessary in a criminal threat statute. *Black* involved a criminal statute that expressly included a showing of subjective intent—a Virginia statute banning cross burning with an intent to intimidate a person or group of persons. The constitutional necessity of that provision was never at issue. *Black* invalidated the Virginia statute because the intent element of its statute was vitiated by its prima facie provision; the statute was overbroad because it could ensnare any individual who burned a cross for any or no reason. 538 U.S. at 365.

In *State v. White*, 53 Kan. App. 2d 44, 57-59, 384 P.3d 13 (2016), *rev denied* 306 Kan. ___ (April 26, 2017), we applied *Black* to the intentional form of criminal threat and held the statute was not overbroad. But no court in Kansas has applied *Black* to the reckless disregard provision of the current criminal threat statute. Defendant appears to read every instance of the word "intent" as meaning actual intent. We believe the more fair reading is that often "intent" is a shorthand method for referring to the need for a *mens rea* higher than accidental or negligent conduct.

Recklessness exists "when a person disregards a risk of harm of which he is aware." *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994). Our criminal intent statute expressly says that recklessness is a culpable mental state. See K.S.A. 2016 Supp. 21-5202(a) ("A culpable mental state may be established by proof that the conduct of the accused person was committed 'intentionally,' 'knowingly' or 'recklessly.'"); K.S.A. 2016 Supp. 21-5202(b) ("Culpable mental states are classified according to relative degrees, from highest to lowest, as follows: [1] Intentionally; [2] knowingly; [3] recklessly."); K.S.A. 2016 Supp. 21-5202(j) ("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."). See also *State v. Johnson*, 304 Kan. 924, 936, 376 P.3d 70 (2016) (involuntary manslaughter is "'the unintentional killing of a human being committed . . . [r]ecklessly,'" and "'[r]eckless conduct is conduct

done under circumstances that show a realization of the imminence of danger to the person of another and a conscious and unjustifiable disregard of that danger.'"); *State v. Ford*, No. 112,877, 2016 WL 2610259, at * 5 (Kan. App. 2016) (unpublished opinion) (K.S.A. 8-1566 states: "Any person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving," and PIK Crim. 4th 66.060 states: "Reckless means driving a vehicle under circumstances that show a realization of the imminence of danger to another person or the property of another where there is a conscious and unjustifiable disregard of that danger."), *rev. denied* 305 Kan. 1254 (2017).

The Kansas cases and statutes noted above reflect that: "Someone who acts recklessly with respect to conveying a threat necessarily grasps that he is not engaged in innocent conduct. He is not merely careless. He is aware that others could regard his statements as a threat, but he delivers them anyway." *Elonis v. United States*, 575 U.S. ___, 135 S. Ct. 2001, 2015, 192 L. Ed. 2d 1 (2015) (Alito, J., concurring in part and dissenting in part.) Recklessness is sufficient *mens rea* to separate wrongful conduct from otherwise innocent conduct. Accordingly, we find that K.S.A. 2016 Supp. 21-5415(a)(1) does not criminalize constitutionally protected conduct by criminalizing threats to commit violence communicated in reckless disregard of the risk of causing fear in another. Thus it is not overbroad.

II. *Is the Reckless Disregard Provision of the Statute Void for Vagueness?*

Standard of Review

Defendant next argues that the reckless disregard provision of the statute is void for vagueness. That subsection provides that criminal threat is any threat to "(1) Commit violence communicated with intent to place another in fear . . . or in reckless disregard of the risk of causing such fear." K.S.A. 2016 Supp. 21-5415(a)(1). Defendant did not raise this issue below, but he properly invokes two exceptions to the rule that issues cannot be raised for the first time on appeal; accordingly, we address this issue.

We also question *sua sponte* whether Defendant has standing to bring this challenge, as "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Hearn v. City of Overland Park*, 244 Kan. 638, 639, 772 P.2d 758 (1989); *State v. Smith,* No. 104,598, 2012 WL 687067, at *2-3 (Kan. App. 2012) (unpublished opinion) (defendant lacked standing because he did not contend that he had no "'fair warning'" that his conduct was within the scope of conduct prohibited by the statute), *rev. denied* 296 Kan. 1135 (2013). But *Williams* seems to imply that the standing question arises only when a party concedes that his or her conduct was prohibited by the statute at issue. 299 Kan. at 918. See *State v. Denton*, No. 111,085, 2015 WL 5036669, at *3 (Kan. App. 2015) (unpublished opinion) (finding standing because defendant did not concede he had violated the statute), *rev. denied* 303 Kan. 1079 (2016); *State v. Thomas*, No. 110,571, 2015 WL 569371, at *22-24 (Kan. App.)

(unpublished opinion) (finding standing because defendant had not conceded that his conduct was covered by the statute), *rev. denied* 302 Kan. 1020 (2015). Defendant makes no such concession here. Accordingly, we find that his contentions sufficiently establish standing.

Defendant argues that the reckless form of criminal threat is unconstitutionally vague because it relies on the subjective fear of the victim. He alleges that the statute makes persons of reasonable intelligence guess at what causes fear in a particular person. He acknowledges, however, that none of the courts evaluating the criminal threat statute has found it unconstitutionally vague.

Courts have consistently held that K.S.A. 2016 Supp. 21-5415(a) is not unconstitutionally vague. See, *e.g.*, *Cope*, 29 Kan. App. 2d at 486 (finding the reckless form of criminal threat not unconstitutionally vague; finding that the words in the statute are commonly used and persons of common intelligence are not required to guess at the meaning of the statute); see also *White*, 53 Kan. App. 2d at 56, and cases cited therein. Our court has repeatedly found the phrase "with intent to place another in fear" is not unconstitutionally vague, noting the term "fear" has a well understood meaning, and the fear element is based on the defendant's intent to cause fear rather than the victim's subjective reaction. See, *e.g.*, *Denton*, 2015 WL 5036669, at *4; *State v. Taylor*, No. 109,147, 2014 WL 113451, at *4 (Kan. App. 2014) (unpublished opinion). We find these cases to be well reasoned and adopt their analysis here. Defendant does not show

why *Cope*'s holding should be altered merely because "fear" has been substituted for "terror." Finding no reason to revisit this issue, we find the reckless disregard provision of K.S.A. 2016 Supp. 21-5415(a)(1) is not unconstitutionally vague.

III. *Did the District Court Commit Clear Error in Varying from the Pattern Jury Instruction on the Elements of the Crime?*

We next examine Defendant's assertion that the district court erroneously instructed the jury. But Defendant failed to object to the challenged jury instruction during trial; thus, our review is limited to determining whether the instruction was clearly erroneous. See K.S.A. 2016 Supp. 22-3414(3); *State v. Kershaw*, 302 Kan. 772, 776, 359 P.3d 52 (2015). Under this standard, we will not grant relief unless we find error in the instruction and "are firmly convinced that the jury would have reached a different verdict if the instruction error had not occurred." *State v. Williams*, 295 Kan. 506, 516, 286 P.3d 195 (2012). The burden to show clear error under K.S.A. 22-3414(3) remains on the defendant. 295 Kan. at 516.

The pattern instructions require the State to prove that "[t]he defendant threatened to commit violence and communicated the threat with reckless disregard of the risk of causing fear in another." PIK Crim. 4th 54.370. The district court's instruction to the jury used that language, except replaced "fear in another" with "fear in Cody Bonham."

Defendant argues that the instruction required the jury to look at the risk of causing fear in Bonham, a

subjective determination, rather than using the objective standard required for due process. However, neither the statute nor the instruction contains a subjective standard. Instead, the offense looks at the communicator's action and mental culpability, not the result of the communication. See *Cope*, 273 Kan. at 647; *Denton*, 2015 WL 5036669, at *6. This statute does not require that the defendant actually incite fear in the victim or that any such fear be reasonable. Instead, the defendant must only act in reckless disregard of the risk of "plac[ing] another in fear." K.S.A. 2016 Supp. 21-5415(a)(1).

But even if we found error, it was clearly not reversible error. Defendant's attempt to show prejudice consists only of the assertion that: "This error had a high likelihood of impact on the jury's outcome because the State admitted that the risk of Mr. Boettger's statements causing fear varied upon whether the listener was Mr. Bonham or Mr. Iles [the co-worker]." We are firmly convinced that the jury would not have reached a different verdict if the phrasing "fear in another" had been used instead of "fear in Cody Bonham." Therefore, Defendant has failed to meet his burden to show clear error in the jury instruction.

IV. *Did the Prosecutor Commit Reversible Error in His Closing Argument?*

Preservation of the Issue

We next examine Defendant's complaints of prosecutorial error in closing argument. Defendant did not make contemporaneous objections to the claimed prosecutorial errors, but we can review errors in

comments made by the prosecutor during closing arguments even absent such objections. *State v. Tahah*, 302 Kan. 783, 787, 358 P.3d 819 (2015), *cert. denied* 136 S. Ct. 1218 (2016).

Standard of Review

The Kansas Supreme Court announced a new analytical framework for evaluating claims of prosecutorial error in *State v. Sherman*, 305 Kan. 88, 378 P.3d 1060 (2016). We apply that standard here. Appellate review of claims of prosecutorial error continues to involve a two-step process of determining whether the prosecutor committed error and whether that error deprived the defendant of a fair trial. The first step remains unchanged, so the existing body of caselaw defining the scope of a prosecutor's "wide latitude" remains sound. 305 Kan. at 104. However, the second step concerning the effect of the error no longer uses the familiar three-factor analysis in applying the constitutional harmlessness inquiry. See *Sherman*, 305 Kan. at 107, 109.

1. *Vouching for the Credibility of Witnesses*

First, Defendant argues that the prosecutor impermissibly vouched for the credibility of the complaining witness and set out a "false dichotomy" for the jury when he said:

> "If you believe the defendant, there are only two possibilities to explain how Cody testified. Either he's lying or he got the whole thing wrong. Why would Cody Bonham lie about what happened? Does he have a reason to do that? No. He has no reason to lie about what happened."

It is error for a prosecutor to state his or her personal belief about the credibility of testimony given at a criminal trial. *State v. Sprague*, 303 Kan. 418, 428-29, 362 P.3d 828 (2015). However, the type of statement made by the prosecutor here has been held not to exceed that wide latitude, at least where the defense has attacked the credibility of a State witness. See, *e.g.*, *State v. Ortega*, 300 Kan. 761, 775-77, 335 P.3d 93 (2014) (no error where prosecutor asked, "'What reason do [State witnesses] have to lie to you?'"); *State v. Campbell*, 268 Kan. 529, 540, 997 P.2d 726 (2000) (finding no error when the prosecutor said in the closing argument, "'[The eyewitness] is not lying about what she saw. She has no motive to come and tell you anything but the truth. She doesn't know the people, doesn't have an interest in the outcome. She came to tell you the truth about what she saw this night.'"). See also *State v. Netherland*, 305 Kan. 167, 182, 379 P.3d 1117 (2016) (listing cases regarding closing arguments).

Defendant relies on *State v. Britt*, 295 Kan. 1018, 1029, 287 P.3d 905 (2012), for both his claim of false dichotomy and of bolstering the credibility of a witness. The dichotomy in the statement is that Bonham lied or got the whole thing wrong. But the choices outlined by the prosecutor summarized, in effect, the defense theory that Defendant did not make a threat against Bonham's father and Bonham misinterpreted his statements and the State's theory that Bonham was intentionally lying. Other options, such as innocent misrecollection or lack of recall, were not foreclosed, however, by the prosecutor's statements. We find no false dichotomy.

As to bolstering the credibility of a witness, we find *Britt* distinguishable. There, the Supreme Court found that the prosecutor's statements misstated the options available to the jury and lead it to believe that it had no choice but to find the victim entirely credible. 295 Kan. at 1029. Here, the prosecutor laid out some of the methods for resolving the conflicts in Defendant's and Bonham's testimony and walked through the potential pitfalls inherent in each method. The prosecutor's statements did not lead the jury to blindly accept Bonham's account of the events. We find no error in the prosecutor's statements. We find no "vouching" for the credibility of a witness, and it is not improper for a prosecutor to argue that of two conflicting versions of an event, one version is more likely to be credible based on the evidence. See *State v. Anthony*, 282 Kan. 201, 210, 145 P.3d 1 (2006); *State v. Davis*, 275 Kan. 107, 122, 61 P.3d 701 (2003).

2. *Referring to Facts Not in Evidence*

Secondly, Defendant alleges the prosecutor referred to facts not in evidence. He argues that "the prosecutor erred by misstating that contradictory evidence is consistent" and "it is not factually supported that Mr. Iles' testimony indicates the accuracy of Mr. Bonham's testimony."

Defendant's argument is not persuasive. The statements invite an inference and do not refer to facts not in evidence. It is the jury's province to determine the consistency and credibility of witness testimony.

3. *Sympathy for the Victim*

Defendant's third argument is that the prosecutor improperly invoked sympathy for the victim and his family. He quotes from the closing argument: "'How could that be taken as anything other than a threat to Cody Bonham, whose dad works for the sheriff's department. Whose dad's in law enforcement. Whose dad goes out every day and risks his life?'"

The general rule is that it is impermissible for a prosecutor to inflame the jury's passions by, for example, discussing the impact of the crime on the victim or the victim's family. *State v. Adams*, 292 Kan. 60, 67, 253 P.3d 5 (2011); see also *State v. Holt*, 300 Kan. 985, 992, 336 P.3d 312 (2014) (prosecutor stated that victim's children no longer had a father after he was murdered). The important question is whether the prosecutor's argument sought to divert the jury from the evidence by making an appeal to sympathy. *State v. Nguyen*, 285 Kan. 418, 425, 172 P.3d 1165 (2007). In *Nguyen*, our Supreme Court held that the prosecutor had not exceeded the bounds of permissible argument by urging justice for the victim in closing remarks, because the closing argument was "largely evidence based." 285 Kan. at 425-26.

Here, the testimony showed that Defendant was angry at law enforcement for not doing more to investigate the death of the dog. The fact that Bonham's father was in law enforcement was an essential fact. The only comment that may invoke sympathy was that Bonham's "dad goes out every day and risks his life," but we do not find that the prosecutor exceeded the latitude allowed—which

includes the ability to use picturesque speech and make reasonable inferences—when these comments are considered in the context of the record as a whole. See *State v. Fisher*, 304 Kan. 242, 252, 254, 373 P.3d 781 (2016).

4. *Misstatement of the Law*

Defendant's last argument is that the prosecutor misstated the law because he referred to "a reasonable person" and indicated all that was necessary for a conviction was that Defendant acted unreasonably, as opposed to recklessly. He quotes statements from the closing argument such as, "'You determine what a reasonable person would do and you use that as a yardstick to measure the defendant's behavior against.'"

As a general rule, a prosecutor exceeds his or her wide latitude by misstating or misrepresenting the applicable law. *State v. Armstrong*, 299 Kan. 405, 419, 324 P.3d 1052 (2014). However, the context of the statements is important. Here, the prosecutor stated:

> "That was reckless, wasn't it? He's totally disregarding the risk of causing fear in Cody Bonham. . . .
>
> . . . .
>
> ". . . [T]here's no question . . . that he communicated the threat to Cody Bonham with a reckless disregard for causing fear in Cody Bonham . . . .

> "Now, the instruction goes on to define what it means to act recklessly. 'A defendant acts recklessly when the defendant consciously disregards a substantial and unjustifiable risk that a result of the defendant's actions will follow.'
>
> . . . .
>
> "'. . . This act by the defendant disregarding the risk must be a gross deviation from the standard of care a reasonable person would use in the same situation.' A reasonable person.
>
> "Well, that's up to you to decide what a reasonable person would do in this situation. You determine what a reasonable person would do and you use that as a yardstick to measure the defendant's behavior against."

The prosecutor correctly read from the jury instructions, including the definition of recklessness. In context, the statements do not misstate the law. See K.S.A. 2016 Supp. 21-5202(j) (defining recklessness). Accordingly, these statements did not amount to error. Finding no error, we need not evaluate prejudice.

V. *Did the District Court Err in Revoking Defendant's Bond and Ordering a Competency Evaluation at Larned?*

Standard of Review

We next address Defendant's assertions relating to the district court's revocation of his bond and placing him into custody so he could get a competency evaluation at Larned State Security Hospital.

Defendant asserts multiple issues relating to his pretrial competency hearing. He asserts the following: that he could not be committed to the state security hospital without a recommendation by the director of a county or private institution; that the district court lacked the authority to revoke his bond since he had not violated any of his bond's conditions; that he was denied his statutory right to be present at the chambers conference at which the competency hearing was discussed, see K.S.A. 2016 Supp. 22-3302(7); and that his counsel completely abandoned him at the competency hearing by agreeing to the judge's plan to revoke his bond and put him in custody for purposes of a competency evaluation.

Each of these issues raises issues of statutory interpretation, subject to our unlimited review. *State v. Collins*, 303 Kan. 472, 473-74, 362 P.3d 1098 (2015). The Due Process Clause imposes certain substantive and procedural due process requirements when the State acts to deprive an individual of his or her liberty. *State* v. *Grossman*, 45 Kan. App. 2d 420, 423, 248 P.3d 776 (2011). An appellate court exercises unlimited review when the gravamen of a defendant's complaint concerns a constitutional due process challenge. *State v. Wade*, 284 Kan. 527, 534, 161 P.3d 704 (2007).

Mootness

These pretrial issues are, however, moot. Defendant served 68 days in custody after his bond was revoked before he got into Larned, served another 60 days at Larned, was returned to bond thereafter, and has since been convicted. He received jail time credit for the time he was revoked and for the time he was confined at

Larned. See *State v. Mackley*, 220 Kan. 518, 519, 552 P.2d 628 (1976) (time spent in mental hospital prior to sentencing must be credited as jail time). Further, Defendant has been convicted and sentenced, and it appears that he has served his sentence and postrelease supervision terms.

Generally, Kansas appellate courts do not decide moot questions or render advisory opinions. *State v. McKnight,* 292 Kan. 776, 778, 257 P.3d 339 (2011). Mootness can be found if it is clearly and convincingly shown that three conditions are met: (1) the actual controversy has ended; (2) the only judgment that could be entered would be ineffectual for any purpose; and (3) it would not impact any of the parties' rights. *State v. Montgomery*, 295 Kan. 837, 840-41, 286 P.3d 866 (2012). This is the case here as to these pretrial issues.

We find the following analysis of bail errors to be instructive:

> "'When a defendant alleges on appeal error in the fixing of bail, but fails to file a writ of habeas corpus and does not claim his defense was hampered by his custody status, the matter of pretrial release is moot.' [*Ruebke*,] 240 Kan. at 498; see *State v. Foy*, 224 Kan. 558, 562, 582 P.2d 281 (1978); *State v. Dunnan*, 223 Kan. 428, 430, 573 P.2d 1068 (1978) (excessive bail claims denied on appeal in both cases; no writs of habeas corpus filed). A criminal defendant must promptly pursue habeas corpus remedies in order to preserve for review on appeal questions concerning bail.

> "The writ of habeas corpus provides a mechanism under which a criminal defendant can seek relief from confinement under an erroneous bond, or even relief while released on bail. See K.S.A. 1997 Supp. 60-1501, the statutory habeas corpus proceeding." *Smith v. State*, 264 Kan. 348, 355-56, 955 P.2d 1293 (1998).

See *State v. Ruebke*, 240 Kan. 493, 498, 731 P.2d 842, *cert. denied* 483 U.S. 1024 (1987); *State v. Carrow*, No. 94,358, 2006 WL 399251, at *5 (Kan. App. 2006) (unpublished opinion) ("A defendant must promptly pursue habeas corpus remedies in order to preserve for appeal issues concerning excessive bail.").

This is not, of course, an issue of excessive bail. But the result of excessive bail is that the defendant remains in custody. And as *Smith* noted, the writ of habeas corpus provides a mechanism under which "a criminal defendant can seek relief from confinement under an erroneous bond." See K.S.A. 2016 Supp. 60-1501 (providing "any person in this state who is detained, confined or restrained of liberty on any pretense whatsoever, . . . physically present in this state may prosecute a writ of habeas corpus"). The same rationale applies here, as even assuming the pretrial errors complained of, we can fashion no remedy on appeal. Defendant's remedy was to file a writ of habeas corpus. He has not done so.

Accordingly, we apply the rule that when a defendant alleges on appeal confinement under an erroneous bond, but fails to file a writ of habeas corpus and does not claim his defense was hampered by his

custody status, the matter of pretrial release is moot. Defendant does, however, contend that his custody prejudiced his defense of his criminal threat charge in two respects, which we address below.

1. *Claims of abandonment by counsel*

First, Defendant claims that because his attorney abandoned him at the hearing during which he was committed to Larned for a competency evaluation, he received no extension of time in which to submit an affidavit in support of the statutory recusal process he had requested. Defendant asserts that if the recusal process had been meritorious, his trial would have been before a different court. But Defendant makes no effort to show that recusal was warranted or that the recusal process would have been meritorious. He does not allege or show how a trial with a different presiding judge would have made any difference to the outcome of his case, which was tried to a jury. Therefore, we find this claim of prejudice to be merely speculative.

Defendant also contends that his counsel was constitutionally ineffective. He claims James Rumsey completely abandoned him at the pretrial competency hearing by agreeing with the district court's plan to revoke his bond and to commit him to Larned and by failing to advocate for placing him at Haskell Mental Health Facility instead of at Larned.

Effective assistance of counsel rights attach during all critical stages of a criminal proceeding where the sentence potentially includes a term of imprisonment. *United States v. Cronic*, 466 U.S. 648, 658-59, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). But Defendant does

not address whether a competency hearing is a "critical stage" so as to bring it under this standard. The Supreme Court has assumed that, even in situations where the defendant is not actually confronting witnesses or evidence against him, he has a due process right "to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934). See *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987).

But Defendant has not briefed how his presence at the chambers conference meets that fact-specific criteria. Compare *Stincer*, 482 U.S. at 745 (finding defendant's due process rights were not violated by his exclusion from a witness' competency hearing), with *United States v. Bergman*, 599 F.3d 1142, 1158 (10th Cir. 2010) (Holmes, J., concurring in part and dissenting in part) (finding the Sixth Amendment entitles a defendant to the assistance of counsel at every critical stage of a criminal prosecution, which includes a competency hearing). The benchmark for judging any claim of ineffectiveness is whether counsel's conduct "'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" *State v. Gleason*, 277 Kan. 624, 643, 88 P.3d 218 (2004).

We do not decide the merits of this issue because Defendant did not brief the issue of the critical stage, and an issue not briefed by the appellant is deemed waived or abandoned. *State v. Williams*, 303 Kan. 750,

758, 368 P.3d 1065 (2016). Additionally, we need not reach the merits of this issue because Defendant has shown no prejudice to the conduct of his trial. Defendant seeks a new trial, but Rumsey was not Defendant's trial counsel and Rumsey's pretrial performance has not been shown to have affected the defense by other counsel of Defendant's criminal threat charge.

2. *Statutory Right to Speedy Trial*

We next address Defendant's contention that his being in custody "impacted" his statutory and constitutional rights to a speedy trial.

Statutory right to speedy trial

The State bears the responsibility for ensuring that the accused is provided with a speedy trial in accordance with K.S.A. 22-3402. *State v. Adams*, 283 Kan. 365, 369, 153 P.3d 512 (2007). K.S.A. 2016 Supp. 22-3402(a) provides that a defendant held in jail solely by reason of being charged with a crime shall be discharged from liability for the crime if he or she is not brought to trial within 150 days after arraignment. Under K.S.A. 2016 Supp. 22-3402(b), a defendant out on an appearance bond must be brought to trial within 180 days.

Defendant contends that because the district court revoked his bond for a limited period of time, the applicable speedy trial period is 150 days, which applies to defendants in jail, rather than 180 days, which applies to defendants on appearance bond. K.S.A. 2016 Supp. 22-3402(a), (b). Defendant states that 101 days elapsed from arraignment to the date his

first attorney withdrew on August 15, 2014, and another 128 days passed while he was in jail and in Larned. Subtracting the statutory 60 days for the competency evaluation, the total is 169 days. See K.S.A. 2016 Supp. 22-3402(e) (time for competency evaluation is excluded for speedy trial purposes).

The State does not dispute the number of days, but it argues that the 150-day limit of 22-3402(a) does not apply because Defendant was in jail "primarily from his need for a competency evaluation, not [solely by reason of] his criminal charges." Thus, it contends the 180-day limit applies.

The speedy trial statute, however, specifically provides for continuances for competency determinations beyond those initial speedy trial deadlines. This provision is separate from the requirement that delay caused by the defendant not be included in the speedy trial calculation. See K.S.A. 2016 Supp. 22-3402(e)(1) and (2). The latter subsection includes the legislature's determination that the "time that a decision is pending on competency shall never be counted against the state." Accordingly, the time between the filing of a motion for a psychiatric examination and the date on which the psychiatrist's report is received is properly chargeable against the defendant. *State v. Warren*, 224 Kan. 454, 457, 580 P.2d 1336 (1978); see *State v. Powell*, 215 Kan. 624, 527 P.2d 1063 (1974). As applied to this case, at least 128 days, rather than just 60 days, would be excluded. Thus even assuming the relevant maximum is 150 days, Defendant fails to show that the speedy trial statute was violated.

Constitutional right to speedy trial

Defendant also contends that the pretrial proceedings impacted his constitutional right to a speedy trial. Constitutional claims are questions of law subject to de novo review. *State v. Bowen*, 299 Kan. 339, 354, 323 P.3d 853 (2014).

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." In evaluating Sixth Amendment claims, the Kansas Supreme Court applies the four-factor test from *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), which focuses on the "(1) length of delay, (2) reason for the delay, (3) defendant's assertion of his or her right, and (4) prejudice to the defendant." *State v. Rivera*, 277 Kan. 109, 113, 83 P.3d 169 (2004). No single factor alone is sufficient for finding a violation. 277 Kan. at 113.

Defendant argues that prejudice can be presumed from the 412-day delay between arraignment and trial. However, the reasons for delay must be considered. 128 days were excludable for the competency evaluation. Several delays resulted from his requests to replace his counsel, his motion for judge recusal, and other motions. The resulting length of delay, although not calculated by either party, does not give strong support to Defendant's speedy trial argument.

As to assertion of the right, Defendant asserted his statutory speedy trial right shortly before trial. The State argues that Defendant did not make a speedy

trial objection at the competency hearing and cannot now use that delay as a basis for a speedy trial claim. However, Defendant clearly expressed his desire to not be committed to Larned and to not be jailed. He did not use the term "speedy trial," but he clearly objected. Nor do we treat his counsel's silence as a waiver. On balance, this factor weighs in Defendant's favor.

As to prejudice, we consider three factors: (1) the prevention of pretrial incarceration; (2) the anxiety of the accused; and (3) the possibility of impairing the defense through the passage of time. *State v. Weaver*, 276 Kan. 504, 511, 78 P.3d 397 (2003). Defendant was wrongfully incarcerated for 68 days, pretrial. As to anxiety of the accused, Defendant cites his testimony from the status conference when he asked for bond to be reinstated so he could go home to care for his mother and fix up her house. However, there is not a nexus between that and the anxiety considered in this factor. Defendant asserts his defense was prejudiced by a loss of evidence because Bonham could not remember the context of the conversation he had with Defendant. But any gaps in Bonham's recall likely benefitted Defendant by affecting the weight and credibility the jury gave Bonham's testimony, particularly because Defendant's counsel cross-examined Bonham on the issue of his recall. Defendant's counsel highlighted Bonham's lack of memory in his closing argument. This factor does not support a finding of prejudice.

Given Defendant's failure to establish either a presumption of prejudice or actual prejudice, we find no violation of his constitutional right to a speedy trial. None of Defendant's claims of prejudice saves his claim

from being moot. See *Smith*, 264 Kan. at 355-56, and cases cited therein.

Had we reached the merits of the pretrial issues, the only one which gives us pause is the court's decision to revoke Defendant's bond despite the fact Defendant had not violated any of its conditions. Revocation was clearly outside the authority of the district court, and we do not condone that act, regardless of any altruistic intent. Nonetheless, Defendant's remedy for that violation is not to appeal his conviction of criminal threat, but rather, to file a writ of habeas corpus, as we discussed above.

Affirmed.

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 116,453

[Filed October 25, 2019]

STATE OF KANSAS,	)
Appellee,	)
	)
v.	)
	)
RYAN ROBERT JOHNSON,	)
Appellant.	)
	)

SYLLABUS BY THE COURT

1.

If a criminal defendant challenges sufficiency of the evidence on appeal in a case in which a district court instructed a jury on alternative means of committing a crime, the State must establish that it presented sufficient evidence of both alternatives.

2.

When a criminal defendant challenges the sufficiency of evidence on appeal, an appellate court reviews the evidence in a light most favorable to the State to determine whether a rational fact-finder could have found the defendant guilty beyond a reasonable

doubt. The appellate court does not reweigh evidence, resolve evidentiary conflicts, or make determinations about witness credibility.

3.

The provision in K.S.A. 2018 Supp. 21-5415(a)(1), allowing for a conviction if a threat of violence is made in reckless disregard for causing fear, is unconstitutionally overbroad because it punishes conduct that is constitutionally protected under some circumstances.

4.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he or she is charged.

5.

A constitutional 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.

Review of the judgment of the Court of Appeals in an unpublished opinion filed December 15, 2017. Appeal from Montgomery District Court; JEFFREY D. GOSSARD, judge. Opinion filed October 25, 2019. Judgment of the Court of Appeals affirming the district

court is reversed. Judgment of the district court is reversed and the case is remanded with directions.

Clayton J. Perkins, of Capital Appellate Defender Office, was on the briefs for appellant.

Natalie Chalmers, assistant solicitor general, and *Derek Schmidt*, attorney general, were on the briefs for appellee.

The opinion of the court was delivered by

LUCKERT, J.: A jury convicted Ryan Robert Johnson under the Kansas criminal threat statute of intentionally placing another in fear *or* of making a threat in reckless disregard of causing fear. He appealed, and we consider two issues.

First, does sufficient evidence support Johnson's conviction for making a criminal threat? Because Johnson's conviction rests on the alternative means of committing the crime by acting either intentionally or recklessly, we must examine the sufficiency of the evidence relating to both mental states. Upon review of the record, we hold the evidence is sufficient.

Johnson's second issue asks: Is the reckless criminal threat alternative in Kansas' criminal threat statute, K.S.A. 2018 Supp. 21-5415(a)(1), unconstitutionally overbroad? We fully discuss this issue in *State v. Boettger*, No. 115,387, 310 Kan. __, __ P.3d __ (2019), (this day decided), and hold that the making-a-threat-in-reckless-disregard alternative is unconstitutionally overbroad. Applying that holding here, we reverse Johnson's conviction and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

The Montgomery County Sheriff's office received a request to check the welfare of Vickie Walker because of allegations that she was being abused by Johnson, her son. An officer called Walker, who reported that Johnson had been causing problems in her home and she was afraid for her safety. But she was "pretty nonspecific," so the officer took no action beyond taking the report. A few nights later, Walker called 911 and requested an officer come to her home.

Deputy Jacob Garcia responded to the call. Johnson was not present when Deputy Garcia arrived. Walker told Deputy Garcia she came home and found Johnson and his wife arguing. She reported that her daughter-in-law went into another room and locked the door to get away from Johnson, but he kicked the door open. Deputy Garcia noticed a metal clasp on the door was broken and there was a crack running down the door as if it had been forced open. He also saw damage to the door frame. He took pictures of the damage that the jury viewed during the trial. While Deputy Garcia was at the house, Johnson called his mother. The deputy asked Johnson to return, but Johnson stayed away.

The next morning Johnson returned to Walker's home and another incident occurred that led to another 911 call. Deputy Christopher Bishop and another officer responded. Deputy Bishop interviewed Walker and recorded the interview on his body camera. She reported that Johnson had forced his way into her home, ripped the phone out of the wall, and said, "'Try to call the sheriff now, bitch.'" She also stated that Johnson told her, "'Bitch, if I'm going to be on the

streets, then you're going to be on the streets because I'm going to burn your shit up. Then I'm going to be back this afternoon and you ain't going to like what I'm bringing for you.'" According to Walker, Johnson then said, "'I hate you, Mom, you fucking bitch. I wish you would die, but don't worry about it because I'm going to help you get there. I'm going to fucking kill your ass. I hate what you do to me.'"

Deputy Bishop used the recording from his body camera to write his report. He played and paused the video, rewinding it several times to ensure he accurately quoted Walker's statements. The video was lost before trial, however. The other sheriff's officer who responded to the call heard the conversation between Walker and Deputy Bishop. He wrote a report either the same day or the day after the conversation, noting that Walker said Johnson pulled the phone out of the wall and threatened to kill her and burn her house down.

The State charged Johnson with one count of criminal damage to property based on the damage allegedly done to the door the night of the fight between Johnson and his wife. It also charged him with criminally threatening Walker the next day when he allegedly tore the phone off the wall and threatened to burn Walker's house and kill her. During Johnson's trial, both Walker and Johnson's wife downplayed the two incidents. They both testified the family commonly threatened to kill each other but did not mean it. Walker also testified she did not recall what she said to any officer, other than telling Deputy Garcia she wanted to get Johnson out of her house. She explained

that she took medicine that cause her to be confused and she could not remember what Johnson said to her.

Walker testified that at the time of this incident, Johnson had a broken neck and had a metal halo device screwed into the bones of his skull. He was in pain and taking pain medication. As a result, he often had angry outbursts. Walker said she grabbed the halo device during the first incident to try to stop the fight and hurt him in the process. At that time, he became angry with her and felt she was taking his wife's side.

Walker also testified that she heard the officers' testimony at trial and was confused by it because she did not remember what had happened or what she had said to the officers. She stated she would have been truthful with the officers and told them what she thought had happened to the best of her abilities. But she thought they may have misinterpreted what she said because she was in a highly excited state and had been discharged from the hospital two days earlier and was still under the effect of morphine.

Johnson denied breaking the door and said it had been broken for a long time. He admitted there had been an argument in Walker's home, but he claimed he did not threaten anyone. And he denied making the quoted threats. The jury heard a recording of Walker's first 911 call made the evening Johnson and his wife were fighting. The voices of a man and woman arguing can be heard on the recording. The woman can be heard saying that Johnson kicked the door open and threw the lock out the window. The man replied, "I didn't."

The jury acquitted Johnson of the criminal damage to property charge but convicted him of criminal threat. He was sentenced to 14 months' imprisonment with 12 months' postrelease supervision.

Johnson timely appealed. Before the Court of Appeals, he argued: (1) the district court erred when it denied his motion to dismiss based on the 180-day speedy trial requirement under the Interstate Agreement on Detainers; (2) the State did not present sufficient evidence to find Johnson guilty of criminal threat beyond a reasonable doubt; (3) the failure to give a voluntary intoxication jury instruction was clearly erroneous; and (4) the reckless form of criminal threat is unconstitutionally overbroad. The Court of Appeals held no trial errors occurred, and it affirmed Johnson's conviction and sentence. See *State v. Johnson*, No. 116,453, 2017 WL 6397060, at *1 (Kan. App. 2017) (unpublished opinion).

Johnson petitioned for this court's review of the Court of Appeals' decision. We granted his request but only in part. We have jurisdiction under K.S.A. 20-3018(b) (petition for review of Court of Appeals' decision).

ANALYSIS

In granting Johnson's petition in part, we accepted review of his second and fourth issues: Whether the evidence was sufficient and whether the reckless disregard provision in the criminal threat statute was constitutional.

Sufficient evidence

As noted, the State charged Johnson with intentionally or recklessly making a criminal threat. The district court instructed the jury on both mental states. And the jury received a verdict form that simply asked for a determination of whether Johnson committed the crime of a criminal threat without asking the jury to indicate whether it unanimously concluded Johnson acted intentionally or recklessly. Johnson now argues the State must establish that the evidence of both means is sufficient to support the verdict because it charged him with alternative means of committing the crime, the court instructed on both means, and the State did not elect one means or the other. He then argues the State failed to meet that burden.

Johnson is correct on the first point about the State having to establish sufficient evidence of both mental states. By defining criminal threat as either an intentional or a reckless act, the Legislature created alternative means of committing the offense. When the district court has instructed the jury on alternative means of committing a crime, on appeal the State must establish that it presented sufficient evidence of both means to ensure the jury's verdict is unanimous. See *State v. Williams*, 303 Kan. 750, 759-61, 368 P.3d 1065 (2016). But we disagree with Johnson on the second point and, instead, hold that the State presented sufficient evidence of both alternative means.

"'When the sufficiency of evidence is challenged in a criminal case, this court reviews 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.'" *State v. Rosa*, 304 Kan. 429, 432-33, 371 P.3d 915 (2016). "'In making a sufficiency determination, the appellate court does not reweigh evidence, resolve evidentiary conflicts, or make determinations regarding witness credibility.'" *State v. Dunn*, 304 Kan. 773, 822, 375 P.3d 332 (2016).

The Court of Appeals panel correctly found that when viewed in a light most favorable to the State, the evidence supported Johnson's criminal threat conviction. Johnson asked the panel and now asks us to focus on Walker's inability to remember the specific words of any threat he allegedly made. The panel appropriately rejected that narrow focus and discussed the multiple statements Walker made to the sheriff's officers about Johnson's actions and violent behavior. Although Walker did not recall these statements at trial, she did not dispute the accuracy of the officers' testimony. And she admitted she would have tried to be truthful when giving officers her statements.

The panel concluded the evidence of what Walker told officers at the time of the events showed Walker was, in fact, threatened by Johnson's statements. *Johnson*, 2017 WL 6397060, at *4. And in seeking our review, Johnson does not dispute that aspect of the panel's analysis. In fact, Johnson does not address any specific point in the panel's decision. Instead, he generally "argues the Court of Appeals erred for the same reasons argued in his initial brief." He essentially asks us, as he did the Court of Appeals, to reweigh the evidence. But appellate courts do not reweigh evidence. See *Dunn*, 304 Kan. at 822.

Here, when viewed in the light most favorable to the State, the language Johnson used and the circumstances in which he threatened to kill Walker and burn down her house provide sufficient evidence of either an intentional or a reckless threat. See *Williams*, 303 Kan. at 762-63 (intent to threaten can be inferred from the circumstances).

Focusing first on the sufficiency of the evidence that Johnson acted intentionally, the timing of the second incident provides compelling circumstantial evidence that Johnson intentionally threatened Walker. The evening before, Johnson had been fighting with his wife when his mother became involved. She, in turn, involved the sheriff's department, and although Johnson was not present when the officers arrived, he was aware they had investigated Walker's complaint. The next morning, Johnson pulled his mother's phone off the wall and expressed his anger about her talking to the officers and trying to get him out of her house. A reasonable jury could have concluded he acted with the intent to keep his mother from (1) calling 911 again and (2) kicking him out of her house. To coerce her cooperation, he made threats of violence to "'burn [her] shit up'" and to "'kill [her] ass.'"

The time and context in which Johnson allegedly made these statements provides sufficient evidence to support a conviction for intentional criminal threat. A reasonable fact-finder could convict Johnson based on the evidence presented by the State.

As to the sufficiency of the evidence about recklessness, K.S.A. 2018 Supp. 21-5202(c) provides: "Proof of a higher degree of culpability than that

charged constitutes proof of the culpability charged. If recklessness suffices to establish an element, that element also is established if a person acts knowingly or intentionally." Thus, under this statute, because the State provided sufficient evidence that Johnson acted intentionally it also presented sufficient evidence of a reckless mental state.

The State presented sufficient evidence to support a conviction of either intentional or reckless criminal threat.

Constitutionality of reckless criminal threat

Johnson next challenges the constitutionality of the reckless threat provision of K.S.A. 2018 Supp. 21-5415(a)(1). He argues the provision is unconstitutionally overbroad. His arguments are nearly identical to those we addressed in *State v. Boettger*, 310 Kan. ___, ___ P.3d ___ (No. 115,387, this day decided).

As we explain more fully in *Boettger*, the United States Supreme Court has held that the government may regulate "true threats" without infringing on rights protected by the First Amendment to the United States Constitution. And that Court has stated: "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003). In *Boettger*, we hold that the reckless disregard provision encompasses more than true threats and thus potentially punishes constitutionally

protected speech. The reckless disregard provision is thus overbroad and unconstitutional. *Boettger*, 310 Kan. at ___, slip op. at 22-28.

Reversibility

In *Boettger*, where the conviction was based solely on the reckless disregard provision, we reversed the conviction. 310 Kan. at ____, slip op. at 28. The question of reversibility is not as simple here because the jury's verdict rested on the alternative means of either an intentional or a reckless mental state. See *Williams*, 303 Kan. at 759-61. The State argues we should affirm the conviction because the evidence that Johnson acted intentionally was very strong. Johnson responds that the State failed to preserve that argument before the Court of Appeals. The preservation argument is not as straightforward as Johnson suggests, but we need not labor through an explanation of the point because we agree with his contention that his conviction must be reversed.

In reaching this conclusion, we apply the constitutional harmless error standard. In doing so, we reject the State's argument that the statutory standard should apply because the error implicates Johnson's statutory right to a unanimous verdict. See K.S.A. 22-3421; see also *State v. Ward*, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 (2011) (explaining difference between statutory and constitutional harmless error standard). That argument ignores the potential implication of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Due Process Clause implications arise because the jury convicted Johnson, at least in the alternative, of a statutory provision that is unconstitutional. And a person cannot be constitutionally convicted under a constitutionally invalid statute. See generally *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965). In addition, "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Here, for Johnson's conviction to be constitutional, the State must have convinced the jury beyond a reasonable doubt that Johnson intentionally made the criminal threat. But it is unclear that the jury convicted Johnson on proof beyond a reasonable doubt that Johnson acted intentionally. We thus apply the constitutional harmless error standard.

A constitutional error is harmless if the State can show "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." *Ward*, 292 Kan. 541, Syl. ¶ 6; see also *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) (defining the constitutional harmless error standard). The State has not met that standard.

The district court instructed the jury on both forms of criminal threat and accurately recited the definitions of "intentionally" and "recklessly" in K.S.A. 2018 Supp. 21-5202(h) and (j). But neither the jury instructions nor

the State's arguments steered the jury toward convicting Johnson based solely on one mental state or the other. Nor did the judge instruct the jury it had to agree unanimously on whether Johnson acted intentionally or recklessly. And the verdict form did not require the jury to make a specific finding. Thus, the record provides no basis for us to discern whether the jury concluded that the State had proved beyond a reasonable doubt that Johnson acted intentionally.

Nor, despite the State's argument, does a review of the evidence. The State asserts that given Johnson's threat to kill his mother, "[n]o jury would find this threat was anything other than intentionally made with the intent to place another in fear." But the State fails to address conflicting evidence at trial, particularly Walker's testimony that the family routinely threatened to kill each other but no one took it literally. Walker also testified she did not recall Johnson threatening to kill her or burn down the house. And she thought the officers may have misinterpreted what she said because she was in a highly excited state and had been discharged from the hospital two days earlier and was still under the effect of morphine. Walker also made it clear she was motivated to have her son leave her home. A reasonable juror could thus conclude she exaggerated the situation to obtain legal help in keeping her son away. Given these circumstances, a reasonable fact-finder may have determined there was some discrepancy between what Johnson said to Walker and what she reported to the officers.

The jury was free to determine Walker's credibility and decide what weight to give to her testimony. If it believed that Johnson did not intend such threats to be taken literally but that Walker was genuinely fearful when she called for law enforcement assistance, it could have believed the statements were made with a reckless disregard for whether they caused fear. See *State v. Raskie*, 293 Kan. 906, 920-21, 269 P.3d 1268 (2012) (recognizing jury's role in weighing conflicting statements and determining credibility). The State has not addressed this possibility and has not met its burden of proving the error harmless beyond a reasonable doubt.

Accordingly, we reverse Johnson's conviction, vacate his sentence, and remand the case to the district court for a new trial.

Judgment of the Court of Appeals affirming the district court is reversed. Judgment of the district court is reversed and the case is remanded with directions.

JOHNSON, J., not participating.

* * *

STEGALL, J., dissenting: I agree with the majority that the "provision in K.S.A. 2018 Supp. 21-5415(a)(1), allowing for a conviction if a threat of violence is made in reckless disregard for causing fear, is unconstitutionally overbroad" because it can punish constitutionally protected speech in some circumstances. Slip op., Syl. ¶ 3. But I would not reverse Johnson's conviction. Instead, borrowing from the modified harmlessness analysis articulated by Justice Nancy Moritz in *State v. Brown*, 295 Kan. 181,

216-28, 284 P.3d 977 (2012) (Moritz, J., concurring), I would find the constitutional error is harmless.

Certainly, as the majority notes, "a person cannot be constitutionally convicted under a constitutionally invalid statute." Slip op. at 11. So Johnson cannot be convicted of recklessly violating K.S.A. 2018 Supp. 21-5415(a)(1). And if that were the conviction we were reviewing the case would be simple and straightforward. As the majority points out, however, the "question of reversibility is not as simple here because the jury's verdict rested on the alternative means of either an intentional or a reckless mental state." Slip op. at 10. Again, I agree with the majority that in this circumstance, we must apply a constitutional harmless error standard and determine whether the State can show "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." *State v. Ward*, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 (2011); slip op. at 10-11.

To answer this question, the majority pivots back to a mode of analysis borrowed from our alternative means sufficiency test and asks how we can be sure the jury relied on the constitutional "intentional" portion of the statute rather than the unconstitutional "reckless" portion. The majority observes that "neither the jury instructions nor the State's arguments steered the jury toward convicting Johnson based solely on one mental state or the other." Slip op. at 11. And the jury wasn't instructed that it had to unanimously agree on either

intentional or reckless conduct. Slip op. at 11. Finally, the verdict form did not require a finding by the jury either way. Slip op. at 11.

All this is true. In the face of such uncertainty, the majority turns to the evidence itself to discern whether a reasonable juror could have decided from the evidence that Johnson acted recklessly rather than intentionally. The majority essentially reasons that if there is any reasonable possibility that a single juror could have reached the conclusion that Johnson acted recklessly but not intentionally, then the State has failed to carry its burden to demonstrate beyond a reasonable doubt that the constitutional error did not contribute to the verdict. I agree that this is the question we must ask. I part ways with the majority only in its analysis of the evidence.

Because our analytical path here is significantly influenced by the reasoning that informs our alternative means sufficiency test, I would borrow from Justice Mortiz' modified alternative means harmlessness analysis set forth in her concurring opinion in *Brown*. It is true that the reversibility question presented here is not strictly an alternative means question—there are significant differences, particularly because here the State carries a higher burden in order to sustain the conviction. Still, when a jury is instructed on an unconstitutional alternative means of committing a crime, if there is "sufficient evidence of [a constitutional] alternative means but *no* evidence or argument regarding [the unconstitutional] means" then there is "no possibility of jury confusion[]" and we can be confident that the error did not

contribute to the verdict. *Brown*, 295 Kan. at 216 (Moritz, J., concurring).

The significant overlapping inquiry in both instances is jury confusion or, put differently, appellate uncertainty about which of two possible routes to conviction were taken by the jury. As the majority has it, "it is unclear that the jury convicted Johnson on proof beyond a reasonable doubt that Johnson acted intentionally." Slip op. at 11. Relying on Justice Moritz' *Brown* approach, I disagree. Instead, after a thorough review of the evidence below, I conclude there is no evidence that Johnson acted recklessly. The evidence relied on by the majority to suggest a reasonable juror could have convicted Johnson of recklessly making a threat is actually evidence of innocence, not recklessness.

As recounted earlier in the majority opinion, the State presented significant evidence that Johnson acted intentionally. One witness testified that Walker told him Johnson "specifically threated to kill [Walker] and burn down the house." Another detailed Johnson's comment to Walker, "I wish you would die, but don't worry about it because I'm going to help you get there. I'm going to fucking kill your ass." The State's closing arguments likewise only presented an intentional threat case to the jury.

Crucially, Walker's testimony that her family used the term "kill" colloquially would suggest that Johnson's statement was not a threat at all. Similarly, her testimony that she did not remember Johnson making any threatening statements is evidence of innocence, not recklessness. Walker's statements that

police misunderstood her and that she was on morphine when she spoke with detectives, along with any conclusion that she was motivated to "exaggerate[] the situation to obtain legal help," all present evidence that no threat was actually made. Slip op. at 12.

Certainly it is true that "[t]he jury was free to determine Walker's credibility and decide what weight to give to her testimony." Slip op. at 12. But in my view, the evidence is not consistent with the hypothetical possibility relied on by the majority that Walker may have been "genuinely fearful" but that "Johnson did not intend [his] threats to be taken literally." Slip op. at 12. Instead, had any reasonable juror believed Walker, the only conclusion that juror could have reached based on the evidence would have been that Johnson was not guilty. Because the State presented no evidence of a reckless threat to the jury, we can be confident that the jury convicted Johnson of making an intentional threat. The constitutional error did not contribute to the verdict. I would affirm Johnson's conviction.

BILES, J., joins the foregoing dissenting opinion.

APPENDIX D

NOT DESIGNATED FOR PUBLICATION

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

No. 116,453

[Filed December 15, 2017]

STATE OF KANSAS,	)
Appellee,	)
	)
v.	)
	)
RYAN ROBERT JOHNSON,	)
Appellant.	)
	)

MEMORANDUM OPINION

Appeal from Montgomery District Court; JEFFREY D. GOSSARD, judge. Opinion filed December 15, 2017. Affirmed.

Clayton J. Perkins, of Kansas Appellate Defender Office, for appellant.

Natalie Chalmers and *Jon Simpson*, assistant solicitor generals, and *Derek Schmidt*, attorney general, for appellee.

Before PIERRON, P.J., ATCHESON, J., and WALKER, S.J.

PER CURIAM: Ryan Robert Johnson appeals his conviction of criminal threat. On appeal, Johnson argues: (1) the district court erred when it denied his motion to dismiss based on the 180-day speedy trial requirement under the Interstate Agreement on Detainers (IAD); (2) the State did not present sufficient evidence to find Johnson guilty of criminal threat beyond a reasonable doubt; (3) the failure to give a voluntary intoxication jury instruction was clearly erroneous; and (4) the reckless form of criminal threat is unconstitutionally overbroad. Finding no errors, we affirm.

FACTS

Johnson was charged on December 30, 2014, with criminal threat by causing terror, evacuation, or disruption. In a separate complaint, he was also charged with criminal damage to property on the same day. At the time the charges were filed, Johnson was incarcerated in Pennsylvania and had a detainer from Kansas.

After Johnson was returned from Pennsylvania, a speedy trial determination hearing was held by the district court on May 5, 2016. The State requested a new jury trial date so it would be within the 180-day time limit. The court offered dates it was available to move the jury trial up in order to meet the 180-day time limit, but defense counsel was unavailable for those dates. Defense suggested holding the trial in May, but the court said it would not be able to summon a jury in time. The court exercised a 30-day extension regarding scheduling for speedy trial purposes as it was not able to schedule prior to the 180-day deadline.

Johnson filed a motion to dismiss on June 28, 2015. In his motion, he stated the detainer was placed on him on October 7, 2015, and on December 31, 3015, he requested a final disposition in the matter. Under the IAD, the case was required to be brought to trial within 180 days after the receipt of Johnson's mandatory disposition detainer request. He stated the case should be dismissed with prejudice, as it was not brought to trial within the 180-day time frame. The court denied Johnson's motion.

A jury trial was held on July 14, 2016. Jerry Gilbert, a shift supervisor with the Montgomery County Sheriff's Department, testified that he received a Kansas Department for Children and Families welfare check referral on Vickie Johnson on March 12, 2014. The nature of the referral was alleged physical and mental abuse by her son, defendant Johnson. Gilbert spoke with Vickie on the phone on March 13, 2014, and she stated her son had been causing problems and that she was afraid for her safety.

A few days later, Vickie called 911 and requested an officer be sent to her residence because of Johnson. Gilbert spoke by phone with Vickie about the situation, and she said Johnson had forced his way back into her residence. Johnson had also threatened to kill Vickie and burn the house down.

Jacob Garcia, a deputy with the Montgomery Sheriff's Department, responded to the 911 call made by Vickie. He spoke with Vickie, and she said when she came home Johnson and his wife, Tiffany Johnson, were arguing. Tiffany tried to get away and go into a room and secure the door, but Johnson kicked the door

open to get inside. Garcia saw that the metal clasp on the door was broken off and there was a crack down the door as if it was forced open. Garcia also saw there was damage to the actual door frame. Tiffany told Garcia that Johnson had knocked the door open.

Christopher Bishop, a deputy with the Montgomery Sheriff's Department, interviewed Vickie on March 17, 2014. Vickie told Bishop that Johnson had forced his way back into the home, ripped the phone out of the wall, and said, "'Try to call the sheriff now, bitch.'" She also said Johnson told her, "'[I[f I'm going to be on the streets then you're going to be on the streets because I'm going to burn your shit up. Then I am going to be back this afternoon and you ain't going to like what I'm bringing for you.'" In addition, Vickie told Bishop that Johnson said, "'I hate you, mom, you fucking bitch. I wish you would die, but don't worry about it because I'm going to help you get there. I'm going to fucking kill your ass. I hate what you do to me.'" Bishop had a bodycam that he wore at the scene and when he made his report, he played and paused the video. At the time of trial, the bodycam video had been lost in the previous two years before trial.

Vickie testified at the jury trial. She said using words like "kill" was just how her family talked to one another. She said she did not remember Gilbert being at her home or talking to him or the other officer. Vickie said she got mixed up a lot from medication that she was taking. She did not remember Johnson saying he was going to burn down the house or that he was going to kill her. At the time of this incident, Johnson had a broken neck with a metal halo screwed into the

bones of his skull. He broke his neck in a car accident in February 2014 and was given a lot of pain medication. Vickie said he often had angry outbursts while on the medication. That night of the alleged threats, in an attempt to stop Johnson and Tiffany from fighting, Vickie grabbed the halo device and hurt him in the process. At the time, Johnson and Tiffany both lived with Vickie. Finally, Vickie said the door Tiffany said Johnson had kicked in had been broken several times over the years.

Tiffany testified that she was married to Johnson, but her name was Tiffany Wells. She said that on the night of the alleged threats, Johnson forced the door open. She also testified it was common to say things like, "'I am going to kill you,'" in their family.

Johnson testified at trial that he did not break the door and that the door had been broken for a long time. He did say there were arguments and disagreements in the home but that he never threatened anyone and denied any of the quoted threats.

The jury found Johnson guilty of criminal threat and not guilty of criminal damage to property. Johnson was sentenced to 14 months in prison and 12 months of postrelease supervision. Johnson has timely appealed from his conviction and sentence.

ANALYSIS

The 180-day speedy trial deadline under the Interstate Agreement on Detainers

On appeal, Johnson first claims the district court erred when it denied his motion to dismiss the case

because it was outside the 180-day speedy trial deadline under the IAD. Resolution of this issue requires interpretation of the IAD, K.S.A. 22-4401 et seq. Interpretation of a statute is a question of law over which an appellate court has unlimited review. *Neighbor v. Westar Energy, Inc.,* 301 Kan. 916, 918, 349 P.3d 469 (2015).

The speedy trial rights of inmates detained in another state are governed solely by the detainer statutes rather than by general speedy trial statutes. *State v. Angelo*, 287 Kan. 262, 269-70, 197 P.3d 337 (2008).

The IAD states, in pertinent part:

> "(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he [or she] shall be brought to trial within one hundred and eighty (180) days after he [or she] shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his [or her] imprisonment and his [or her] request for a final disposition to be made of the indictment, information or complaint: *Provided*, That for good cause shown in open court, the prisoner or his [or her] counsel being present, the court having jurisdiction of the matter may grant any

> necessary or reasonable continuance." K.S.A. 22-4401, Art. III(a).

If the prisoner is not brought to trial within the appropriate speedy trial time frame, the court shall enter an order dismissing the case with prejudice and any detainer based on the case will no longer exist. K.S.A. 22-4401, Art. V(c).

Under the IAD, any continuance granted for good cause shown in open court extends the 180-day time limit provided the prisoner or his counsel is present. K.S.A. 22-4401, Art. III(a); *State v. Waldrup*, 46 Kan. App. 2d 656, 671, 263 P.3d 867 (2011). The language of the statute does not distinguish between a continuance requested by the State or the defendant. The essential question is whether good cause was shown in open court with either Johnson or his counsel present. While the granting of a continuance is generally within the discretion of the district court, "when a constitutional or statutory right is involved, that discretion is limited and 'there is a greater need for the trial judge to articulate the reasons for any discretionary decision.' [Citation omitted.]" *State v. Burns*, 44 Kan. App. 2d 289, 292, 238 P.3d 288 (2010).

In *State v. Buie*, No. 106,156, 2013 WL 678219 (Kan. App. 2013) (unpublished opinion), a panel of our court found the continuances granted by the district court were granted for good cause based on remarks made by the district court at the hearing. The court stated that counsel provided reasonable explanations for missing the hearings due to inclement weather and a scheduling conflict. 2013 WL 678219, at *4.

Here, the State requested a new jury trial date in order to comply with the 180-day time limit under the IAD. The district court offered to advance the trial to various dates it had available on its calendar which were within the 180 days, but defense counsel had scheduling conflicts with those dates. Defense counsel did suggest moving the trial to May, but the court stated it would not be able to summon a jury in time, as that was just a few weeks away. Because of the scheduling conflicts, the court granted a 30-day continuance as it was not able to schedule prior to the 180-day deadline. At this hearing, defense counsel was present in court and there was a clear scheduling conflict among the parties, mostly caused by defense counsel's obligations, that kept the district court from meeting the 180-day deadline under the IAD. Under these circumstances, we have no hesitation in finding that the continuance was granted for good cause and the district court did not err when it granted a 30-day continuance past the 180-day deadline under the IAD.

Sufficiency of the State's evidence at trial

For his second issue on appeal, Johnson argues the State presented insufficient evidence to support the contention that he communicated a threat to commit violence with the intent to place another in fear. He also argues there is even less evidence to support that he made a threat to commit violence with reckless disregard of the risk of causing fear.

The standard we are to apply has been clearly articulated by our Supreme Court:

> "'When the sufficiency of the evidence is challenged in a criminal case, the standard of review is whether, after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt. In making a sufficiency determination, the appellate court does not reweigh evidence, resolve evidentiary conflicts, or make determinations regarding witness credibility.' [Citations omitted.]" *State v. Dunn*, 304 Kan. 773, 821-22, 375 P.3d 332 (2016).

It is only in rare cases where the testimony is so incredible that no reasonable fact-finder could find guilt beyond a reasonable doubt that a guilty verdict will be reversed. *State v. Matlock*, 233 Kan. 1, 5-6, 660 P.2d 945 (1983).

K.S.A. 2016 Supp. 21-5415(a)(1) states "[a] criminal threat is any threat to: (1) Commit violence communicated with intent to place another in fear . . . or in reckless disregard of the risk of causing such fear."

Here, Deputy Bishop testified that Vickie told him Johnson had forced his way back into her home, ripped the phone out of the wall, and said, "'Try to call the sheriff now, bitch.'" Vickie also said Johnson told her, "'[I]f I'm going to be on the streets then you're going to be on the streets because I'm going to burn your shit up. Then I am going to be back this afternoon and you ain't going to like what I'm bringing for you.'" Bishop further testified that Vickie told him Johnson said to

her, "'I hate you, mom, you fucking bitch. I wish you would die, but don't worry about it because I'm going to help you get there. I'm going to fucking kill your ass. I hate what you do to me.'"

Vickie obviously felt sufficiently alarmed by these events to have called the police and reported the argument and threats that occurred in her home. While at trial, Vickie testified the family used the word "kill" all the time, but this explanation is inconsistent with the fact she called 911 on this occasion and reported the threats to a law enforcement officer.

Viewing the trial testimony in the light most favorable to the State, it is clear a reasonable jury would have found the language Johnson used when he spoke to his mother a criminal threat either with intent to place Vickie in fear or with reckless disregard of the risk of causing fear. The State presented sufficient evidence for a reasonable jury to find beyond a reasonable doubt that Johnson was guilty of criminal threat.

Failure to give a voluntary intoxication jury instruction

Johnson's third allegation of trial error is that the district court improperly failed to give a jury instruction on voluntary intoxication. Johnson argues the evidence at trial demonstrates he was prescribed heavy narcotics and that his medication changed his mood, causing him to have angry outbursts. Given that he was on these pain medications during the incident, he argues he was in an intoxicated state and therefore unable to control his outbursts and unable to form the intent to place another in fear.

Johnson admits he did not request a voluntary intoxication instruction at trial. When a jury instruction issue is not properly preserved, the court may grant relief if the instruction was clearly erroneous. *State v. Kershaw*, 302 Kan. 772, 776, 359 P.3d 52 (2015).

Once again our Supreme Court has given extensive guidance in this area:

> "When analyzing jury instruction issues, an appellate court follows a three-step process:
>
> '(1) determining whether the appellate court can or should review the issue, *i.e.*, 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, *i.e.*, whether the error can be deemed harmless.' [Citation omitted.]" *State v. Pfannenstiel*, 302 Kan. 747, 752, 357 P.3d 877 (2015).
>
> "At the second step, we consider whether the instruction was legally and factually appropriate, employing an unlimited review of the entire record. [Citation omitted.] If the district court erred, and the error did not violate a constitutional right, 'the error is reversible only if [the court] determine[s] that there is a "reasonable probability that the error will or did affect the outcome of the trial in light of the entire record."' *State v. Plummer*, 295 Kan. 156,

> 168, 283 P.3d 202 (2012) (quoting *State v. Ward*, 292 Kan. 541, 569, 256 P.3d 801 [2011], *cert. denied* 565 U.S. 1221 [2012])." *State v. Louis*, 305 Kan. 453, 457-58, 384 P.3d 1 (2016).

K.S.A. 2016 Supp. 21-5205(b), the voluntary intoxication statute, states:

> "An act committed while in a state of voluntary intoxication is not less criminal by reason thereof, but when a particular intent or other state of mind is a necessary element to constitute a particular crime, the fact of intoxication may be taken into consideration in determining such intent or state of mind."

A voluntary intoxication defense is used to negate the intent element of a specific intent crime. *State v. Hilt*, 299 Kan. 176, 192, 322 P.3d 367 (2014). K.S.A. 2016 Supp. 21-5202(h) states that a specific intent crime is any crime "in which the mental culpability requirement is expressed as 'intentionally' or 'with intent.'" Criminal threat is "any threat to: (1) [c]ommit violence communicated with intent to place another in fear." K.S.A. 2016 Supp. 21-5415(a)(1). Thus, because it has the requisite mental culpability, criminal threat is a specific intent crime.

Johnson's own testimony at the jury trial contradicts his claim that a voluntary intoxication instruction should have been given. First, Johnson testified that he remembered dates in question and specific statements that he made to Vickie. He testified at trial that there were arguments and disagreements in the home but that he did not threaten his mother

and denied the quoted threats. In addition, Johnson stated he did not break the door and that the door had been broken for a long time.

In *State v. Hernandez*, 292 Kan. 598, 607, 257 P.3d 767 (2011), the court stated the defendant's ability to provide a "detailed recollection of the events on the night of the offense" demonstrated his mental faculties were intact. In order to receive a voluntary intoxication instruction, a defendant must present evidence that his or her consumption of alcohol or drugs impaired his or her mental faculties in a way that made him or her unable to form the required intent. 292 Kan. at 607. Johnson only presented evidence that he consumed pain medications, not that the medication impaired his mental faculties. In summary, we find no error in the failure of the district court to give a jury instruction on voluntary intoxication.

Constitutionality of the criminal threat statute

As his final appellate issue, Johnson argues the reckless form of the criminal threat statute under K.S.A. 2016 Supp. 21-5415 is unconstitutionally overbroad because it criminalizes protected speech under the First Amendment to the United States Constitution. Johnson did not preserve this issue for appeal because it was neither raised nor argued before the district court.

But Johnson's argument addresses a fundamental right, and he states resolving the issue is necessary to serve the ends of justice. Therefore, this challenge may be raised for the first time on appeal. *State v. Dukes*, 290 Kan. 485, 488, 231 P.3d 558 (2010).

In addition, to raise a constitutional issue Johnson must show that he has standing to bring this challenge. See *Gannon v. State*, 298 Kan. 1107, 1122, 319 P.3d 1196 (2014). For standing, the plaintiff must show he or she suffered a cognizable injury and a causal connection between the injury and the challenged conduct. 298 Kan. at 1123. However, when an overbreadth challenge that seeks to protect First Amendment rights under the United States Constitution is brought, standing exists even if the litigant asserts only the rights of third parties because "'the mere existence of the statute could cause a person not before the Court to refrain from engaging in constitutionally protected speech.' [Citations omitted.]" *State v. Williams*, 299 Kan. 911, 918-19, 329 P.3d 400 (2014). Therefore, Johnson has standing.

When analyzing this constitutional challenge, the court must presume the law is constitutional, resolve all doubts in favor of validating the law, uphold the law if there is a reasonable way to do so, and strike down the law only if it is clearly unconstitutional. *City of Lincoln Center v. Farmway Co-Op, Inc.*, 298 Kan. 540, 544, 316 P.3d 707 (2013). The burden to establish the statute is unconstitutional rests with Johnson.

When a statute is overbroad, it punishes conduct that is constitutionally protected. *Dissmeyer v. State*, 292 Kan. 37, Syl. ¶ 1, 249 P.3d 444 (2011). A statute is overbroad when a significant part targets protected activity and there is no satisfactory method of severing the law's constitutional applications from its unconstitutional applications. *State ex rel. Murray v. Palmgren*, 231 Kan. 524, 533, 646 P.2d 1091 (1982).

In *Watts v. United States*, 394 U.S. 705, 707-08, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969), the United States Supreme Court recognized "true threats" as a type of speech that is not protected by the First Amendment and, therefore, is subject to regulation. "True threats" encompass statements "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003). "True threats" are criminally actionable, unprotected free speech. 538 U.S. at 359-60.

Recently, in *State v. Boettger*, No. 115,387, 2017 WL 2709790, at *3-5 (Kan. App. 2017) (unpublished opinion), *petition for rev. filed* July 24, 2017, a panel of this court addressed this exact challenge. In *Boettger*, the defendant pointed to *Black* as does Johnson, to argue intent is the requisite standard for true threats. *Black* involved a criminal statute that expressly included a showing of subjective intent. The Virginia statute banned cross burning with an intent to intimidate a person or group of persons. The Supreme Court held the statute unconstitutional because the "prima facie evidence" provision meant that a person could be convicted of cross burning done in a way other than to intimidate. *Black* invalidated the Virginia statute because the statute was overbroad in that it could criminalize burning a cross for any reason or no reason. 538 U.S. at 365.

The *Boettger* court demonstrated that our criminal intent statute expressly says that recklessness is a culpable mental state. 2017 WL 2709790, at *4. See

K.S.A. 2016 Supp. 21-5202(a) ("A culpable mental state may be established by proof that the conduct of the accused person was committed 'intentionally,' 'knowingly' or 'recklessly.'"). Kansas cases also demonstrate that recklessness is a culpable mental state. See *State v. Johnson*, 304 Kan. 924, 936, 376 P.3d 70 (2016) ("'Reckless conduct is conduct done under circumstances that show a realization of the imminence of danger to the person of another and a conscious and unjustifiable disregard of that danger.'"); *State v. Ford*, No. 112,877, 2016 WL 2610259, at *5 (Kan. App. 2016) (unpublished opinion) ("'Reckless means driving a vehicle under circumstances that show a realization of the imminence of danger to another person or the property of another where there is a conscious and unjustifiable disregard of that danger.'"), *rev. denied* 305 Kan. 1254 (2017).

The Kansas cases and statutes regarding recklessness illustrate that "[s]omeone who acts recklessly with respect to conveying a threat necessarily grasps that he [or she] is not engaged in innocent conduct. He [or she] is not merely careless. He [or she] is aware that others could regard his [or her] statements as a threat, but he [or she] delivers them anyway." *Elonis v. United States*, 575 U.S. ___, 135 S. Ct. 2001, 2015, 192 L. Ed. 2d 1 (2015) (Alito, J., concurring in part and dissenting in part). "Recklessness is sufficient *mens rea* to separate wrongful conduct from otherwise innocent conduct." *Boettger*, 2017 WL 2709790, at *5.

We agree with the holding in *Boettger* and likewise conclude that K.S.A. 2016 Supp. 21-5415(a)(1) does not criminalize constitutionally protected conduct by criminalizing threats to commit violence communicated in reckless disregard of the risk of causing fear in another. It is therefore not overbroad, and Johnson's contentions are without merit.

Affirmed.