No. 20-123216-S

IN THE
SUPREME COURT OF THE
STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

ZACHARY JACOB MCFALL
Defendant-Appellant

BRIEF OF APPELLANT

Appeal from the District Court of Shawnee County, Kansas
Honorable David Debenham, Judge
District Court Case No. 19 CR 1946

Jennifer C. Roth #18858
Kansas Appellate Defender Office
Jayhawk Tower
700 SW Jackson, Suite 900
Topeka, Kansas 66603
(785) 296-5484
(785) 296-2869 fax
adoservice@sbids.org
Attorney for the Appellant

Table of Contents

Nature of the Case

Zachary McFall and Joaquin McKinney were just kids—both 16 years old. (R. 19: State's Exs. 71, 156). What might have been a temporary "beef" between friends became a permanent loss when a bullet fired by Danny Williams killed Joaquin. (R. 14: 707, 750; R. 15: 964, 986, 1040-41). The district court authorized prosecution of Zachary in adult court, where a jury found him guilty of both forms of first-degree murder and criminal discharge of a firearm at an occupied vehicle. The court sentenced him to life in prison with no possibility of parole until he is 66. Zachary appeals from his convictions and sentence.

Issues to be Considered

Issue 1. **The district court made errors of fact and law when it denied Zachary's request for new counsel.**

Issue 2. **Trial counsel's failure to function as an advocate at sentencing denied Zachary his Sixth Amendment right to counsel.**

Issue 3. **The State's comments misstated the law on (1) first-degree murder, (2) aiding and abetting liability, and (3) premeditation.**

Issue 4. **The district court did not appropriately instruct the jury on how to consider (1) first-degree and second-degree murder and (2) the State's aiding and abetting theory.**

Issue 5. **The combination of the jury instruction errors and the State's errors in closing argument deprived Zachary of a fair trial.**

Statement of Facts

Introduction

Before going into detail about what happened before and during Zachary's court proceedings, here is an overview of the quick progression of this case:

Date	What happened	Pincite
July 25, 2019	Joaquin was killed	R. 1: 18
July 27, 2019	Zachary turned himself in to police	R. 15: 964
July 30, 2019	• State filed Complaint against Zachary in 19 JV 319, charging (1) premeditated first-degree murder; (2) first-degree felony murder; and (3) criminal discharge of a firearm at an occupied vehicle • State filed Motion to Authorize Prosecution as an Adult • Zachary was appointed a "Guardian ad Litem/Attorney"	R. 5: 2, 11, 19
September 25, 2019	Hearing held—State's motion to prosecute Zachary in adult court; court ruled for the State	R. 1: 23; R. 5: 30
September 26, 2019	• Court dismissed 19 JV 319 • State filed complaint/information in 19 CR 1946 with same charges as before; included 56 witnesses in the complaint	R. 1: 18-20; R. 5: 36
September 27, 2019	First appearance on 19 CR 1946—court appointed Zachary an attorney	R. 1: 26-27
October 2, 2019	Attorney had to withdraw, and new counsel was appointed	R. 1: 36, 38, 42
October 29, 2019	Hearing held—Zachary's "presence is waived"; court granted the State's request for a consolidated preliminary hearing (with two co-defendants)	R. 1: 55
November 12, 2019	Preliminary hearing—Zachary and two others bound over on all counts	R. 1: 60
November 14, 2019	Arraignment—case set for pretrial on February 20 and trial on March 16; State moved to endorse 67 witnesses	R. 1: 65, 71
December 6, 2019	Motion to endorse granted	R. 1: 76
February 18, 2020	Trial counsel filed Motion to Determine Competency to Stand Trial and Motion to Withdraw as Counsel of Record	R. 1: 81, 83
February 20, 2020	Hearing held—court granted motion for competency evaluation with Dr. Blakely; set competency hearing and motion for new counsel for March 6	R. 1: 84
February 27, 2020	Dr. Blakely met with Zachary	R. 22: 1

March 6, 2020	Hearing held—State and trial counsel stipulated to Dr. Blakely's report (signed on March 5) finding Zachary competent; court denied motion for new counsel; parties filled out pretrial conference form	R. 1: 91
March 12, 2020	Chief Justice Luckert signed Kansas Judicial Branch Policy on Pandemic Disease	2020-PR-013
March 16, 2020	Jury trial began	
March 18, 2020	Chief Justice Luckert signed Order Imposing Statewide Judiciary Restricted Operations Due to COVID-19 Emergency	2020-PR-016
March 20, 2020	Jury trial ended	R. 1: 122
July 23, 2020	Sentencing	R. 17: 1

Pretrial proceedings in 19 CR 1946

The first time Zachary appeared with counsel in "adult court" was at the preliminary hearing on November 12, 2019. Before that, his attorney had appeared in court twice on Zachary's behalf, but without Zachary present. (R. 1: 43, 55, 60; R. 3: 2). At arraignment on November 14, the court set the case for a pretrial conference on February 20 and trial on March 16. (R. 1: 73).

Trial counsel and Zachary express problems

On February 18, 2020, Zachary's attorney filed a Motion to Determine Competency to Stand Trial, which began with "[t]he accused is a minor, in custody and is currently charged with First Degree Murder. It is movant's understanding that the accused has been treated for mental illness in the past and has a family history of the same." (R. 1: 81). Counsel requested that the court sent Zachary to Larned for a competency evaluation and that Dr. Flesher "be appointed to determine whether the accused has the ability to assist his counsel in his defense."

(R. 1: 82). Counsel also filed a Motion to Withdraw, stating that Zachary had instructed him to file the motion. (R. 1: 83). Two days later, the court held a hearing on the motions. (R. 10: 1). Zachary had written a letter to the court:[1]

> THE COURT: Okay. We were set for pretrial today. Motion -- jury trial is set March 16th. I've received a Motion to Withdraw as Counsel, a Motion to Determine Competency, and Mr. McFall has filed a paper.
>
> I'm not sure what you wanted done. What did you want done on your paper? What are you requesting?
>
> DEFENDANT MCFALL: A new attorney.
>
> THE COURT: Is that what you're requesting?
>
> DEFENDANT MCFALL: Yeah. Yes, sir.
>
> THE COURT: It really helps if you double space it. It's easier to read.

(R. 10: 2).

Counsel began his argument in support of a competency evaluation with "number one, he's a minor." (R. 10: 3). He had reviewed "about 200 pages of records" that he received from Family Service and Guidance Center—records that he had shared with the State. (R. 10: 3-5). Zachary first went to the Center when he was five years old; the records continued through the end of 2018. (R. 10: 5). "[T]hose records were rife with symptoms or issues presented by Mr. McFall and his parents concerning ability to concentrate, ability to remain focused, issues with disruptive and impulsive behavior." (R. 10: 6). Counsel expressed concern that Zachary was "young." (R. 10: 8).

[1] The court did not file it so counsel is attempting to locate it in order to add it to the record.

Counsel also asked the court to appoint Dr. Flesher "to do a complete psychiatric workup" of Zachary. (R. 10: 9). The court told counsel it was up to him if he wanted to hire Dr. Flesher, and he would have to seek funding from BIDS. (R. 10: 10-12). Whether this ever happened is unknown; there is no mention of Dr. Flesher again. (R. 8, 11-17, generally).

The court granted the motion for a competency evaluation, and noted that trial was set for March 16. (R. 10: 13). The court advised Zachary of his right to a trial in 150 days, and court and counsel discussed taking it off the jury trial calendar. (R. 10: 16-17). But the State interjected that "the Court couldn't even consider taking any sort of waiver" from Zachary at that time, "given that all proceedings are stayed pending competency[.]" (R. 10: 17-18). The court set the competency hearing and motion for new counsel for March 6. (R. 10: 18).

Before the court closed the proceedings, Zachary addressed the court, "apologiz[ed] for taking [its] time," briefly explained his concerns, and asked for a new attorney. (R. 10: 18-19). The court said they would take that up on March 6 because of the pending competency determination. (10: 19).

At the February 20 hearing, counsel admitted he had not provided Zachary with paper discovery, but had done what he "define[s] as discovery": "advising the client of the State's theory of the case and all of the facts that are alleged." (R. 10: 12). But counsel agreed to give Zachary his discovery, adding "what's going to be required is I'm going to have to take a Sharpie and go through all of those reports and redact or scratch out all of the identification information[.]" (R. 10: 12-13).

Dr. Blakely's evaluation

Dr. Blakely's interview with Zachary was on February 27. (R. 22: 1). Dr. Blakely signed his report on March 5—the day before the court reviewed it and used it to rule on Zachary's competency, then minutes later taking up Zachary's motion for a new attorney. (R. 8: 3-5). According to Dr. Blakely:

> [Zachary] understands the roles of the various Court officers. He understands that a lawyer is supposed to "defend me", "help me through the case", "prove I'm not guilty", and he adds "not call me a dumbass". He says the lawyer called him that as he was leaving. The patient had told the lawyer that he did not want this lawyer anymore; he wants to switch lawyers and that was the occasion of the comment that the patient is claiming. He also adds the lawyer is supposed to "make a case for me, believe in me".
>
> ***
>
> He does say that they say big words in Court. He does not always understand all of them. He feels that [his lawyer] "has not done anything for me". He has only see him three times, and he has been here "seven months". He says that he did say "I hope that God will help me"; "I hope the judge will help me."

(R. 22: 2).

Although he gave them to the State, Zachary's attorney did not provide Dr. Blakely with all of the reports from Family Service and Guidance Center; Dr. Blakely only had ones from July 21, 2008, to September 28, 2011. (R. 22: 1). Zachary told Dr. Blakely that he no longer took his previously prescribed medicines, which he thought may have been a mistake. (R. 22: 2). He told Dr. Blakely that he had been on growth hormones, and that his 5'3" sister "is quite a bit taller than he is." (R. 22: 3). Dr. Blakely found Zachary "fairly easy to establish a rapport with." (R. 22: 4).

In the "Key Problems and Goals" section of his report, Dr. Blakely concluded:

> The first problem is competence, and while this patient does hear some voices and **he has some learning disability** he also has a serious substance abuse problem. Today he is clearly competent. He clearly understands the charges. He does not like his lawyer; there is a problem going on there it sounds like. **It may come out of misinformation or it may come out of not understanding,** but it does not come out of psychosis as I see him today. He understands the charges, and **if he gets the right lawyer or irons things out with this lawyer, he can help in his own defense.**

(R. 22: 6-7) (emphasis added).

Zachary's concerns, his attorney's response, and the court's ruling

The hearing on March 6 began with the parties saying they had no objection to Dr. Blakely's report, other than:

> MR. CHAPPAS: Judge, I have no objections to the doctor's finding of the defendant to be competent. I do have an objection to the -- to the examiners conclusion of fact that I called Mr. McFall a name, so I'll object to that part of the report. But the rest of it, I have no objection to.

(R. 8: 2). After noting that objection, the court relied on the report to find Zachary competent to stand trial. (R. 8: 3).

Then the court excused everyone but Zachary and his attorney from the courtroom. (R. 8: 4). Zachary explained that he felt it was a conflict of interest that his attorney had represented a woman who "was defending the people that killed his" cousin about two years before: "she was there during the murder which everybody says she set it up." (R. 8: 5-9). His second problem was he had only seen his attorney three times and still did not have his discovery; he had not read the reports himself. (R. 8: 9-11).

His attorney confirmed he had represented a material witness in the homicide of Zachary's cousin, and was still representing her in a drug case. (R. 8: 12-13). When the court said it seemed like there was no conflict, counsel agreed: "I can't see one." (R. 8: 13).

The court asked the attorney to "address [Zachary's] second complaint." (R. 8: 13). The attorney admitted he still had "not sat down and provided [Zachary] with the actual police reports." (R. 8: 13). He went on about discussions he had had with Zachary's former attorney from the waiver hearing, Zachary's parents, and Zachary himself. He talked about things he tells all his clients. (R. 8: 13-24). He finished by addressing the "dumbass" comment, then volunteered "as an officer of the court, if the Court's question to me is if you have an opinion as to whether there's a basis under the law to justify my removal as counsel and my answer is no." (R. 8: 13, 24). The court denied Zachary's motion:

> What I find in this case is the defendant is being represented by competent counsel, that counsel provided discovery, analysis, suggestions, his take on the case, has gone over the evidence in this case, besides which the defendant had a full hearing in juvenile court before he was waived upwards as part of the waiver. He had a full preliminary hearing in this case. I adopt the findings – the statements made by Mr. Chappas of his representation and I find the defendant has not met his burden in this case the [sic] show that there is a conflict as – as a valid reason for the appointment of new counsel in this case, that his dissatisfaction with Mr. Chappas is unjustified. So that motion for new counsel is denied.

(R. 8: 25-26).

Trial proceedings

At trial, the State admitted almost 200 exhibits and called 34 witnesses. (R. 11: 2-7). The State submitted proposed jury instructions. (R. 1: 93). During the

instructions conference, the State told the court that "[b]ased on the evidence that was presented, and I think the current state of the law, a lesser second degree intentional would be required." (R. 15: 1011, 1024-25).

Zachary's attorney filed no evidentiary pretrial motions, submitted no proposed jury instructions, had no objections to the jury instructions, requested no jury instructions, called no witnesses, introduced no exhibits, waived opening statement, and gave a closing argument that, in his own words, was "extremely, extremely brief"—it fits on one transcript page. (R. 1: generally; R. 11: 2-7; R. 12: 234; R. 15: 993, 998, 1020, 1046). Out of the State's 34 witnesses, trial counsel asked no questions of 19 of them. (R. 12: 376, 441, 450; R. 13: 484, 598, 612 ,648, 678; R. 14: 756, 782, 792, 813, 846, 877, 885, 889, 915, 930; R. 15: 989). After the jury found Zachary guilty, trial counsel filed no sentencing motions. (R. 1: 13-15; R. 15: 1053).

Evidence

Knowing that the State is likely to extensively discuss the evidence it produced at trial in its brief, the following facts are relatively brief.

According to Didier Cosey—who was also 16 years old—he, Joaquin McKinney, Jacob Powell, and Joaquin's cousin "Bop" were all hanging out at Joaquin's house on July 25, 2019. (R. 14: 691-92, 723). Three of them were playing a video game while Jacob, who is a rapper, wrote a song. (R. 14: 694). At some point in the afternoon, they got in Joaquin's car—Joaquin was driving, Bop was in the front passenger seat, Jacob was behind Joaquin, and Didier was behind Bop. (R. 14: 698). At trial, Didier claimed he didn't know why they got in the car, or where they were

going. (R. 14: 698-700). But he told the police something different on July 25. (R. 14: 717). Detective Hayden testified that Didier told him that "Zach called Mr. McKinney on the telephone and that Mr. Cosey and Mr. McFall were kind of feuding over a girl, because -- so Mr. Cosey had been out of town, and when he got back, this girl had told him, hey, Mr. McKinney and said some things about you, had posted some comments on Facebook about some of my pictures, and then shared that information, and then there was this -- kind of this feud between Mr. McFall and Mr. Cosey….They agreed to meet at Betty Phillips Park to fight." (R. 14: 750). It was just going to be a fistfight between Zachary and Didier, but Zachary's brother might be there. (R. 14: 750, 752). Didier told Det. Hayden that when Zachary didn't show up at the park, they went to a house nearby, where Joaquin and Bop "shot at the house." (R. 14: 752).

At trial, Didier admitted they did a "drive-and-go" by a house near Betty Phillips Park, where Joaquin fired off four to five shots straight up in the air. (R. 14: 701-06, 733). Didier and Jacob asked to get dropped off at Jacob's house "[b]ecause we didn't want nothing to do with it." (R. 14: 706-07). At about 37th and Adams, someone in the car said, "that's them," and "that's when it all started." (R. 14: 704, 709-10). He and Jacob ducked down on the floor of the backseat, and Didier heard shots. (R. 14: 710-11). He didn't look up until the car stopped, and that's when he saw Joaquin had been shot. (R. 14: 712-13). Joaquin had a bullet come through the right side of his thigh, but the one that killed him came through his headrest. (R. 13: 527, 530).

As for the "it" Didier referred to, multiple witnesses testified to seeing a blue car following a white car down 37th Street, with a young man—who was not Zachary—sitting on the rolled-down passenger-side window. He had a semiautomatic rifle on the roof and was shooting at the white car, which crashed a few blocks later. (See, *e.g.*, R. 12: 239, 268, 274; R. 13: 486). Witnesses testified to hearing other shots coming from the blue car. (See, *e.g.*, R. 12: 351, 358; R. 13: 510).

Darin Disney saw or heard everything that afternoon. He was out picking up sticks in his yard at 3350 Irvingham, which is a block from Betty Phillips Park, when a white car he didn't know pulled up. (R. 13: 647, 649-50). A hand came out of the driver's side and fired shots up in the air. (R. 13: 649, 654). Mr. Disney called 911 and, while on the phone with dispatch, a blue car pulled up. (R. 13: 654-56; R. 20: State's Ex. 113). A group of kids congregated on his front porch at the same time the blue car showed up. (R. 13: 660). People Mr. Disney knew named Tay and Danny (later identified as Danny Williams and Lavonte Johnson) ran up to the blue car, which was driven by a white, young, black-haired kid who Mr. Disney didn't know. (R. 12: 352; R. 13: 655-56, 659; R. 20: State's Ex. 113). Danny and Tay came from a neighboring house, each carrying a bag, and jumped into the blue car. (R. 13: 655-660, 663; R. 15: 948; R. 20: State's Ex. 113). Mr. Disney thought he heard Tay say "let's go get 'em" and Danny say "yeah". (R. 13: 665).

This same afternoon, Zachary and older brother, Lee McFall, were at their dad's house, working on Zachary's car. (R. 14: 890, 892; R. 15: 986). Lee overheard Zachary "having an argument or disagreement" with Joaquin and Didier over "a

stolen handgun." (R. 15: 986-87). Zachary asked Lee to follow him to Betty Phillips Park, which he did. (R. 14: 894, 896-97). Zachary was by himself in his blue Pontiac. Once Lee saw Zachary arrive at the park, he went his own way. (R. 14: 898; R. 988). He got a call from Zachary, which his phone recorded automatically; Lee later shared the recording with the police. (R. 14: 905-07; R. 20: State's Ex. 143). Lee testified that Zachary sounded "real scared": "I will never forget that. It's the sound of his voice. You could just hear that there was something wrong." (R. 14: 901). Zachary said, "hey Lee … they just slid on me bro … I am fixin to slide back on them bro … Come on bro." (R. 20: State's Ex. 143). Lee said, "I'm coming." Lee testified that he "was gonna try to protect my little brother and try to help him…. Get them out of harm's way, if it ever could be possible." (R. 14: 912).

Zachary kept asking his brother to come on, then said he was going back to Danny's house. (R. 20: State's Ex. 143). Lee picked Zachary up from Danny's house (by Mr. Disney's house) and took him back to their dad's house. (R. 14: 902). Their neighbor, Jeff Orender, claimed that Zachary told him "he thought he might have killed a kid" and heard Zachary tell his dad that he didn't shoot him. (R. 20: State's Ex. 146). Mr. Orender said, "he ain't a bad kid," to which Detective Jones replied, "making some bad choices, bad friends," and Mr. Orender said, "Exactly." (R. 20: State's Ex. 146).

When the State asked, Lee said he didn't know what "they just slid on me" and "fixing to slide back on them" meant. (R. 14: 910-11). The lead detective in the case, Detective Strathman, couldn't say what it meant. (R. 15: 815, 977-78).

Witnesses testified that in Joaquin's lap was a .380 handgun, wrapped in a mask that said "Thug Life" on it. (R. 12: 316, 454-55, 462, 467-68; R. 14: 714; R. 15: 951; R. 20: State's Ex. 107). In Joaquin's car, they found items that only could have come from occupants in the car: an unfired .45 bullet, a spent .45 casing, and an unfired .22 bullet. (R. 13: 565-79). In front of Mr. Disney's house, the police found four .380 casings and two .45 casings. (R. 13: 635-38). Det. Strathman confirmed that the .380 casings came from Joaquin's gun. (R. 14: 855, 860; R. 15: 951-52). Neither Bop nor a .45 firearm were located. (R. 15: 952-53).

Det. Strathman knew Danny and Tay from previous investigations. (R. 15: 954). Police found a 7.62 Century Arms rifle at Danny's house, which matched the 7.62 casings found along 37th Street. (R. 14: 802; R. 15: 943-44). Danny's DNA was on the rifle. (R. 14: 843). Police found 9-mm casings on 37th Street. (R. 14: 867). Police took Danny into custody at Mr. Disney's house three days later, where they found a 9-mm magazine and an empty Glock 9-mm handgun. (R. 14: 811-12; R. 15: 966). They found Tay in Arkansas. (R. 15: 968).

Verdict and sentencing

The State argued that Zachary was guilty because he aided and abetted the person who killed Joaquin. (See, *e.g.*, R. 15: 1040-42). The jury found Zachary guilty as charged. (R. 15: 1053). When the court asked the attorneys how long they would need for sentencing, the State said 30 minutes, and trial counsel said one hour. (R. 15: 1055).

But trial counsel did not file any motions in the four months between trial and sentencing. (R. 1: 13-15). The presumptive sentence for Count 1, murder in the first degree (premeditation) is life with no possibility of parole for 50 years. (R. 1: 18); K.S.A. 21-6620(c)(1)(A); K.S.A. 21-6623. However, the district court can find "substantial and compelling reasons, following a review of mitigating circumstances," to impose a life sentence with the possibility of parole after 25 years. K.S.A. 21-6620(c)(1)(A), (c)(2)(A). Whether Zachary's attorney knew about this departure process is unknown from the record.

Zachary was 17 years old at the time of sentencing. (R. 17: 17). His attorney called no witnesses and introduced no evidence for the court to consider. (R. 17, generally). The State's request was brief, primarily consisting of asking the court to "impose the presumptive sentence" of life with no parole for 50 years. (R. 17: 8-11). The State also asked the court to run the sentence for criminal discharge of a firearm into an occupied vehicle consecutively to Count 1. (R. 17: 11).

Then the court turned to Zachary's attorney for comments, who began by talking about the trial and the "benefit" he gave Zachary. (R. 17: 12-13). Then he said this:

> Notwithstanding all of that, Judge, I'm at a loss to in good faith present to the Court something positive that I can say about my client. Throughout the course of this proceeding, he's exhibited no remorse, no repentance, no acceptance of his criminal action, no acknowledgement of the life that in fact was taken. Although, Judge, he was not the shooter, the criminal

> action that he was involved with was overwhelming. The jury did not take much time to come back with a verdict in this particular case. And as I've related to the Court, usually in these cases, we have something positive that we can say about our clients, and I'm at a loss for anything to say positive about Mr. McFall. In fact, and I'll relay it to the Court, and the Court knows this, he wrote a song while he's been in custody about the taking of this young man's life.

(R. 17: 13-14). The attorney concluded by apologizing to "the Court, Counsel, and the members of the audience for being late this morning." (R. 17: 16). The court gave the attorney an offender registration form. (R. 17: 16). When he returned it without Zachary's social security number on it, the court said "I need to have your client put in his Social Security Number," and the attorney's reply was "[h]e doesn't know what it is, Your Honor." (R. 17: 16).

After all of this, Zachary did not say anything to the court. (R. 17: 17). The court mimicked the trial attorney's comment, saying "quite frankly, you've shown no remorse for your actions in this case. This crime would not have taken place without your direct participation. You too, as well as the other individuals in your car, you took the life of a young man about the same age as you, if I recall correctly. This is inappropriate. It's illegal. You have to face the consequences, so that's what you're here for today." (R. 17: 18). After noting that Zachary would be 67 when he is first parole-eligible, the court ran the 94-month sentence for Count 3 concurrently to the life sentence for Count 1, because of his "age and immaturity." (R. 17: 19-20). Zachary appealed. (R. 1: 171).

Arguments and Authorities

Issue 1. The district court made errors of fact and law when it denied Zachary's request for new counsel.

Preservation

Zachary wrote to the district court to request a new attorney. (R. 8: 4-5; R. 10: 2). His attorney filed a motion to withdraw at Zachary's request. (R. 1: 83). The court had a hearing on both. (R. 8). The court denied Zachary's request by adopting what his attorney said. (R. 8: 25-26). This issue is preserved.

Standard of Review

When this Court reviews (1) the appropriateness of the district court's inquiry into a potential conflict and (2) whether the court erred in denying an accused's motion for new counsel, it uses the abuse of discretion standard. *State v. Pfannenstiel*, 302 Kan. 747, 761-62, 357 P.3d 877 (2015). Judicial discretion is abused if the action is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. *State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594 (2012).

Relevant law

If an accused provides "an articulated statement" showing "justifiable dissatisfaction" with his appointed counsel, the district court has a duty to inquire into the potential conflict of interest. *State v. Brown*, 300 Kan. 565, 575, 331 P.3d 797 (2014). Types of "justifiable dissatisfaction" include "a conflict of interest, an irreconcilable disagreement, or a complete breakdown in communication between counsel and the defendant." *Brown*, 300 Kan. at 575.

As expected, the court's inquiry "often includes questions of the attorney." *State v. Pfannenstiel*, 302 Kan. 747, 765-66, 357 P.3d 877 (2015). **That inquiry "requires both the court and defense counsel to walk a delicate line** in making the inquiry. The [U.S.] Supreme Court has observed that judges must explore the basis of the alleged conflict of interest 'without improperly requiring disclosure of the confidential communications of the client.' [Citation omitted.] Moreover, other courts draw a meaningful distinction between (1) an attorney truthfully recounting facts and (2) an attorney going beyond factual statements and advocating against the client's position. [Citation omitted.]" *Pfannenstiel*, 302 Kan. at 766 (emphasis added).

Even if the accused's or counsel's statements fail to pinpoint the potential conflict for the court, counsel can put "the court on notice of that potential" by going "beyond the facts, express[ing] a personal opinion about the merits of [his client's] claim, and explicitly advocat[ing] against [his client's] interest by explicitly saying, 'I didn't see a conflict.'" *State v. Prado*, 299 Kan. 1251, 1259, 329 P.3d 473 (2014).

Additional context

In reviewing the district court's decision to deny Zachary a new attorney, this Court must do what the district court did not—it must take into consideration what we know about children generally (see, *e.g.*, *J.D.B. v. North Carolina*, 564 U.S. 261, 273, 131 S. Ct. 2394, 180 L. Ed. 2d 310 [2011]), as well as what the district court knew about Zachary specifically (because of the individualized nature of motions for new counsel).

Up to (and beyond) the moment the court sentenced Zachary to life with no possibility of parole for 50 years, Zachary was a child. Kansas law extends the "period of minority" to "all persons to the age of eighteen (18) years" except for 16- and 17-year-olds who are or have been married. K.S.A. 38-101. Nothing in Chapter 38, or any other law known to counsel, converted Zachary into an adult after the court signed an order subjecting him to the adult criminal legal system. Nothing about Zachary changed legally, physically, or mentally once that happened. The only way to not be considered a child under Kansas law would be to get married, have been married, or have the district court "confer upon minors the rights of majority." K.S.A. 38-101; K.S.A. 38-108. And children, including Zachary:

- cannot purchase, hold, possess and control in their own person and right . . . any goods, chattels, rights, interests in land, tenements and effects lawfully acquired or inherited" (K.S.A. 38-108)
- cannot be "employed in any occupation, trade or business which is in any way dangerous or injurious to the life, health, safety, morals or welfare of such minor" (K.S.A. 38-602)
- cannot be on a jury (https://www.shawneecourt.org/388/Common-Questions)
- can be excused from a courtroom if "vulgar, obscene or immoral evidence is elicited" (K.S.A. 38-111)
- cannot have a recognized common-law marriage (K.S.A. 23-2502)
- cannot obtain a marriage license without the express consent of a parent, guardian, or judge (K.S.A. 23-2505(c)(2))
- are under the control of their parents (K.S.A. 38-141b) ("It shall be the public policy of this state that parents shall retain the fundamental right to exercise primary control over the care and upbringing of their children")
- cannot donate blood for compensation without permission (K.S.A. 38-123a)
- needs a parent or delegation of parents' authority to be immunized (K.S.A. 38-136; K.S.A. 38-137)
- needs a parent to consent to surgery unless one is not immediately available (except unmarried pregnant minor) (K.S.A. 38-122 et seq.)
- cannot execute a do-not-resuscitate order without parental or guardian permission (K.S.A. 38-150)

- cannot move for expungment of their own records or files relating to proceedings under the Revised Kansas Juvenile Justice Code (RKJJC) (K.S.A. 38-2312(a))
- when subject to the RKJJC, the child's parents must attend all court proceedings unless excused by the court, and can be held in indirect contempt for not doing so (K.S.A. 38-2351)
- when subject to the (RKJJC), the child's parents can be held responsible for the costs incurred by the county and held in contempt of court for not paying (K.S.A. 38-2315; K.S.A. 38-2323; K.S.A. 38-2324)
- can be taken out of their home as a child in need of care (K.S.A. 38-2231)
- cannot vote (https://www.sos.ks.gov/forms/elections/voterregistration.pdf)
- cannot buy cigarettes
- cannot buy alcohol
- cannot join the military (16-year-olds cannot; must be at least 17) (https://www.usa.gov/join-military)

This nonexhaustive list illustrates what our society, by way of laws, has decided what children are allowed to do, not allowed to do, what they can decide for themselves, what they can't, and so on.

Of course Kansas is not alone in this: "…the law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them. See, *e.g.,* 1 W. Blackstone, Commentaries on the Laws of England *464–*465 (hereinafter Blackstone) (explaining that limits on children's legal capacity under the common law 'secure them from hurting themselves by their own improvident acts')." *J.D.B.*, 564 U.S. at 273. "[T]he legal disqualifications placed on children as a class…exhibit **the settled understanding that the differentiating characteristics of youth are universal**." *J.D.B.*, 564 U.S. at 273 (emphasis added).

It is "common knowledge" that people's brains are not fully developed until age 25. *Matter of V.B.*, No. 120,523, 2019 WL 4724758, *8 (Kan. App. 2019) (unpublished); Nat. Ctr. for State Courts, Trends in State Courts 2022, Meeting the Needs of Emerging Adults in the Justice System (2022), p. 60-61 ("Because the adolescent brain does not drastically transform into a fully mature brain at 18, setting the boundaries of juvenile jurisdiction at this age is somewhat arbitrary and not supported by developmental science"); see also *Miller v. Alabama*, 567 U.S. 460, 471, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) ("Our decisions [in *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) and *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)] rested not only on common sense—on what 'any parent knows'—but on science and social science as well").

"Describing no one child in particular, these observations restate what 'any parents knows'—**indeed, what any person knows**—about children generally": children are generally less mature and responsible; they "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them"; and they "are more vulnerable or susceptible to … outside pressures." *J.D.B.*, 564 U.S. at 272 (emphasis added); *Bellotti v. Baird*, 443 U.S. 622, 635, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979); *Roper*, 543 U.S. at 569.

Regardless of what type of court they are in, children are not adults; "effective juvenile defense not only requires specialized practice—wherein the attorney must meet all the obligations due to an adult client—but also necessitates expertise in … the science of adolescent development and how it impacts a young

person's case, skills and techniques for effectively communicating with youth[.]" Nat. Juvenile Defender Ctr., Limited Justice: An Assessment of Access to and Quality of Juvenile Defense Counsel in Kansas (2020), p. 10. "Juvenile defenders must also ensure a client-centered model of advocacy and empower and advise their young clients using developmentally appropriate communication." Limited Justice, p. 10; see also Limited Justice, p. 11 (citing to Kan. R. Prof. Conduct 1.2, 1.3, 1.4, 2.1). "'Those big beautiful words you use with adults, you can't use with kids.'" Limited Justice, p. 33. Counsel for children need to "build rapport, confidence, and trust with the youth." Limited Justice, p. 31.

"A child's age is far 'more than a chronological fact.' [Citations omitted.] It is a fact that '**generates commonsense conclusions** about behavior and perception.' [Citation omitted.] Such conclusions apply broadly to children as a class. **And, they are self-evident to anyone who was a child once himself, including any** police officer or **judge.**" *J.D.B.* 564 U.S. at 272 (emphasis added).

The time between (1) when counsel first expressed concerns to the district court about Zachary and (2) the first day of trial was *one month*—here is a summary of counsel's comments (or lack thereof) in that time, along with what happened (or didn't) regarding those concerns/comments:

2/18/20 (from written motions; R. 1: 81-82)	**2/20/20 (in court; R. 10: 3-9, 12-13)**	**3/6/20 (in court; R. 8: 13-24; R. 22)**	**What happened RE: concerns**
Zachary is a minor charged with first-degree murder	Zachary is a minor; he is young and looking at a life sentence; he can't seem to piece together concepts such as aiding and abetting	"At least in the law's mind, he's a grown man"; no mention of Dr. Blakely's comment that Zachary said they say big words in court and he doesn't always understand them	It is unknown if he changed how he spoke with him, if he got another professional involved, etc.
Requesting competency evaluation at Larned	Counsel requesting a "full psychiatric examination" at Larned	Nothing on this	At this stage of the proceedings, a person can only go to Larned if incompetent
Requesting that court appoint Dr. Flesher to determine whether Zachary has the ability to assist in his defense	Concerned about cognitive abilities; has seen a lack of ability for Zachary to appreciate aspects of what is happening and "an inability to make any sound decision in terms of how to proceed…[and] interact with his lawyer" Asked the court to appoint Dr. Flesher	Nothing on this; no mention of Dr. Blakely's comment about cognitive functioning slippage; no mention of Dr. Blakely's comment that his ability to help in his defense is dependent on getting the "right lawyer or iron[ing] things out with" the one he has	Court told counsel this was his responsibility; it is unknown if counsel had Dr. Flesher or any other professional do an evaluation of Zachary
Zachary has been treated for mental illness	Has reviewed 200 pages of Zachary's treatment records spanning 10 years—they are "rife with symptoms and issues", including learning disability	Nothing on this—again, he talked at length about all that he had talked to Zachary and his parents about, but made no comment on whether Zachary understood it	Counsel gave the records to the State but not Dr. Blakely

Then there were (1) Zachary's concerns to the court and Dr. Blakely, (2) Dr. Blakely's findings, (3) what his attorney's response was, and (4) what the court asked or said during the hearing on Zachary's request for new counsel:

Zachary's and/or Dr. Blakely's concerns	**When made and to whom**	**What counsel said on March 6**	**What the court said on March 6**
He had not seen the paper discovery in his case (R. 8: 9-10; R. 10: 18)	At court on 2/20/20 and 3/6/20	Admitted on 2/20 and 3/6 that he had not provided the discovery yet (R. 8: 15; R. 10: 10-13)	Found "that counsel has provided discovery." (R. 8: 25)
Counsel represented a witness in his cousin's murder case and he believed that was a conflict of interest (R. 8: 5-9; R. 10: 19)	At court on 2/20/20 and 3/6/20	Said he still represents the witness and that he "couldn't see" a conflict (R. 8: 5-9, 12-13)	Did not mention it in its ruling; adopted counsel's statements (R. 8: 25)
Counsel hates jury trials and thinks Zachary needs to plead. (R. 8: 10; R. 10: 9)	At court on 2/20/20 and 3/6/20	Has tried murder cases before; "I advised him that he really should work out a plea in this matter" but never "begged" him to (R. 8: 22-23)	Just adopted trial counsel's statements
Last time he saw counsel, he told him he was fired; counsel replied by saying he was a "dumbass" and would spend his life in prison (R. 10: 19; R. 22: 2)	At court on 2/20/20 and to Dr. Blakely on 2/27/20	Counsel denied calling him that, found it "almost comical" (R. 8: 24)	Just adopted trial counsel's statements
"[T]hey say big words in Court. He does not always understand them." (R. 22: 2)	To Dr. Blakely on 2/27/20		No inquiry by the court to either Zachary or counsel; no reference in ruling

He may have made a mistake in getting off his meds. (R. 22: 2)	To Dr. Blakely on 2/27/20		No inquiry; no reference in ruling
Dr. Blakely: exam shows cognitive slippage (R. 22: 5)	2/27/20		No inquiry; no reference in ruling
Dr. Blakely: Zachary can help in own defense **if** he gets the right lawyer or irons things out with this one (R. 22: 6; emphasis added)	2/27/20		No inquiry; no reference in ruling

Analysis

As the facts previously set out and the charts show, there was a mountain of evidence to support that Zachary had justifiable dissatisfaction, such as:

- Ten days before trial was to start, the attorney admitted he had still not shown Zachary the discovery, which he had said on the record he would do.

- The attorney filed the motion to withdraw because Zachary said he was firing him. In arguing so strenuously against it, counsel solidified a conflict. He also went beyond what was necessary to respond and got into confidential client communications.

- The attorney furthered that conflict by explicitly saying there was no conflict *and* no reason for him to get off the case—the latter being a question the court did not ask him.

- The attorney had read Dr. Blakely's report, which contained concrete concerns regarding the very question of new counsel and Zachary's understanding of what happens in court. But the only thing he said about it was to dispute that he called Zachary a name.

- On February 20, two weeks prior to March 6, counsel had a litany of concerns, yet did not address them on March 6. There is no evidence that Zachary transformed in the span of two weeks.

- There is no evidence that the attorney tried to do anything to change how he communicated with Zachary, or get him evaluated by Dr. Flesher or another professional. The attorney took no responsibility for the state of the relationship between himself—a longtime attorney—and his minor client.

In sum, there was no attempt by Zachary's attorney to "walk the delicate line" in responding to Zachary's motion—he stomped on it.

A court's inquiry into a conflict can lead to two types of errors: investigating the potential conflict by not making an "appropriate" inquiry and/or determining whether or not to replace counsel. *Pfannenstiel*, 302 Kan. at 761-62. Both happened here. Again, the second chart above sets out some of the court's errors, which include:

- The court didn't ask Zachary about things in Dr. Blakely's report—the one it had used minutes before to find Zachary competent.

- The court didn't ask the attorney what he had done to address his own concerns or the ones Dr. Blakely identified during the evaluation the attorney requested and the court ordered. The record does not show that the court ever received any information about whether the attorney changed the way he worked with and talked to Zachary; on the contrary, the record indicates that counsel did not make any special accommodations for Zachary. See *In re J.M.*, 769 A.2d 656 (Vt. 2001).

- The court aggravated the conflict when it did nothing to shut down counsel when he went "beyond factual statements" and started "advocating against the client's position." *Pfannenstiel*, 302 Kan. at 766. Then the court went further by adopting those line-crossing statements about confidential client communications as the court's findings.

- The court adopted counsel's statements, which had put heavy emphasis on Zachary being at two substantive hearings. This emphasis was misplaced. The transfer hearing had two witnesses: Det. Strathman, the lead detective, and Dustin Karr, who testified about resources in the juvenile correctional facility. (R. 7, generally). The entire proceeding, including argument and the court's ruling, was 59 pages. None of the 200 exhibits from trial were admitted at that hearing. (Compare R. 7 with R. 12-15). At the preliminary hearing in adult court, the State called six civilian witnesses (no law enforcement) and admitted three exhibits. (R. 4: 3). These abbreviated, in-court proceedings were no substitute for what Zachary was requesting and what counsel had committed to providing to him.

- The court found no conflict with the attorney's continuing representation of a witness involved in Zachary's cousin's murder, which was clearly a conflict in Zachary's mind, even if it wasn't to legally trained adults.

- The court found counsel had provided discovery, even though he said minutes before he had not.

Conclusion

The court acknowledged Zachary's age and immaturity for the first time when he sentenced him to life in prison. (R. 17: 19-20). But the time to recognize "what any person knows," and make legal and factual determinations based on the same, was way before that. One such time was when ruling on Zachary's request.

Legally and developmentally, Zachary was a child. The record shows that no one tailored what they were saying to work for a young man with a documented learning disability. The record of the court's decision on the request for new counsel shows no regard for Zachary's status as a child. There is nothing in this record to support that the court or Zachary's attorney were taking into consideration how old Zachary was, his development, his cognitive abilities, and the impact those things would have on his relationship to this particular attorney, and his understanding and ability to assist in his own defense generally.

He was locked up in a juvenile facility, away from his family, facing the real prospect of dying in prison—and the judge's first comment about his letter was it's not double-spaced. Then his attorney's only comment about a report made by a trained professional was that he didn't call his client a name. Even without the benefit of hindsight gained from what happened at trial and sentencing, it was clear on March 6, 2020, that Zachary had shown justifiable dissatisfaction and there was

a conflict and breakdown between Zachary and the attorney. The only acceptable outcome here is for this Court to conclude that the district court erred as a matter of law and fact when it refused to appoint Zachary a new attorney. Zachary's convictions must be reversed and his case remanded for further proceedings.

Issue 2. Trial counsel's failure to function as an advocate at sentencing denied Zachary his Sixth Amendment right to counsel.

Preservation and Standard of Review

While Zachary did not raise this issue at his sentencing hearing after his attorney's comments, this Court may consider it on appeal because it presents a case-dispositive question of law, based on undisputed facts. See *State v. Godfrey*, 301 Kan. 1041, 1043, 350 P.3d 1068 (2015). Whether counsel's representation meets the requirements of *United States v. Cronic*, 466 U.S. 648, 659, 104 S. Ct. 2039, 80 L. Ed. 2d 257 (1984), presents a question of law, and counsel's advocacy, or lack thereof, is evidenced by the lack of sentencing motions and his comments on the record at sentencing. (R. 1, generally; R. 17: 12-16). Furthermore, this issue concerns Zachary's fundamental constitutional right to counsel. See *Pierce v. Board of County Commissioners*, 200 Kan. 74, 80–81, 434 P.2d 858 (1967).

Additional facts

At trial, with no objection from Zachary's attorney, the State admitted some papers taken from Zachary's cell at the juvenile detention center on February 25, 2020, as well as a phone call between Zachary and his dad on the same day. (R. 14: 926, 928-29; R. 19: State's Ex. 186; R. 20: State's Ex. 225).

In the call, Zachary told his dad that they found "raps" in his room and turned them over to the police. When Zachary asked his dad what he thought they were going to do with them, his dad replied, "I don't know, probably use it against you in court." (R. 20: State's Ex. 225). Zachary said, "There really ain't nothing bad, though. I mean, they're raps. I guess they're bad." (R. 20: State's Ex. 225). Zachary said the raps were old; he had written them during his first month in custody. (R. 20: State's Ex. 225). During the almost-20-minute call, Zachary went back and forth between saying things like "I ain't tripping" to reciting raps to his dad and asking him things like "that's really nothing, am I right or wrong?" He told his dad "I have been wanting to get this off my head all day." (R. 20: State's Ex. 225).

At sentencing, Zachary's own attorney referred to what was taken from his client's cell, and used it against his client. (R. 17: 14). His own attorney also told the court: "Throughout the course of this proceeding, he's exhibited no remorse, no repentance, no acceptance of his criminal action, no acknowledgement of the life that in fact was taken." (R. 17: 13). Minutes later, the court used trial counsel's words against Zachary, telling him "quite frankly, you've shown no remorse for your actions in this case." (R. 17: 18).

Analysis

Prior to July 1, 2014, the presumptive sentence for first-degree murder with a finding of premeditation was life with no possibility of parole for 25 years, but the State could seek a Hard 50 sentence by arguing aggravating factors to the district court. K.S.A. 2012 Supp. 21-6620. After *Alleyne v. United States*, 570 U.S. 99, 133 S.

Ct. 2151, 186 L. Ed.2 d 314 (2013), the Kansas Legislature called a special session in September 2013 and passed provisions requiring a jury to determine aggravating circumstances to warrant a Hard 50 life sentence. 2013 HB 2002. Before the ink was dry, the Legislature flipped the sentencing provisions and made life/Hard 50 the presumptive sentence. 2014 HB 2490. Instead of the State having to seek the Hard 50, a person convicted of this offense must move for a departure and put forth "substantial and compelling reasons" for the court to rely on to impose life/Hard 25. When Zachary and the attorney walked into sentencing on July 23, 2020, there was nothing before the court for its consideration—there was no motion for Zachary to receive anything but life with no possibility of parole for 50 years.

The constitutional right to counsel applies not only to trials but to all critical stages of a prosecution. See *Coleman v. Alabama*, 399 U.S. 1, 9-10, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970). "[I]n addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *United States v. Wade*, 388 U.S. 218, 226, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967); see also K.S.A. 22-4503(a).

A person is denied the Sixth Amendment right to effective counsel when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 659, 104 S. Ct. 2039, 80 L. Ed. 2d 257 (1984). The United States Supreme Court has emphasized that effective assistance of counsel is necessary to "assure fairness in the adversary criminal

process." *Cronic*, 466 U. S. at 656. As such, "the adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate.'" *Cronic*, 466 U.S. at 656, quoting *Anders v. California*, 386 U.S. 738, 743, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

When an attorney has completely abandoned his role, courts should presume prejudice to the accused. *Cronic*, 466 U.S. at 662; see *State v. Carter*, 270 Kan. 426, 435-36, 144 P.3d 1138 (2000) (reasoning of *Cronic* "would require reversal in circumstances where counsel sufficiently betrays a client"). This is an exception to the general rule that the accused must demonstrate prejudice resulting from an attorney's deficient performance. See *Edgar v. State*, 294 Kan. 828, 839-40, 283 P.3d 152 (2012) (discussing the *Cronic* exception).

The attorney's representation was ineffective under *Cronic*

Simply put, having the attorney at sentencing was worse than nothing. Zachary's attorney's egregious performance at sentencing is undeniable—both in what he said, and his failure to file a departure motion (or finally move for that Larned evaluation he thought was important and was now authorized by K.S.A. 22-3429) and present any mitigation whatsoever. His attorney's betrayal is shocking, but not particularly surprising, given what the record shows about how he talked about his client on March 6 and his performance at trial, for example.

Ethical duty and constitutional obligations aside, the attorney literally had things he could have said. He had his concerns on and before February 20, 2020, that he presented to the court. He had Dr. Blakely's report. He had a stack of ten

years' worth of Zachary's treatment records. All of that, and likely more, still existed at the time of sentencing—but he chose to throw his own client under the bus instead.

Cronic provides that counsel is ineffective when the record "demonstrate[s] that counsel failed to function in any meaningful sense as the Government's adversary." *Cronic*, 466 U.S. at 666. In Zachary's case, his own attorney spoke way worse of him than the State did. Counsel's failure was inherently prejudicial, and demands reversal. See *Edgar*, 294 Kan. at 839-40.

To be clear, at this stage, Zachary is deliberately raising a *Cronic* issue only as to his counsel's performance at sentencing. Should this Court disagree, the Court's analysis should end. Zachary is not waiving or abandoning any other challenges—he is preserving them for postconviction remedies if necessary.

Conclusion

Twice during voir dire, the State told the members of the venire that they weren't there to decide whether Zachary is a "good or bad person"—their job was to "determine the facts and apply the law to those facts." (R. 11: 56, 126). And what happened after that was not their "concern" or "role"—"[t]he rest after that would be up to the judge[.]" (R. 11: 56, 126, 170).

When it came time for the "what happens next," Zachary's counsel failed him spectacularly. A 17-year-old boy being evaluated for competency to stand trial knew the role of his attorney—he's "supposed to 'defend me', 'help me through the case', 'make a case for me, believe in me'—but the same cannot be said about his attorney.

(R. 11: 29; R. 22: 2). Zachary did not receive "counsel acting in the role of an advocate" at his sentencing. See *Cronic*, 466 U.S. at 656. This Court must reverse Zachary's sentence and remand for resentencing.

Issue 3. The State's comments misstated the law on (1) first-degree murder, (2) aiding and abetting liability, and (3) premeditation.

Preservation

Defense "counsel" did not object to the State's comments in voir dire or closing argument. (R. 11: 51-53, 109, 193-94; R. 15: 1040-42). No contemporaneous objection is required in order for this Court to review a prosecutorial error claim based on remarks made during voir dire, opening statements, or closing argument. *State v. King,* 288 Kan. 333, 349, 204 P.3d 585 (2009).

Standard of Review

Appellate courts use a two-step process – error and prejudice – to evaluate claims of prosecutorial error. *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016). If error is found, the prejudice inquiry is subject to the constitutional harmlessness standard. *Sherman*, 305 Kan. at 109-10. See also *State v. Pribble*, 304 Kan. 824, 375 P.3d 966 (2016).

Analysis

"Misstating the law is not within the wide latitude given to prosecutors in closing arguments." *State v. Bunyard*, 281 Kan. 392, 406, 133 P.3d 14 (2006), *disapproved of on other grounds in State v. Flynn*, 299 Kan. 1052, 329 P.3d 429 (2014). Prosecutorial error violates a person's fundamental right to a fair trial as

guaranteed by the Fourteenth Amendment. *State v. Sperry*, 267 Kan. 287, 308, 978 P.2d 933 (1999); U.S. Const. amend. XIV.

In at least three ways during Zachary's trial, the State misstated the law.

Aiding and abetting

During all three jury selection panels, the State gave its take on aiding and abetting. (R. 11: 51-53, 109, 193). In closing argument, the State referenced jury selection, then said:

> We talked about the example of the bank robber. Three guys jump in the car. They both rob Cap Fed. You've got your driver driving there. Two guys jump out. One goes in, holds the guard at gunpoint, while the third person stuffs the bag full of money. In for a penny in for a pound. They're all good for it. That's what the law says, and that makes sense to us. You all are equally responsible, unless it's mere presence or a mere association. As an example, Mr. Wolfley was nearby. Mr. Stokes was nearby. Mr. Eisenberger and the AMR were nearby. They were merely present. They weren't participants. They couldn't be charged with this crime. But what about Mr. McFall? He didn't shoot anyone. We don't know that, but let's assume that. Does this happen without him? Does he aid and abet them? Absolutely. In fact, he may be the most critical person in the commission of this crime. And I'm not just saying that, because but for him, this doesn't happen this way; right? If Mr. Williams or Mr. Johnson are on foot with their guns and wanting to shoot at the Grand Marquis after it leaves the neighborhood, good luck. You need a way to get there. And that's where Zach McFall came in. He was the driver. He knew exactly from the time they pulled out when they have guns -- a long gun getting in there, and they yell, "Let's get 'em." And he peels out. And you heard Mr. Keeler say that the front seat passenger said, "Go, go, go, go," with a gun. And what does Zach do? He goes. He is the driver, the classic example of an aider and abetter. He even tells it to his brother. "Yo, Bro, they slid on us. I'm fixing to slide on them back." And then you hear the shots. "Where you at? Where you at?" "I'm going to Danny's." He even said Danny's. "We just made 'em wreck." There's a reason there. He's part of it. He knows that. This took all of their efforts to commit this crime, not just Mr. Johnson or Mr. Williams. It took a driver, and Zach is that guy.

(R. 15: 1041-42).

That's not "what the law says." Through its comments and example, counsel misstated how aiding and abetting liability works. As Zachary discusses in more detail in Issue 4, the State has to prove that the accused had the same specific intent to commit the crime as the principal. *State v. Overstreet*, 288 Kan. 1, 13, 200 P.3d 427 (2009); *State v. Gleason*, 299 Kan. 1127, 329 P.3d 1102 (2014) (to prove aiding and abetting premeditated murder, prosecution must show defendant shared principal's premeditated intent to murder victim). But the State never said that in closing. And it didn't say it in voir dire—it used an example where an agreement had been made to rob a bank or, in one instance, conflated being part of something with knowing what other people's intentions were: "Is everyone comfortable with the fact that under our principles of law in Kansas and aiding and abetting, that if the getaway driver was in on it, he knew the plan?" (R. 11: 109, 192).

What the State told the jury is not what the law requires. The State was required to prove, beyond a reasonable doubt, that Zachary had the specific intent to kill his friend Joaquin *and* did so with premeditation. Not the intent to "slide on" the people who just "slid on" them (whatever that means—there was no definitive testimony on that). Not the intent to scare the daylights out of another group of teenagers by shooting at their car. Not the intent to make them wreck their car. The State's burden was to prove Zachary had the specific intent to kill Joaquin, with premeditation, *i.e.* "more than the instantaneous, intentional act of taking another's life." As Zachary explains in Issue 4, the lack of a jury instruction on shared intent compounded the State's error.

Premeditation

> There was known premeditation. Well, what does that mean? Does it have to be drawn out in a contract? Does it have to be agreed to weeks earlier? Does it have to be planned out? No. **It just has to be something more than instantaneous.** In this particular case, **we know it took time**, because they had to leave the neighborhood, drive down to 37th, chase them down as someone is sitting up over the roof of the car firing off rounds. That's thought about beforehand. That's not just incidental. Oh, there they go. Bam. That's different. That's not what happened. This is premeditated murder, ladies and gentlemen.

(R. 15: 1043) (emphasis added).

The State essentially told the jury that if they found some undefined thing that was "more than instantaneous," that was premeditation—then referenced time. But this Court has said "that what distinguished premeditation from intent was *more* than mere timing." *State v. Stanley*, 312 Kan. 557, 570, 478 P.3d 324 (2020) (emphasis in original). "Premeditation requires more than mere impulse, aim, purpose, or objective. It requires a period, however brief, of thoughtful, conscious reflection and pondering—done before the final act of killing—that is sufficient to allow the actor to change his or her mind and abandon his or her previous impulsive intentions." *Stanley*, 312 Kan. at 574.

First-degree murder instructions

> I want to talk to you a little bit about some of the instructions, because there's quite a few of them, and sometimes it can get a bit overwhelming when you look at the charges.
>
> ***
>
> A second count of first degree murder is also charged. We call it felony murder. So you think, well, how can anyone be charged with two murders for one murder, one homicide? **There are two alternative charges. So you look at the first degree premeditated.** I'm already seeing I'm getting looks on your faces of confusion. I understand. **The first one**, you go through the elements. **If you believe, based on the evidence that was**

> **presented, that the State has met its burden on each of those elements, you find him guilty of first degree premeditated murder. Then you turn the page, and you get to felony murder.** Those have their own elements again, and you go through those elements. And in that particular case, it requires the intentional death. Let me just look at that real quick -- that the defendant, or another killed J.J.-M., Joaquin McKinney, that the killing was done while the defendant, or another was committing the crime of criminal discharge of a firearm. Well, that evidence is not even in dispute, right? Either Mr. Williams or Mr. Johnson was firing off rounds on the 7.62 into that occupied vehicle. And as a result of that, Mr. McKinney was killed. And again, under aiding and abetting, Mr. McFall is criminally responsible as the other two are. So as you go through those elements, you would find the defendant guilty of murder in the first degree under felony murder as well. **So two murders for one homicide. Well, what happens at that point is by operation of law.** That doesn't involve you. It will involve the Judge. The Court will only be able to accept or sentence the defendant as to one of the two. You decide whether they were both there. If they were, you find him guilty. But I want to assure you, you don't get sentenced for two murders for one homicide.[2]

(R. 15: 1043-45) (emphasis added).

In its comments, the State "made it appear that felony murder was a lesser included offense." *State v. Dominguez*, 299 Kan. 567, 578, 328 P.3d 1094 (2014). But felony murder is not a lesser-included offense of premeditated murder. *State v. Stewart*, 306 Kan. 237, 247, 393 P.3d 1031 (2017). The State said they were two different things, but "premeditated murder and felony murder are not separate and distinct crimes, notwithstanding their considerable differences. They are alternative ways to commit the singular crime of first-degree murder." *Stewart*, 306 Kan. at 247. For this reason, a jury must consider them simultaneously rather than one after the other. *Stewart*, 306 Kan. at 247. As Zachary details in Issue 4, the court's

[2] Incidentially, the State asked the court to sentence Zachary to two murders. (R. 17: 8-10).

failure—mostly brought on by the State—to give the correct jury instructions compounded the State's error.

Conclusion

This Court evaluates prejudice by "allow[ing] the parties the greatest possible leeway to argue the particulars" of the case. *Sherman*, 305 Kan. at 110-11. This Court must determine whether the State has met its burden—*i.e.*, shown that there is no reasonable possibility that the error contributed to the verdict. *Sherman*, 305 Kan. at 111. These errors primarily impacted first-degree premeditated murder, which was the focus of the State's closing argument. That offense carries a mandatory minimum twice as long as felony murder (see K.S.A. 21-6620)—that is why the State's errors were so prejudicial. The State cannot show its errors were harmless, especially in light of the way the jury instructions compounded them. This Court must reverse Zachary's convictions and remand for further proceedings.

Issue 4. The district court did not appropriately instruct the jury on how to consider (1) first-degree and second-degree murder and (2) the State's aiding and abetting theory.

Preservation

Defense "counsel" did not request any jury instructions. (R. 1, generally; R. 15: 998). Defense "counsel" did not object to any of the jury instructions. (R. 15: 998, 1000-11). However, this Court may review this issue pursuant to K.S.A. 22-3414(3).

Standard of Review

A court exercises several standards of review in determining whether the failure to give a jury instruction is reversible. *State v. Plummer*, 295 Kan. 156, Syl.

1, 283 P.3d 202 (2012). Appellate courts have unlimited review of whether an instruction is legally appropriate. *Plummer*, 295 Kan. at 161. A determination of whether an instruction is factually appropriate is made by viewing all evidence in the light most favorable to the party claiming error. See *Plummer,* 295 Kan. at 161-62. If an instruction is legally and factually appropriate, the failure to give it is error and this Court applies an appropriate test for reversal. *Plummer,* 295 Kan. at 162. Because defense "counsel" did not request the instructions discussed below, and didn't object to the instructions given, that test is whether this Court is "firmly convinced that the jury would have reached a different verdict had the instruction error not occurred." *State v. Williams*, 308 Kan. 1439, 1451, 430 P.3d 448 (2018).

Additional facts

In its Complaint/Information, the State charged Zachary in Count 1 with murder in the first degree; premeditation, and in Count 2 with murder in the first degree; inherently dangerous felony. (R. 1: 18-19). Prior to trial, the State had requested a list of instructions from the Pattern Instructions for Kansas. (R. 1: 93). The court gave the instructions the State requested. (R. 1: 93, 105-07, 135-38; R. 15: 1023-26).

The court suggested PIK Crim. 4th 54.130 (Murder in the First Degree—Alternative Theories—Premeditated and Felony Murder), but the State did not want it so the court did not give it. (R. 15: 1005-06). The State's rationale was that "[t]hey are alternative charges not alternative theories for the same charge." (R. 15: 1005). As Zachary explains in Issue 3, this is wrong. And, in fact, the Notes on Use

for the instruction the court mentioned say: "For authority, see K.S.A. 21-5402. **This statute establishes but one offense, murder in the first degree, but it provides alternative theories of proving the crime. Where the information and evidence include both felony murder and premeditated murder, this instruction must be given** in addition to PIK 4th 54.110, Murder in the First Degree, and PIK 4th 54.120, Murder in the First Degree—Felony Murder." (Emphasis added.)

The State requested PIK Crim. 4th 54.110 and PIK Crim. 4th 54.120—which both begin "The defendant is charged with murder in the first degree. The defendant pleads not guilty"—but the court's instructions read like this:

INSTRUCTION NO. 10

The defendant is charged in Count 1 with murder in the first degree. The defendant pleads not guilty.

INSTRUCTION NO. 13

The defendant is charged in Count 2 with the crime of first degree murder while involved in the commission of an inherently dangerous felony. The defendant pleads not guilty.

(R. 1: 106-07, 135, 138). Neither party objected. (R. 15: 1002-05).

The State requested, and the court gave, the multiple counts verdict instruction from PIK Crim. 4th 68.060. (R. 1: 93, 140). The State requested, and the court gave, the verdict forms from PIK Crim. 4th 68.070. (R. 1: 111-13, 142-44). But the Notes on Use for PIK Crim. 4th 68.190 (Murder in the First Degree—

Premeditated Murder and Felony Murder in the Alternative—Verdict Instruction) say that this instruction "**should be used instead of an instruction under PIK 4th 68.060**, Multiple Counts—Verdict Instruction and **PIK 4th 68.070, Multiple Counts—Verdict Forms**." (Emphasis added.) The Notes on Use go on to say this instruction "**should be given along with PIK 4th 68.200, Murder in the First Degree—Premeditated Murder and Felony Murder in the Alternative—Verdict Form, when the defendant is charged with murder in the first degree under the alternative theories of premeditated murder and felony murder**." (Emphasis added.)

The court instructed on the lesser-included offense (to first-degree murder, premeditated) of second-degree murder. (R. 1: 136; R. 15: 1024-25). The court modeled its instruction after PIK Crim. 4th 68.080, yet 68.080's Notes on Use say **"[t]his instruction should not be used when the crime is first-degree murder under the alternative theories of premeditated murder and felony murder. Instead, use PIK 4th 68.190 and 68.200**." (Emphasis added).

Additionally, the State requested, and the court gave, Instruction No. 9, which was PIK Crim. 4th 52.140 with both options included:

> A person is criminally responsible for a crime if the person, either before or during its commission, and with the mental culpability required to commit the crime intentionally aids another to commit the crime, or advices, counsels, procures the other person to commit the crime.
>
> All participants in a crime are equally responsible without regard to the extent of their participation. However, mere association with another person who actually commits the crime or mere presence in the vicinity of the crime is insufficient to make a person criminally responsible for the crime.

(R. 1: 105, 134; R. 15: 1002).

Argument

The court's failures in instructing the jury were clear error

Zachary's case is the scenario that PIK Crim. 4th 54.130, 68.190, and 68.200 were made for—the Notes on Use in all three said that. They were legally and factually appropriate in this case. See *State v. Dominguez*, 299 Kan. 567, 575, 328 P.3d 1094 (2014). Not only did the court use the wrong verdict form—the right one would have led the jury through the sequence of deliberations—but it did not instruct the jury (1) that felony murder and premeditated murder are two alternative theories to prove first-degree murder and (2) how to order their deliberations. The court also gave the wrong lesser-included offense instruction. The instructions the court gave were legally and factually inappropriate.

This Court reached this conclusion in *Dominguez*. There, just as in Zachary's case, (1) the trial court did not give the pattern jury instructions and verdict form specifically designed for use when the State presents alternative theories of first-degree murder to the jury, *i.e.* PIK Crim. 3d 52.06-A [now 54.130], PIK Crim. 3d 68.15 [now 68.190] (verdict instruction; first-degree murder is presented in alternative theories), and PIK Crim. 3d 68.16 [now 68.16] (verdict form; same), and (2) gave the wrong instruction for the lesser-included offense of second-degree murder. *Dominguez*, 299 Kan. at 577-80. Zachary notes that in *Dominguez*, the felony murder instruction the court gave did not say felony murder was first-degree murder. *Dominguez*, 299 Kan. at 579-80. But the instructions in Zachary's case

were still erroneous: although the felony murder instruction said first degree, it did not begin like PIK Crim. 4th 54.120. (R. 1: 138).

In *Dominguez*, after comparing what the jury had versus what the court failed to instruct on, this Court determined "neither the jury instructions nor the verdict form in this case provided the jurors with information that allowed them to understand the need to consider felony murder as part of their deliberations regarding the first-degree murder charge …. [and] the sequencing of instructions and words within the instructions suggested that felony murder was not on 'equal footing' with premeditated murder. Consequently, we conclude the instructions given by the trial court were legally inappropriate and, therefore, erroneous." *Dominguez*, 299 Kan. at 581. Zachary addresses reversibility later in this issue.

Failure to instruct on the shared-intent requirement of aiding and abetting was clear error

For a person to be convicted of a specific-intent crime, *i.e.* first-degree premeditated murder, on an aiding and abetting theory, a "defendant must be shown to have the same specific intent to commit the crime as the principal. *State v. Overstreet*, 288 Kan. 1, 13, 200 P.3d 427 (2009); *State v. Gleason*, 299 Kan. 1127, 329 P.3d 1102 (2014) (to prove aiding and abetting premeditated murder, prosecution must show defendant shared principal's premeditated intent to murder victim)." Comment to PIK Crim. 4th 52.140. In other words, if one actor has a different intent or mental state than the other actor, then they do not have the same specific intent required for guilt. But the jury was not instructed on this crucial point of law.

The State admitted Zachary did not shoot the gun that killed Joaquin. (R. 15: 1041). The State's theory was that Zachary aided and abetted two other people, so an aider and abettor instruction was factually warranted. (R. 15: 1040).

However, the aiding and abetting instruction was not legally appropriate, including viewing the instructions as a whole. The language in Instruction No. 9/PIK Crim. 4th 52.140 comes from K.S.A. 2019 Supp. 21-5210(a): "A person is criminally responsible for a crime committed by another if such person, acting with the mental culpability required for the commission thereof, advises, hires, counsels or procures the other to commit the crime or intentionally aids the other in committing the conduct constituting the crime." The 2011 Recodification altered the prior aiding and abetting statute, K.S.A. 21-3205(1), which stated "[a] person is criminally responsible for a crime committed by another if such person intentionally aids, abets, advices, hires, counsels or procures the other to commit the crime."

The court gave 16 jury instructions. (R. 15: 1020-28). Although the term "mental culpability" mirrors K.S.A. 2019 Supp. 21-5210(a), it appears in none of the instructions other than No. 9—it is not defined or explained in any of the instructions, including the one it appears in. (R. 15: 1020-28). Despite there being 16 instructions, none of them told the jury that in order to find Zachary guilty of premeditated murder, it must find beyond a reasonable doubt that Zachary and whoever else was in his car that day *shared the same intent*, *i.e.* an intent to kill Joaquin, done with premeditation. Instead, the jury was instructed on an undefined "mental culpability required." This was error.

In *State v. Betancourt*, 299 Kan. 131, 322 P.3d 353 (2014), this Court addressed the use of the pre-Recodification aiding and abetting instruction, which read: "A person who, either before or during its commission, intentionally aids another to commit a crime with intent to promote or assist in its commission is criminally responsible for the crime committed regardless of the extent of the defendant's participation, if any, in the actual commission of the crime." *Betancourt*, 299 Kan. at 134. Mr. Betancourt argued on appeal "that these instructions were deficient because they did not inform the jury that a defendant who is guilty on an aiding and abetting theory of premeditated murder must share the principal's premeditated intent." *Betancourt*, 299 Kan. at 135. In support, he pointed to language in *Overstreet*, 288 Kan. at 1, Syl. 2-3, explaining the "defendant must have the same specific intent to commit the crime as the principal," and "a person guilty of aiding and abetting a premeditated first-degree murder must be found, beyond a reasonable doubt, to have had the requisite premeditation to murder the victim." This Court held that "[c]onsidering the entirety of the jury instructions, we conclude that the instructions as given accurately stated Kansas law and did not mislead or confuse the jury." *Betancourt*, 299 Kan. at 136.

But *Betancourt* cannot control here due to the intervening changes to the statute and related instructions. The *Betancourt* instruction used "intentionally aids" and "with intent to promote or assist"—terms defined in other instructions. In contrast, PIK Crim. 4th 52.140/Instruction No. 9 generally refers to "mental

culpability" — a term that appears nowhere else in Zachary's instructions. Nothing ties No. 9's "mental culpability" to any definitions from other instructions.

While the term "mental culpability" mirrors Kansas statutory law post-Recodification (see K.S.A. 2019 Supp. 21-5202), the absence of any explanation means the jury would have been misled or confused; they did not have Westlaw or a legal background. In fact, the first thing they were told during the instructions was they "must decide the case by applying these instructions." (R. 15: 1020-21). And "[a] jury cannot be presumed to have legal knowledge outside the statements of law in the instructions." *State v. Dixon*, 289 Kan. 46, 68, 209 P.3d 675 (2009).

Reversibility

First, as to the instructions and verdict forms regarding first-degree and second-degree murder, the prosecutor himself made a record of the jury's apparent confusion: when trying to explain how the jury should consider the forms of first-degree murder, he said, "I'm already seeing I'm getting looks on your faces of confusion. I understand." (R. 15: 1044).

For the reasons in Issue 3, the State's explanation only added to the confusion. Even if this Court disagrees with Zachary's assessment of the State's misstatements of law in closing, our "appellate courts presume a jury follows the trial court's instructions—especially given that the jurors in this case were instructed that they *must* apply the instructions—there is no similar presumption relating to arguments of counsel." *Dominguez*, 299 Kan. at 583 (emphasis in original).

And for the same reasons detailed in *Dominguez*, 299 Kan. at 576-85, the court's instructions, or lack thereof, in Zachary's case failed to give the jury sufficient direction. And the reason this Court found clear error in *Dominguez* and reversed is the same reason why this Court should reverse here:

> One may ask whether this difference in the verdict would matter because under any of the three alternatives the jury should have been given—(1) unanimously finding Dominguez guilty of premeditated first-degree murder, (2) unanimously finding him guilty of first-degree felony murder, or (3) unanimously finding him guilty of first-degree murder but splitting votes between the two alternative theories—Dominguez would have been guilty of first-degree murder. **The answer is that the verdict would have had a significant impact on Dominguez' minimum sentence.** The legislature has chosen to impose a different minimum sentence for first-degree felony murder—at the time of Leyva's death a 20–year minimum [note: for Zachary it would be 25 years]—than for premeditation first-degree murder—up to a 50–year minimum [note: for Zachary, it is 50 years].

Dominguez, 299 Kan. at 584-85 (emphasis added).

As to aiding and abetting, the other instructions do not mitigate the error. For example, the elements instruction given says that the killing must be premeditated, but nowhere in that instruction (or the aiding and abetting instruction, or any of the other instructions) did it say that *Zachary and the other people* in his car had to share that premeditation. In other words, if the shooter of the 7.62 rifle acted with premeditation to kill—which Zachary does not concede—but Zachary did not, then Zachary is not guilty. As this Court has repeatedly recognized, "the propriety of jury instructions is to be gauged by the consideration of the whole, each instruction being considered in conjunction with all other instructions in the case." *State v. Davis*, 275 Kan. 107, 61 P.3d 701 (2003). When

this Court considers the instructions as a whole, it must find they did not guide the jury.

There was overwhelming evidence that Joaquin and Bop "slid on" some "us" that included Zachary. And Zachary told his brother he was "fixing to slide on them back" after two people got in his car and those two people a neighbor saw holding guns. But there was *not* overwhelming evidence that Zachary *had the specific intent to kill Joaquin that day, with premeditation.*

At trial, no one testified what it meant for sure—including what it meant to Zachary for sure–to "slide on" someone else. The State made a big deal about the call from Zachary to Lee, so using Zachary's own words, paired with what Mr. Disney and another neighbor saw and heard from Joaquin and Bop, "slide on" means shooting off guns without meaning to kill anyone. The State argued:

> But what we do know, they were supposed to get together at Betty Phillips Park to either fight, have an argument, **do whatever**. And that's what brought Mr. McKinney and the people in his car to Betty Phillips Park.
>
> ***
>
> In a residential neighborhood, they pull up, and they start popping off rounds into the air. **Who knows what their intent was. I suppose**, maybe to flush out Zach and his friends. **Who knows.** But it did. It had that effect.
>
> ***
>
> And for whatever reason, the argument, the conflict, the fight doesn't happen there. **And for a very stupid reason**, Mr. McKinney and or "Bop" shoot off a firearm or firearms into the air on Irvingham.
>
> ***
>
> And you heard Mr. Disney tell you, they said "Let's get 'em." **Well, you know what that means.**

(R. 15: 1036-37) (emphasis added). To the contrary, we don't know what any of it means. Who knows what Zachary's intent was? We don't know it, just as the State said we don't know what Joaquin's intent was minutes before. It was the State's

burden to prove, beyond a reasonable doubt, that on July 25, Zachary specifically intended to kill Joaquin, and did it as "more than mere impulse, aim, purpose, or objective," after "thoughtful, conscious reflection and pondering." *Stanley*, 312 Kan. at 574. The State did not meet its burden.

Conclusion

As the State said in closing, "we all understand that based on our conversation [in jury selection], you want to be confident in your verdict. You want to know that you're convicting the right man for the right crimes." (R. 15: 1033). For all the reasons above, this Court cannot be confident that the jury had the right instructions to convict Zachary. This Court must find clear error, reverse, and remand for further proceedings.

Issue 5. The combination of the jury instruction errors and the State's errors in closing argument deprived Zachary of a fair trial.

Preservation

Zachary did not argue cumulative error in the trial court; however, this Court can, and should, reach this issue. *Pierce v. Board of County Commissioners*, 200 Kan. 74, 80–81, 434 P.2d 858 (1967). The first and second *Pierce* exceptions apply: this issue presents a legal question, and cumulative error violates the due process right to a fair trial, a fundamental right Zachary has. See U.S. Const. amend. XIV and Kan. Const. Bill of Rights, § 10.

Standard of Review

To assess the prejudice of multiple trial errors, this Court "examines the errors in the context of the record as a whole considering how the district court

dealt with the errors as they arose (including the efficacy, or lack of efficacy, of any remedial efforts); the nature and number of errors committed and their interrelationship, if any; and the strength of the evidence." *State v. Tully*, 293 Kan. 176, 205-06, 262 P.3d 314 (2011). If one error is constitutional in nature, then the errors' cumulative effect must be harmless beyond a reasonable doubt. *State v. Santos-Vega*, 299 Kan. 11, 27-28, 321 P.3d 1 (2014). Because the prosecutorial error amounts to a constitutional error, the State must prove that this combination of above errors was harmless beyond a reasonable doubt. See *Santos-Vega*, 299 Kan. at 27-28; *State v. Lumbrera*, 252 Kan. 54, 57, 845 P.2d 609 (1992).

Analysis

Even if the errors raised in Issues 3-4 do not constitute reversible error alone, the combination of errors, "when viewed cumulatively in the totality of the circumstances herein," denied Zachary a fair trial as guaranteed by the Fourteenth Amendment. *Lumbrera*, 252 Kan. at 57, 845 P.2d 609 (1992); *see also State v. Brinklow*, 288 Kan. 39, 51, 200 P.3d 1225 (2009). In Issues 3-4, Zachary discussed how the errors are interrelated, how one started as early as jury selection, and how they impacted the offense that carries a Hard 50 sentence. There were no objections from Zachary's attorney, and no "remedial" measures from the court—in fact, the court compounded the errors by giving the State's requested instructions and not alternative-theory-specific PIK instructions.

Conclusion

If this Court does not reverse for other reasons, it should reverse because of the "accumulated effect of multiple trial errors" that denied Zachary his right to a fair trial. *Tully*, 293 Kan. at 205.

Conclusion

This Court must reverse Zachary's convictions and remand his case for further proceedings. In the alternative, this Court should vacate Zachary's sentence and remand for resentencing.

Respectfully submitted,

/s/ Jennifer C. Roth

Jennifer C. Roth #18858
Kansas Appellate Defender Office
700 SW Jackson, Suite 900
Topeka, KS 66603
(785) 296-5484 (voice)
(785) 296-2869 (fax)
adoservice@sbids.org
Attorney for Appellant Zachary McFall

Certificate of Service

I served this Brief of Appellant by e-mailing a copy to Michael F. Kagay, Shawnee County District Attorney, at Da_appeals@snco.us and to Kris Kobach, Attorney General, at ksagappealsoffice@ag.ks.gov, on January 18, 2023.

/s/ Jennifer C. Roth

Jennifer C. Roth #18858

449 P.3d 454 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

In the MATTER OF V.B.

Nos. 120,523
|
120,524
|
Opinion filed September 27, 2019.

Appeal from Johnson District Court; THOMAS E. FOSTER, judge.

Attorneys and Law Firms

Jacob M. Gontesky, assistant district attorney, Stephen M. Howe, district attorney, for appellant.

Michael J. Bartee, of Michael J. Bartee, P.A., of Olathe, for appellee.

Before Standridge, P.J., Pierron and Atcheson, JJ.

MEMORANDUM OPINION

Per Curiam:

***1** The State appeals the district court's denial of its motion to waive V.B. to adult status for prosecution.

FACTS

On February 12, 2018, the State charged V.B. with theft of a firearm in case No. 18JV198. During the pendency of the theft charge, on May 31, 2018, the State charged him with attempted second-degree murder in case No. 18JV665. Four days later, the State moved to waive V.B. to adult status for prosecution in 18JV665. On June 27, the State moved to waive V.B. to adult status for prosecution in 18JV198. The State amended the complaint in 18JV665 to include charges for attempted aggravated robbery and possession of marijuana on December 4, 2018.

On December 7, 2018, the district court heard the motions. The court took judicial notice of 14JV1218, 14JV1474, 17JV1516, 18JV198, 18JV665, and 17JC662. The State's first witnesses testified about the facts in 18JV665. Shawnee Police Officer David Brandau testified he responded to a call for shots fired on May 25, 2018. The call was upgraded to a call for a person shot. When he arrived, he saw a vehicle disabled in the roadway with multiple bullet holes and the victim sitting on the ground with a bullet wound to his left torso. Brandau later obtained a warrant and searched V.B.'s residence. In the furnace closet, he found a bag containing a jar of marijuana, a spare magazine to a handgun, baggies, and a 9 mm Smith & Wesson handgun. Brandau confirmed there was no indication of who owned the gun. However, Dustin Calvin, forensic scientist at the Johnson County Crime Lab latent print section, testified he had recovered V.B.'s fingerprint on the slide of the handgun as well as on the jar containing marijuana.

In preparation for the waiver hearing, Laura

Brewer, chief court services officer, reviewed police reports, lab reports, and photographs for the two pending cases. She also reviewed the case files of V.B.'s previous court involvement for both juvenile delinquency and child in need of care (CINC) cases. She reviewed performance reports from the juvenile detention center (JDC); his psychological evaluation; and school records, including his individualized education program (IEP). She interviewed V.B. in July 2018.

The State focused Brewer's testimony on the eight factors in K.S.A. 2018 Supp. 38-2347(d), which a district court must consider when determining whether to waive a juvenile to adult status for prosecution:

> "(1) The seriousness of the alleged offense and whether the protection of the community requires prosecution as an adult or designating the proceeding as an extended jurisdiction juvenile prosecution;
>
> "(2) whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;
>
> "(3) whether the offense was against a person or against property. Greater weight shall be given to offenses against persons, especially if personal injury resulted;
>
> "(4) the number of alleged offenses unadjudicated and pending against the juvenile;
>
> "(5) the previous history of the juvenile, including whether the juvenile had been adjudicated a juvenile offender under this code or the Kansas juvenile justice code and, if so, whether the offenses were against persons or property, and any other previous history of antisocial behavior or patterns of physical violence;
>
> ***2** "(6) the sophistication or maturity of the juvenile as determined by consideration of the juvenile's home, environment, emotional attitude, pattern of living or desire to be treated as an adult;
>
> "(7) whether there are facilities or programs available to the court which are likely to rehabilitate the juvenile prior to the expiration of the court's jurisdiction under this code; and
>
> "(8) whether the interest of the juvenile or of the community would be better served by criminal prosecution or extended jurisdiction juvenile prosecution.
>
> "The insufficiency of evidence pertaining to any one or more of the factors listed in this subsection, in and of itself, shall not be determinative of the issue. Subject to the provisions of K.S.A. 2018 Supp. 38-2354, and amendments thereto, written reports and other materials relating to the juvenile's mental, physical, educational and social history may be considered by the court."

Of the eight factors for consideration, Brewer testified that only the second and third, which are specific to the alleged offenses, supported waiver. She stated five of the remaining six factors favored extended juvenile jurisdiction prosecution (EJJP). As for the sixth factor, she stated it did not support waiver, but she did not clarify if it supported EJJP or standard juvenile jurisdiction.

V.B.'s witnesses focused on factors related to his abilities and personality rather than the

offense-specific factors. Dr. Todd Shimmel, psychologist at Johnson County Mental Health testified V.B.'s intellectual functioning was in the lower one percentile for his age range and, socially, he tended to be a follower and pleaser. Jeff Goss, who coached V.B. in basketball at Lenexa Baptist Church, testified he knew V.B. had challenges at home and V.B. had shown some maturity in that he appeared to have to make a lot of his own decisions. He also viewed V.B. sitting through devotion time before basketball, rather than goofing off like many other players, as a sign of maturity.

Tracy Mays, V.B.'s maternal aunt, stated he had lived with her since March 2018. Before that, he lived with his mother and six siblings. V.B. was close with his younger brother, who was the leader of the two. Tracy stated V.B. had always been a follower and had gotten into trouble in the past because he followed the wrong people. She stated V.B.'s mother passed away on May 4, 2018, and shortly thereafter his half sister from his father's side was found dead. Shelby Coleman, KVC Behavioral Healthcare adoption case manager, testified she had been working with V.B. since August 2018 and had a good relationship with him. She stated she generally had to explain things to V.B. more than once and was not sure if he fully understood what she was saying. She testified his level of sophistication and maturity was below that of the average 16-year-old.

Rex Arthur, JDC case manager, testified V.B. had been in JDC for 192 days. He had received eight behavioral reports in that time, three of which occurred in his first six weeks at the facility. V.B.'s last report had been on September 28, 2018. He testified V.B.'s behavior had significantly improved, and he had even received at least three ACE awards for being the best-behaved resident during those weeks.

***3** The district court considered the factors and found that V.B. was alleged to have committed a very serious violent offense against a person that resulted in injury. The court appeared to have been neutral regarding the fourth factor as it noted V.B. could have had less or could have had more unadjudicated offenses. It found he had only been adjudicated for two misdemeanors. In its consideration for the sixth factor, the court found a long history of investigations by the Department for Children and Families (DCF). The court considered Dr. Shimmel's psychological evaluation, which indicated V.B. was not as mature as others his age and Arthur's report that V.B. had demonstrated his ability to improve in a structured environment. The court found a history of neglect in V.B.'s home environment and no evidence to support a pattern of living as an adult or the desire to be treated as an adult. The court held that the facilities and programs available in the juvenile system were more appropriate for V.B. and, in weighing the community's safety interests in a longer sentence in the adult system against the increased likelihood of rehabilitation in the juvenile system, the court found the State had failed to meet its burden to show V.B. should be waived to adult status for prosecution. The court denied the State's motion. The State appeals.

ANALYSIS

The State claims the district court's factual findings as to the first four factors were supported by substantial evidence and the legal conclusion that each of those factors supported waiver was not an abuse of discretion. However, it contends the district

court's factual findings as to the fifth through eighth factors were not supported by substantial evidence and the court based its ultimate legal conclusion on errors of fact and unreasonable interpretations of law.

V.B. contends the district court's fact-finding was based on substantial evidence and the State is asking us to make different findings of fact which permit it to draw inferences in its favor. He claims the State misconstrued the court's findings as to the first factor by limiting its findings to the first element of the factor. V.B. claims the court made a negative finding as to the second element. He agrees with the State's assertion that the court found the second and third factors favored waiver. However, he claims the district court's findings as to the fourth through eighth factors were supported by substantial evidence and in favor of EJJP.

When reviewing a district court's determination of whether to waive a juvenile to adult status for prosecution, an appellate court determines whether the district court's factual findings are supported by substantial evidence. *In re D.D.M.*, 291 Kan. 883, 892-93, 249 P.3d 5 (2011). Substantial evidence is "evidence which possesses both relevance and substance and which furnishes a substantial basis of fact from which the issues can reasonably be resolved." 291 Kan. at 893 (citing *State v. Mays*, 277 Kan. 359, 363, 85 P.3d 1208 [2004]). We must accept the evidence and all inferences to be drawn from it that support the district court's findings as true and give deference to its evaluation or characterization of the facts. *D.D.M.*, 291 Kan. at 893.

Appellate courts review the district court's determination of whether to waive the juvenile status using the abuse of discretion standard. 291 Kan. at 893. Though the district court must have considered the eight statutory factors, it was not constrained by the insufficiency of the evidence to support one or more of the factors. 291 Kan. at 893. Judicial discretion is abused if judicial action is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. *State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801 (2011).

The parties agree with the district court's factual findings that V.B. was accused of violent person offenses in which a person had been injured. The parties agree with the conclusions that the second and third factors favored a waiver. Thus, we need not review them individually.

Factor One

K.S.A. 2018 Supp. 38-2347(d)(1) considers the seriousness of the alleged offense and whether the protection of the community requires prosecution as an adult or designating the proceeding as an extended jurisdiction juvenile prosecution.

Here, the district court found the first factor was the severity level of the crime and the seriousness of the alleged offense. The most serious offense was a level 3 felony—use of a handgun, the shooting, and an injury. The court found it was one of the more serious types of crimes that can be committed.

***4** The State had charged V.B. with attempted second-degree murder, a level 3, person felony, and during the commission of this crime a person was shot. Though the district court did not make findings regarding the second element of the factor, the element is the ultimate determination by the district court. To say the court found the offense

required adult prosecution would render the remaining seven factors futile. It appears the court's focus on the first element of the factor shows the State had met its burden in showing the seriousness of the offense and the severity of the offense presented a concern of community protection. The court seemingly weighed this factor in favor of waiver. The district court's findings are supported by substantial evidence.

Factor Four

K.S.A. 2018 Supp. 38-2347(d)(4) considers the number of alleged offenses unadjudicated and pending against the juvenile.

The district court found "there could be less, there could be more. There are four in this case." The State asserts the district court's findings were based on substantial evidence. It seems V.B. interpreted the State's agreement as an interpretation that the factor weighed in favor of waiver. However, the State made no such assertion. As V.B. noted, it seems the court viewed this factor neutrally. However, under K.S.A. 2018 Supp. 38-2347(a)(1), the court must presume a juvenile to be a juvenile unless the State rebuts the presumption by a preponderance of the evidence. Therefore, although the court did not specify whether it held this factor to weigh in favor of adult or juvenile prosecution, the State failed to rebut the presumption and so it should weigh in favor of V.B. being prosecuted as a juvenile.

Factor Five

K.S.A. 2018 Supp. 38-2347(d)(5) concerns the previous history of the juvenile, including whether the juvenile had been adjudicated a juvenile offender under this code or the Kansas Juvenile Justice Code and, if so, whether the offenses were against persons or property, and any other previous history of antisocial behavior or patterns of physical violence.

Regarding V.B.'s court history, the district court found, "There is some previous history as a juvenile which I believe are all misdemeanors. ... It was a misdemeanor battery charge, misdemeanor theft, theft of a bicycle. There was a charge of a firearm theft. No prior felonies." The court held that if V.B. had been tried as an adult, he would have a criminal history score of H, putting him "on the lower end of the criminal history as far as [the] adult sentencing grid goes."

The State contends the district court provided insufficient attention to factor five. It appears the State is asking us to reevaluate and recharacterize the evidence such that it supports a waiver. However, the court did not disregard the evidence presented for factor five, rather, it placed more value on V.B.'s criminal history and possible criminal history score than the pattern of behaviors the State emphasized.

The State claims the district court minimized V.B.'s juvenile delinquent and CINC referrals. But the court took judicial notice of all prior cases. The State argued in closing that in 2015 and 2016 V.B. had been on probation for a total of 16 months and he had a history of antisocial behavior and physical violence, in support of waiver.

Contrary to the State's assertions, Brewer testified this factor supported EJJP. She explained V.B. had a total of eight prior referrals. Three of those were CINC referrals, and the remaining are all misdemeanor

referrals. Brewer noted that V.B. had been on probation for misdemeanor battery through which he received limited services. She testified that the bulk of his probation was the requirement that he complete the Healthy Boundaries class, but after his probation had been extended he was ultimately released from probation as unsuccessful due to his failure to complete the class. She explained unsuccessful release means court services did not feel there were any further services that probation could offer to aid the client in successfully completing probation. She noted that during his time on probation V.B. was in middle school, he had issues with transportation, and he was not able to make it to classes and meetings with his probation officer. There was also a concern that he did not have a medical card and so could not attend the classes. She stated there were "issues beyond the control of him at that age."

***5** Because the district court's factual findings were supported by substantial evidence, we would have to reweigh the evidence or recharacterize the facts to provide the State with the outcome it seeks. However, that is outside the authority of the appellate court.

Factor Six

K.S.A. 2018 Supp. 38-2347(d)(6) considers the sophistication or maturity of the juvenile as determined by consideration of the juvenile's home, environment, emotional attitude, pattern of living, or desire to be treated as an adult.

The district court found:

> "In reviewing the Child in Need of Care petition, the facts alleged in that petition, ... and the testimony presented would indicate there is a challenging environment for [V.B.] to grow up in. Talk about 22 DCF investigations concerning the family beginning in 1997 including allegations of neglect, lack of supervision, lack of medical attention, emotional issues, truancy, domestic violence, parental. It talks about encouraging unlawful behavior by the children, parents having weapons, delinquency, addictions, homelessness.
>
> "[W]e have a psychological evaluation and the IEP which also indicates the challenges that [V.B.] has, and the education environment; and talking about some needs for some accommodations in regard to his learning environment; and Dr. Shimmel's report which talked about some of [V.B.'s] strengths including playing sports and being kind to people. Certainly whatever happened in this case, this incident was not a kind situation. That's Dr. Shimmel's comment. Dr. Shimmel did do some testing, standardized testing that resulted in some scoring and some comparative percentile rankings for [V.B.]. ... Dr. Shimmel did have the opinion that ... [V.B.] is not as mature as others of his age. Dr. Shimmel also believes that [V.B.] is in need of extensive academics, court services, and he would benefit from continued support of counseling. The testimony from Mr. Arthur indicated [V.B.] can improve, can learn, especially in a controlled environment. The evidence would show that there's been neglect in regard to [V.B.] in his home environment. The evidence really doesn't indicate a pattern of living or desire to be treated as an adult."

The State contends the district court's findings on the factor six were abbreviated. It claims this factor is inherently subjective but there is no basis for it to be based on

comparison with others his age to determine maturity. The State claims the court's findings were not sufficient as some witnesses indicated V.B.'s maturity and intelligence were below average, while others testified he showed some independence and maturity. The State is essentially asking us to reweigh the evidence and reverse the court's determination of credibility of the witnesses, neither of which we can do. *D.D.M.*, 291 Kan. at 893.

Brewer testified factor six did not support a waiver. She testified that despite V.B.'s given age, he would turn 17 pretty quickly and his level of functioning was not necessarily that of a normal almost 17-year-old. She testified school records showed V.B. had an IEP for as long as he could remember, and he had challenges with learning. She indicated the psychological evaluation showed he was in the lower percentiles for IQ and abilities. As far as his pattern of living or desire to be treated as an adult, she noted he had never had a driver's license, lived on his own, had a bank account, or had any means of supporting himself. She concluded: "I just think socially he's much younger than his given age."

***6** Dr. Shimmel testified that V.B. potentially suffered from PTSD, although he did not see enough for a diagnosis. However, he had diagnosed V.B. with bereavement for the recent death of his mother and with intellectual disability. V.B.'s full scale IQ score was 67, placing him in the first percentile for his age range. The full scale score was based on four skills, and V.B. did not score higher than the fifth percentile in any of them. The assessment that measures personality suggested V.B. was a pleaser—a follower who wants to comply. The test reflected distressing emotions, attention, and some guardedness. Dr. Shimmel stated V.B. cognitively reflected feelings of inadequacy or a tendency to think he was not very capable. The third assessment, which provided insight into "how that person's doing, how they feel about themselves, their future," showed V.B. was stressed about his incarceration and regretful about being in jail. Some of V.B.'s answers reflected his difficulty with reading and school and a desire to learn more and do better. Dr. Shimmel concluded that

> "based on [V.B.'s] intellectual testing, his IQ scores that came up based on the descriptions of his struggles academically, even based on his aunt Tracy's description of some of his involvement with the law, it just seems to speak to somebody that didn't have the judgment, the decision-making of an average 16-year-old."

Shelby Coleman testified about V.B.'s level of sophistication and maturity, stating it was "below average of other 16 almost 17-year-olds that I work with on my case load if I'm comparing it to the current population that I work with." In reference to [V.B's] cognitive abilities, she stated:

> "I feel that when I explain things to [V.B.], I generally explain them more than one time. So generally it's more than one way. Just because I want to make sure he's fully understanding what I'm saying to him because sometimes I get the impression based on this facial expression that he doesn't understand what I'm telling him. I understand that this whole system can be a little confusing so I try to get creative to explain things to him."

Jeff Goss was the only witness who testified that V.B. had demonstrated maturity in that "there's certain things like during devotion time you had a lot of youth that goofed off and didn't listen and you had to kind of tell,

'Hey, let's do the devotion then play basketball.' [V.B.] would sit, he'd listen. You know, he wasn't disrespectful."

Contrary to the State's assertion, the district court's findings were sufficient. Though the State contends there is no basis for determining this factor on comparison to others of V.B.'s age, the psychological tests provided comparative percentile rankings by age group. The comparison provides meaning to the numbers. It would make sense that, if the testing provides comparative analysis, the court should consider analysis by individuals who work with juveniles in V.B.'s age range to provide a gauge for their conclusions. The court clearly considered the different witnesses' testimony as well as V.B.'s family history with DCF as it referred to different sources of information in its findings. The State's suggestion that we reweigh the evidence, placing Goss' testimony above the other witnesses', is beyond our scope of review. The district court's findings were supported by substantial evidence.

Factor Seven

K.S.A. 2018 Supp. 38-2347(d)(7) considers whether there are facilities or programs available to the court which are likely to rehabilitate the juvenile prior to the expiration of the court's jurisdiction under this code.

Regarding the seventh factor, the district court found there were facilities and programs available in both the juvenile and adult setting. The programs available within the juvenile justice system were more appropriate for V.B. at that time and more likely to rehabilitate him as compared to programs in the adult system.

The State contends the district court's findings were particularly abbreviated and contends the evidence that the juvenile system would be more effective was "weak." However, the State attempts to shift the burden in making such an assertion. The court must have worked on the presumption that the juvenile system was more appropriate than the adult system. The State had the burden of rebutting the presumption and showing otherwise. K.S.A. 2018 Supp. 38-2347(a)(1). Yet, it provided no evidence to support the conclusion it asks us to adopt.

***7** Contrary to the State's claim of weak evidence, Brewer—the State's witness—testified V.B. had "ample time available to him within the juvenile facility to complete programming which could include individual counseling, educational programming, aggression replacement training, Thinking for a Change, [and] more reformation therapy." She stated there were many services available to him within the juvenile correctional facility which she thought he could take advantage of. She stated that in the six months he had been at JDC, he had shown a willingness and ability to comply with things that were in his control. She stated the programs she believed would rehabilitate V.B. were custodial services.

Rex Arthur testified that V.B.'s behavior had greatly improved since he entered JDC. V.B. had worked and progressed in his reading abilities and with accepting help from others. Arthur expressed that V.B.'s better self-esteem should help him be more assertive in standing up for himself instead of falling into the negativity of others. He stated V.B. responded very well to the structure at JDC such that he had received the ACE award three or four times.

The State contends the testimony about the programs and facilities likely to rehabilitate V.B. are meaningless when considering his unsuccessful release from probation when he had very little required of him at the time. However, the district court gave more weight to the programs and facilities than to his previous failure to complete a class. As Brewer testified, at the time of V.B.'s previous probation, he was in middle school and could not make it to appointments or class because he had no access to transportation or his medical card. The district court also considered V.B.'s positive response to the structured environment in making its determination regarding this factor. The court's findings were not abbreviated and were supported by substantial evidence.

Factor Eight

K.S.A. 2018 Supp. 38-2347(d)(8) considers whether the interests of the juvenile or of the community would be better served by criminal prosecution or extended jurisdiction juvenile prosecution

The district court found:

> "Criminal prosecution would extend juvenile jurisdiction. The community's interest would be that—I guess there's a couple different ways you can look at it. One is you try to take [V.B.] and put him in a place where community can't be affected for a certain period of time; and then, eventually he would get out; and then, how we determine if the community is safer or less safe at that point; and plus the fact he was incarcerated a certain number of years and couldn't hurt anybody, and then released, and what—to what extent is he rehabilitated, and is he a danger to the community then or not? Is juvenile justice going to do a better job of helping [V.B.] be the best person he can be, but that will be an earlier date. And then he's released, and so, the community was safe while he was incarcerated; and then, how is the community affected once he's released? Difficult—difficult to know. Experts say it's 25 when the adult brain is fully developed.
>
> "... I do find that having considered all these factors that the community in the long run, and hopefully in the short run too, and for [V.B.] in both the short and long run, to continue to treat him as a juvenile in the juvenile system."

The State contends the district court's findings are abbreviated and more speculative than supported. It asserts the court proposed questions about V.B.'s and the community's best interests in length of incarceration and likelihood of rehabilitation without resolving the apparent conflict. The State claims that in making its findings, the court failed to appreciate the impact a lengthier sentence would have on the safety of the community.

***8** V.B. asserts the district court's statements were merely its expression of the factors it weighed in determining what was in the best interests of V.B. and the community. The court had to choose between a lengthier sentence during which the community was safe from V.B., but with little confidence in rehabilitation, or a shorter sentence during which V.B. would have a greater likelihood of rehabilitation, providing a greater chance of community safety after his release. In making the above statements, the court was being candid in its evaluation. Ultimately, the court expressed its determination that in the

long-and short-term, both the community's and V.B.'s interests were better served with juvenile prosecution.

The State takes issue with the district court's statement that the brain is not fully developed until age 25 because it indicates the court does not believe juveniles should ever be waived to adult status and it was not supported by the record. However, the presumption is that juveniles should not be prosecuted as adults and so the court's starting point should reflect that. Absent a showing that the court regularly abuses its discretion by denying waiver, the appearance of being against waiver is of no consequence. Further, the statement about brain development is common knowledge, and so, the district court did not make any extrajudicial fact-finding.

The district court's findings are in line with its previous findings that the juvenile system offers a better chance of rehabilitation and are supported by substantial evidence. The speculation by the court was merely it openly discussing the factors it weighed in making the determination. The court's determination that the community and V.B. were better served by juvenile prosecution showed its emphasis on short- and long-term safety through rehabilitation.

The district court's findings of fact with regard to all eight of the factors listed in K.S.A. 2018 Supp. 38-2347(d) are based on substantial competent evidence.

Legal Conclusion

Finally, the State argues the district court's legal conclusion is an abuse of discretion as it was based on an error of law and it was an unreasonable interpretation of the statute. The State makes the same arguments for the factual errors as above. As discussed above, the district court's factual findings were supported by substantial competent evidence. Again, the State is essentially asking us to reweigh the evidence and recharacterize the facts in a way that supports waiver. However, that is outside the scope of our review.

Following its K.S.A. 2018 Supp. 38-2347(d) analysis, the district court concluded:

> "I find that the State has not established by a preponderance of the evidence that the community would be safer if we went to criminal prosecution. There's lots of services in the juvenile system that have not been—that are available and have not been tried yet for [V.B.]. There—hasn't shown a desire to be treated as an adult. I guess at times he's out there acting like an adult. That seems more like his life circumstances than his preference or his desire. I know these doctors like Dr. Shimmel thinks if you work hard you can catch up to others of your age. I guess some of them; and there are programs that can help you do that in the juvenile justice system as opposed to sending a young man with this personal intellectual system in the adult system. I think he's going to have even more challenges while he's dealing with that and after he's released."

Though the court did not specify in its findings whether each factor weighed in favor of waiver or EJJP, the court summed up the evidence it gave the greatest weight in the paragraph above.

Under K.S.A. 2018 Supp. 38-2347(a)(1), a juvenile is presumed to be treated as a juvenile unless the State proves otherwise. The district court properly began with such a presumption, and the witnesses' testimony

strengthened the presumption. The court's findings of fact were supported by substantial competent evidence and sufficiently provided how it evaluated and characterized the evidence to reach its conclusion. The court's conclusion aligned with its factual findings and was a reasonable interpretation of the law. The district court did not abuse its discretion.

***9** Affirmed.

All Citations

449 P.3d 454 (Table), 2019 WL 4724758

End of Document