Case 123216 CLERK OF THE APPELLATE COURTS Filed 2023 May 19 PM 5:14

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 APPELLEE

Appeal from the District Court of Shawnee County, Kansas
Honorable David Debenham, Judge
District Court Case 19 CR 1946

JODI LITFIN, # 24638
Deputy District Attorney
Office of the District Attorney
200 SE 7th Street, Suite 214
Topeka, Kansas 66603
(785) 251-4330
Fax: (785) 251-4909
jodi.litfin@snco.us
Attorney for Appellee

TABLE OF CONTENTS

NATURE OF THE CASE

Zachary McFall, the Defendant, was a minor who the district court authorized to be prosecuted as an adult. The Defendant was convicted by a jury of one count of first-degree premeditated murder, one count of felony murder, and criminal discharge of a firearm at an occupied vehicle resulting in great bodily harm. The district court sentenced the Defendant to a hard 50 life sentence for the premeditated first-degree murder conviction and 94 months for the criminal discharge of a firearm conviction to run concurrently. The Defendant now appeals.

STATEMENT OF THE ISSUES

I. **The district court did not abuse its discretion when it denied the Defendant's request for a new attorney.**

II. **The Defendant was not denied the right to effective assistance of counsel at sentencing under *Cronic*.**

III. **The prosecutor did not misstate the law, and thus, did not commit prosecutorial error.**

IV. **The jury instructions on aiding and abetting, first-degree murder, and second-degree murder were not clearly erroneous.**

V. **The Defendant was not denied his right to a fair trial by cumulative error.**

STATEMENT OF THE FACTS

On July 25, 2019, D.C., J.P., and D.S. aka "Bop" were at J.M.'s house playing video games. (R. 14, 691-94, 749-50.) D.C. knew the Defendant from high school. (R. 14, 719.) D.C. and the Defendant were feuding, either over a girl, or over the fact that D.C. and J.M. had stolen a gun from the Defendant. (R. 14, 750; R. 15,

964.) That day, there was a plan for the Defendant and D.C. to meet at Betty Phillips Park, in the Hi-Crest neighborhood of Topeka, to have a fist fight—one on one. (R. 14, 721, 750-52.)

J.M., D.C., J.P., and "Bop" loaded up into J.M.'s white Grand Marquis and drove to the park. (R. 12, 280; R. 14, 697, 701, 752; R. 15, 953, 980.) J.M. was driving, "Bop" was in the front passenger seat, and D.C. and J.P. were in the back seats. (R. 14, 698, 731.) During the time J.M and the other boys were at the park, the Defendant did not show up. (R. 14, 752.) While driving slowly in that area, J.M. stuck his hand out the window and "let off like four [or five] shots in the air" from a semi-automatic handgun. (R. 13, 649, 653; R. 14, 704-06, 730, 740-41, 752, 761; R. 15, 945.) "Bop" also shot off some rounds. (R. 14, 752, 761-62.) J.M. then drove off. (R. 13, 654; R. 14, 753, 763-65, 767.) Darin Disney lived nearby and called 911 to report the gunshots. (R. 13, 649, 653.)

Shortly thereafter, the Defendant and D.W. arrived at Disney's house in the Defendant's blue Pontiac G6. (R. 12, 352; R. 13, 655, 657; R. 15, 957.) The Defendant parked at the bottom of Disney's driveway. (R. 13, 657.) The Defendant and D.W. got out for a few seconds and interacted with the group of people that had gathered on Disney's porch. (R. 13, 655, 659-61; R. 15, 957.) Then another male, "Tay" ran to the Defendant's car from a nearby house. "Tay" was carrying a "longer bag" and got in the backseat. (R. 13, 655, 660, 663-65; R. 15, 957.) The Defendant and D.W. then got back in the car. The Defendant drove, and D.W. got in the front passenger seat. (R. 13, 661; R. 15, 948.) D.W. had a book bag when he returned to

the car. (R. 13, 660, 661.) Disney heard "Tay" say "Let's go get 'em" and D.W. answer "yeah." (R. 13, 665; R. 15, 948.) Disney knew they were talking about the group of boys in J.M.'s white Grand Marquis. (R. 13, 665-66.) The Defendant then drove away in the same direction that J.M.'s car went. (R. 13, 666.)

Jacob Keeler also lived in the area. Keeler was outside working on his motorcycle, heard the gunshots, and saw J.M.'s white car speed away. (R. 14, 761-62, 764, 765, 767.) Shortly after that, the Defendant's G6 pulled up to Keeler, and D.W. asked him where the white car went. (R. 14, 768, 770, 772, 773, 774.) D.W. had a black semi-automatic pistol in his hand. (R. 14, 773-74.) Keeler also saw a male in the backseat with a black semi-automatic rifle. (R. 14, 773.) Keeler said, "I didn't see nothing." (R. 14, 768.) The Defendant then sped away. (R. 14, 776.)

When J.M. got to the intersection of 37th and Adams, someone in the car said "that's them there." (R. 14, 709-10.) D.C. then heard shots and then he and J.P. ducked down in the backseat. (R. 14, 710, 711, 716, 754.) D.C. heard around 16 shots and felt pieces of the car seats coming off from the bullets. (R. 14, 711.) D.C. knew it was coming from behind them, but he never actually looked back. (R. 14, 712.) Behind them, in the G6, either D.W. or "Tay" was sitting on the edge of the windowsill of the back window with a semi-automatic rifle resting on the roof of the car shooting at J.M.'s car. (R. 12, 237, 239, 252-53, 257-58, 260, 263-64, 267-69, 273-77; R. 13, 486-87, 490, 508, 665; R. 14, 753; R. 15, 946, 969.) Several people were at or near the intersection and witnessed the shooting. The witnesses heard between 10 to 30 consistent shots from the rifle. (R. 12, 239-40, 276-77, 281; R. 13,

504; R. 14, 777.) Then a handgun appeared from the driver's side of the Defendant's car and shot another five to six shots at J.M.'s car. (R. 12, 240, 250, 277-78; R. 13, 489-90, 506, 508-09, 602, 606-07.)

J.M. was shot in the back of the head and in the thigh. (R. 12, 384; R. 14, 713, 754.) J.M.'s car coasted, popped over the curb, and came to a stop. (R. 12, 277-78, 281-82, 294, 313, 452; R. 13, 505, 608.) D.C., J.P., and "Bop" all got out of the car and ran. (R. 12, 241, 255-56, 280, 294, 311-12; R. 13, 488, 494; R. 14, 712, 714, 754.) Witnesses came to help render aid to J.M. (R. 12, 453-54.) They found a .380 handgun wrapped in a mask or bandana in J.M.'s lap and placed it on the hood of the car. (R. 12, 315-17, 386-87, 454-58, 462-67; R. 15, 951-52.) The .380 was collected by law enforcement. (R. 12, 462, 466-67.)

J.M. was taken to the hospital but later died from the gunshot wound to his head. (R. 12, 386-88; R. 13, 519-23, 530.)

The Defendant drove back to D.W.'s house. (R. 13, 668; R. 14, 778.) The Defendant and D.W. went inside the house. (R. 14, 668, 672, 778, 780; R. 15, 949.) "Tay" arrived at D.W.'s house separately, in a silver car, and went inside another nearby house. (R. 14, 671; R. 15, 949.) The Defendant's brother, Lee, came and picked up the Defendant from D.W.'s house and took him to their father's house. (R. 14, 902-03; R. 15, 989.)

Jeffrey Orender, a neighbor of the Defendant's father, spoke to the Defendant after the shooting. (R. 14, 880-82.) The Defendant told Orender that somebody had been shot or killed. (R. 14, 882-83; R. 15, 956.) Orender also overheard the

Defendant talking to his father on the phone. (R. 14, 883.) The Defendant told his father that he believed that someone got shot or killed. (R. 14, 883.)

D.C. and J.P. returned to the scene and were taken to the Law Enforcement Center and interviewed by Detective Ryan Hayden. (R. 14, 716, 717, 746-47.) D.C. told Det. Hayden about the plan to meet at the park to fight. (R. 14, 751-52, 755.) D.C. told Det. Hayden that the Defendant did not show up at the park so they went to a nearby house, and J.M. and "Bop" shot at it. (R. 14, 752.) D.C. told Det. Hayden that they then left the area. When they got to 37th and Adams a blue-green Pontiac appeared behind them and started shooting. (R. 14, 753.) When the gunfire started, D.C. ducked down in the backseat. Eventually, the car came to a stop, D.C. looked up, and saw that J.M. had been shot in the back of the head. (R. 14, 754.) D.C. told Det. Hayden he got out of the car and ran to a friend's house nearby. (R. 14, 754.) J.P. gave a similar statement to Det. Hayden. (R. 14, 755.) "Bop" never returned to the scene and was never found or interviewed by law enforcement. (R. 14, 717; R. 15, 953, 981.)

The Defendant's car was quickly located at D.W.'s house. (R. 13, 604, 610; R. 14, 748-49; R. 15, 947.) The Defendant's father was the registered owner of the car, and the Defendant's wallet and driver's license were found inside the car. (R. 14, 791; R. 15, 947.) No firearms or ammunition was found inside the car. (R. 14, 788, 792.)

During the investigation, Detective Victor Riggin spoke with Lee. (R. 14, 904-05; R. 15, 984.) Lee told Det. Riggin that he was with the Defendant earlier on

the day of the shooting. Lee said that he and the Defendant were at their father's house working on the Defendant's car. (R. 14, 891-94; R. 15, 986.) Lee heard the Defendant on the phone arguing with J.M. and D.C. over a stolen handgun. (R. 15, 986-87.) Lee told Det. Riggin that, after that, the Defendant asked Lee to follow him to Betty Phillips Park, so Lee did. (R. 14, 894-96; R. 15, 987.) Lee thought that the Defendant was going to meet up with D.W. at the park because their father does not approve of the Defendant hanging out with D.W. at his house. (R. 15, 987.) Lee followed the Defendant to the park and then drove away. (R. 4, 896, 898-99; R. 15, 988.)

Shortly thereafter, the Defendant called Lee. (R. 14, 900, 901, 909-10; R. 15, 988.) Due to a child custody case, Lee had his phone record his phone calls. (R. 14, 905.) As a result, the phone call between the Defendant and Lee was recorded, and Lee provided it to Det. Riggin. (R. 14, 905-07; R. 15, 988-89.) The conversation between the Defendant and Lee was:

The Defendant:	Hey Lee, Lee, bro they just slid on me, bro.
The Defendant:	I'm finna slide back on 'em, bro.
Lee:	Where you at?
Lee:	Where you at?
The Defendant:	On, on, on Adams, bro, come on, bro.
Lee:	I'm comin'.

[Then a series of more than 20 gunshots can be heard]

The Defendant:	Where they headed?
The Defendant:	They just wrecked. We just made 'em wreck, bro.
The Defendant:	Where you at?
The Defendant:	I'm going back to [D.W.'s] house, dog.
The Defendant:	Go to [D.W.'s] house, bro. Go to [D.W.'s] house.
Lee:	I'm on my way there now.
The Defendant:	Take this, bro.

(R. 20, 9, State's Exhibit 143.)

Lee told Det. Riggin that he picked up the Defendant from D.W.'s house and took him to their father's house. (R. 14, 902; R. 15, 989.) Lee said that the Defendant was scared and said, "he had killed him." (R. 15, 989.) Lee did not ask the Defendant what that meant. (R. 15, 989.)

As a part of the investigation, a search warrant was executed at D.W.'s house. (R. 14, 793, 795, 801; R. 15, 959, 961.) A .9 mm bullet was found in a bedroom. (R. 14, 800; R. 15, 959-60; R. 19, 41, State's Exhibit 160.) A gray duffle bag containing a Century Arms 7.62 by 39 mm semi-automatic rifle and an empty magazine was found inside a closet. (R. 14, 802, 809; R. 15, 943, 959, 961; R. 19, 43-51, State's Exhibits 162-170.) The rifle had a partial DNA profile from at least three different people. (R. 14, 809, 843.) The partial major DNA profile from the rifle was consistent with D.W.'s DNA. (R. 14, 843-44.)

Four .380 shell casings and four 45 shell casings were found near Betty Phillips Park. (R. 13, 618-20, 632-38.) The .380 shell casings matched the .380 gun that was found in J.M.'s lap. (R. 14, 860; R. 15, 951-52.) The DNA on that gun was insufficient for comparison. (R. 14, 842.) A 45 firearm was never found. (R. 15, 952.) Twenty 7.62 by 39 mm shell casings associated with an assault rifle and four .9 mm shell casings were found in the area of 37th and Adams. (R. 12, 407, 417, 424-25, 427.) The 7.62 by 39 mm shell casings matched the assault rifle found in D.W.'s house. (R. 14, 861-65.) A .9 mm firearm was never found. (R. 15, 944.)

The Defendant turned himself into law enforcement on July 27, 2019. (R. 15, 964-65.) On July 28, 2019, Disney called Detective Jared Strathman and told him that D.W. was at his house. (R. 15, 965.) Law enforcement arrived and arrested D.W. (R. 15, 966.) "Tay" was arrested in another state and brought back to Kansas. (R. 15, 967-68.)

Another search warrant was executed at Disney's house, and an empty Glock .9 mm magazine was found in a dresser drawer in a bedroom. (R. 13, 647; R. 14, 811, 812.)

Four days after the Defendant was arrested, he spoke to Chastine Slater on the phone from the jail. (R. 15, 941-42.) Slater told the Defendant, "Monica said they found the guns at [D.W.'s] house." (R. 15, 942; R. 20, 12, State's Exhibit 224 at 00:21-00:38.) The Defendant replied, "all of 'em?" (R. 15, 942; R. 20, 12, State's Exhibit 224 at 00:21-00:38.) Slater said she didn't know but that they found the gun at D.W.'s house. (R. 20, 12, State's Exhibit 224 at 00:21-00:38.)

Rap lyrics authored by the Defendant were found in his jail cell. (R. 15, 969-980; R. 19, 64-75, State's Exhibit 186.) The lyrics mention the shooting and murder of J.M., rifles and guns, "I slid back and emptied a whole clip," "my shootas Tay G and [D.W.]," "We gon blow yo ass down like we did you friend July 25," "Nigga got shot in the head. We all caught homis for it. Free me, free Tay G, and free D." (R. 15, 971-78.) In another jail call to his father, the Defendant admitted that he wrote the raps to "express my feelings" and that he was a "grown ass man" that can write

raps if he wanted. (R. 20, 13, State's Exhibit 225 at 00:56-09:40, 10:29-13:30, 13:42-16:07, 17:39-18:53; R. 15, 979-80.)

The Defendant was prosecuted as an adult and charged with one count of first-degree premeditated murder, one count of felony murder, and criminal discharge of a firearm at an occupied vehicle. (R. 1, 18-24.) The case proceeded to jury trial. The jury found the Defendant guilty of first-degree premeditated murder, felony murder, and criminal discharge of a firearm at an occupied vehicle. (R. 1, 142-44; R. 15, 1053.)

The district court sentenced the Defendant to a hard 50 life sentence for the premeditated first-degree murder conviction, and 94 months for the criminal discharge of a firearm conviction to run concurrent. (R. 1, 174-183; R. 17, 18-22.) The Defendant now appeals his convictions and sentence. (R. 1, 171.)

ARGUMENTS AND AUTHORITIES

I. The district court did not abuse its discretion when it denied the Defendant's request for a new attorney.

Relevant Facts and Preservation

Prior to trial, defense counsel filed a "Motion to Determine Competency to Stand Trial." (R. 1, 81-82.) Additionally, at the Defendant's request, defense counsel filed a "Motion to Withdraw as Counsel." (R. 1, 83.) A pretrial hearing was held, and the district court referenced that the Defendant filed "a paper." (R. 10, 2.) The district court asked the Defendant what he was requesting, and the Defendant answered, "[a] new attorney." (R. 10, 2.) The district court then heard defense

counsel's request for a competency evaluation. (R. 10, 3-9.) The district court ordered a competency evaluation be completed. (R. 10, 13.)

Defense counsel also informed the district court that both he and the Defendant's previous juvenile attorney had discussed the discovery and the meaning of all of the reports with the Defendant as well as the State's theory of the case and all the facts alleged. Defense counsel did not provide him with actual paper discovery but said that he would do that once he had properly redacted information from it. (R. 10, 12, 13.) The district court noted, "And I don't mean to entail that providing your client with the summation of the evidence the State has, witnesses and statements and things like that isn't discovery by any means. And discovery can be actually providing your client with written reports or passing that information on. I know some counsel are – they're hesitant about sending over paper reports, because other individuals in jail can get hold of that; it seems like." (R. 10, 12-13.)

The district court then set a competency hearing and stated that the motion for new counsel would be addressed at that hearing, after they resolve the competency issue. (R. 10, 15.) At the end of the hearing, defense counsel informed the district court that the Defendant would like to address the court. The Defendant told the district court:

> Your Honor, I apologize, for taking your time. Your Honor, I have been in custody since July 27th of 2019. I still do not have my discovery. I still have not had a fit. The entire relation, my attorney has only been to see me for –
>
> [...]

> All right. My attorney has only been to see me four times. He represented me. He represented a witness in my cousin's murder trial. I personally believe that is a conflict of interest in my case.
>
> He has told me he hates jury trials. They scare him, and they are long, and that I need to take a plea, and that included protective custody, out-of-state, when I addressed [defense counsel] with my defense and as he asked me what he[SIC] should say on the stand.
>
> The last time I seen [defense counsel], I told him I wanted a new attorney, and he was fired. He respond with "You're a dumb – sorry for my language – ass, and will spend the rest of your life in prison."
>
> Your Honor, please appoint me a new attorney.

(R. 10, 19.)

The district court told the Defendant that they would take up his request after the competency evaluation. (R. 10, 19-20.)

A competency hearing was held, and the district court also addressed the Defendant's motion for new counsel. (R. 8.) Neither party had an objection to Dr. Blakely's evaluation that the Defendant was competent. (R. 8, 2.) Based on the evaluation, the district court found the Defendant was competent. (R. 8, 3.)

The district court then had an in camera hearing on the motion for new counsel. (R. 8, 4.) The district court allowed the Defendant to explain his request for new counsel. (R. 8, 5.) The Defendant first told the district court that he believed there was a conflict of interest because defense counsel had previously represented a witness in a murder trial involving the murder of his cousin in 2018. (R. 8, 5-9.)

Next, the Defendant argued that he wanted new counsel because defense counsel had only been to see him three times, he had not received discovery, and that defense counsel begged him to take a plea deal that he did not want to take. (R. 8, 10.) The Defendant asserted that defense counsel had not talked to him about what was in the police reports and had not discussed any of the evidence in the case. (R. 8, 10-11.) The Defendant claimed that his attorney only told him that the "DA is trying to accuse me of driving the vehicle. That's all he told me." (R. 8, 11.) The Defendant agreed that he was present at the preliminary hearing and heard the evidence from the State's witnesses at that time but claimed that was the only thing that he knew about the case. (R. 8, 10-11.)

The district court asked the Defendant if there were any other reasons for his request for new counsel. The Defendant answered, "No, sir." (R. 8, 11.)

Defense counsel told the district court that he had represented a woman who was a material witness in a homicide case where the Defendant's cousin was the victim. (R. 8, 12.) Defense counsel did not make the connection between the Defendant and the victim in the other case until the Defendant mentioned it. (R. 8, 12.) Defense counsel explained that the witness was not charged in relation to that homicide. Defense counsel also told the court that he represented the woman in a recent drug case in which she pled, was placed on probation, and had an alleged probation violation. (R. 8, 12-13.) The district court stated it "seems to me from what you told me and [the Defendant] told me on this issue is that there is no conflict." (R. 8, 13.) Defense counsel agreed. (R. 8, 13.)

The district court then asked defense counsel to address the second complaint raised by the Defendant in his request. (R. 8, 13.) Defense counsel stated that he had extensive discussions with the Defendant's prior juvenile attorney about his representation. The Defendant's juvenile attorney explained to defense counsel that he had extensive discussions with the Defendant about the allegations against him, the State's theory of the case, and the relevant facts associated with the charges. (R. 8, 14.) Defense counsel told the court he had three if not four meetings with the Defendant where they had extensive discussion about the crimes charged, the State's theory of prosecution, and the possible penalties. (R. 8, 15.) Defense counsel stated that he had not provided the Defendant with actual police reports but had extensive discussion about all the allegations made by the State. (R. 8, 15.)

Defense counsel also noted that he had met with the Defendant's parents numerous times to discuss the charges and penalties and that they related to him that they were discussing this with the Defendant. Defense counsel then made lengthy and detailed comments to the district court about everything that he had done with the Defendant throughout the case. (R. 8, 13-24.) At the end of defense counsel's remarks, he stated, "as an officer of the court, if the Court's question to me is if you have an opinion as to whether there is a basis under the law to justify my removal as counsel and my answer is no. I'm ready to proceed but that decision is yours." (R. 8. 24.)

After defense counsel's comments the district court asked if the Defendant had anything to add. The Defendant responded, "No, sir." (R. 8, 24.) The district court denied the motion for new counsel. The district court held:

> As to the defendant's motion for new counsel, that is denied. What I find in this case is that the defendant is being represented by competent counsel, that counsel has 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 – evidentiary preliminary hearing in this case. I adopt the findings – the statements made by defense counsel of his representation and I find the defendant has not met his burden in this case [to] show that there is a conflict as – as a valid reason for the appointment of new counsel in this case, that his dissatisfaction with [defense counsel] is unjustified. So that motion for new counsel is denied.

(R. 8, 25-26.)

Standard of Review

Whether the district court adequately discharges its duty to inquire into a potential conflict of interest is reviewed for an abuse of discretion. *State v. McDaniel*, 306 Kan. 595, 606, 395 P.3d 429 (2017). A court abuses its discretion when its decision is arbitrary, fanciful, or unreasonable or based on a mistake of fact or law. *State v. Moyer*, 306 Kan. 342, Syl. ¶ 4, 410 P.3d 71 (2017). When a potential conflict of interest arises as to an attorney's representation, a district court can abuse its discretion in three ways: (1) by failing to inquire about a potential conflict; (2) by failing to appropriately inquire (by not investigating the basis of the complaint or the facts underlying it); and (3) by reaching an unreasonable result after an appropriate inquiry. *McDaniel*, 306 Kan. at 606-07; see also *State v. Toothman*, 310 Kan. 542, 554, 448 P.3d 1039 (2019) (describing

appropriate inquiry).

Argument

The Sixth Amendment of the United States Constitution guarantees a criminal defendant the right to effective assistance of counsel. *State v. Pfannenstiel*, 302 Kan. 747, 758, 357 P.3d 877 (2015). This right carries with it "a correlative right to representation that is unimpaired by conflicts of interest or divided loyalties." 302 Kan. at 758.

The district court is charged with ensuring a defendant receives conflict-free representation. *State v. McDaniel*, 306 Kan. 595, 606, 395 P.3d 429 (2017). To carry out this obligation, a district court has an independent duty to inquire further when it either becomes aware or should have been aware of a potential conflict of interest. *State v. Prado*, 299 Kan. 1251, 1257, 329 P.3d 473 (2014); *State v. Sharkey*, 299 Kan. 87, Syl. ¶ 2, 322 P.3d 325 (2014). Practically speaking, this means that when a district court receives "an articulated statement of attorney dissatisfaction," the court must inquire into the alleged conflict. *McDaniel*, 306 Kan. at 606. The existence of this duty turns on the allegation of a conflict, not the particular relief sought by the defendant. *Pfannenstiel*, 302 Kan. at 760.

An appropriate inquiry involves "fully investigating both the basis for the defendant's dissatisfaction with counsel and the facts necessary for determining whether the dissatisfaction justifies appointing new counsel." *State v. Staten*, 304 Kan. 957, Syl. ¶ 8, 377 P.3d 427 (2016). At the same time, the district court need not undergo a "detailed examination of every nuance of a defendant's claim .... A

single, open-ended question by the trial court may suffice if it provides the defendant with the opportunity to explain." 304 Kan. at 972-73. The focus is not on the defendant's relationship with the attorney, but on whether the attorney can adequately represent the defendant's interests. *Pfannenstiel,* 302 Kan. at 761-62.

To begin his analysis, the Defendant includes a section entitled "Additional Context." (Appellant's Brief, 17-21.) In this section, the Defendant asserts that due to his minority age, he was still a child, even if he was being prosecuted in adult court. See K.S.A. 38-101 (period of minority). The Defendant includes a nonexclusive list of what children are allowed to do and not allowed to do under numerous Kansas statutes and laws. The Defendant contends that because he was a child, the district court must take into consideration what we know about children generally as well as the Defendant as an individual, when addressing a motion for new counsel in this circumstance.

The Defendant fails to adequately explain how his youth amounted to justifiable dissatisfaction. Nor is there anything in the record to support the Defendant's claim that despite the fact that he was prosecuted as an adult, the district court did not fully consider the circumstances present in this case when determining whether he had established justifiable dissatisfaction warranting the appointment of new counsel.

Here, the Defendant's request for new counsel alerted the district court to the potential conflict of interest between him and defense counsel. The district court then set a hearing, appropriately inquired about the potential conflict, and reached

a reasonable result when it denied the Defendant's motion. The Defendant's contention that the district court abused its discretion when it denied his motion has no merit.

The record establishes that the district court asked the Defendant for the reasons he was requesting a new attorney, and the Defendant explained his reasons. Then defense counsel explained his working relationship with the Defendant and informed the district court that he did not believe there was a legal reason to remove him as counsel. (R. 8, 24.)

The Defendant was given the chance to tell the district court any and all additional reasons why he believed there was a conflict of interest, irreconcilable disagreement, or potential breakdown of communication between he and defense counsel. Despite the chance to elaborate, the Defendant offered no other reasons. Contrary to the Defendant's argument, the district court conducted an appropriate inquiry into any potential conflict of interest, offered the Defendant the opportunity to present any other reasons or concerns, and went through the listed reasons in his motion.

The district court found no conflict of interest in defense counsel's representation of a woman who was a material witness in a prior homicide case. The district court did not abuse its discretion in making this finding.

The Defendant next claims the district court abused its discretion when it did not specifically ask him about certain statements he made to Dr. Blakely that were in the competency evaluation. Notably, the competency evaluation is used to

determine whether the Defendant is competent or not. The purpose of the evaluation is not for the district court to comb through to find statements by the Defendant that might support justifiable dissatisfaction. The Defendant ignores the fact that he was given two opportunities by the district court to express all his concerns about defense counsel and provide the reasons he believed he was entitled to new counsel.

Additionally, in an earlier hearing, the Defendant told the district court that defense counsel had called him a "dumbass," so the district court was aware of this complaint even if he did not specifically ask the Defendant about it. Defense counsel denied calling the Defendant this name, and the district court accepted defense counsel's statement.

The Defendant also contends that the district court abused its discretion when it failed to ask defense counsel about "the concerns Dr. Blakely identified during the evaluation." (Appellant's Brief, 24.) The evaluation mentioned that the Defendant said that "they say big words in Court" and that he does not always understand all of them, he may have made a mistake getting off of his medication, he shows cognitive slippage, and that he can help in his own defense if he gets the right lawyer or irons things out with his current lawyer. (R. 22, 1-7.) Again, the Defendant was given the opportunity to explain that defense counsel used words that he did not understand, and thus, there was a breakdown in communication or he was unable to communicate with defense counsel. But the Defendant did not raise that concern at the hearing. The other concerns identified by the Defendant in

the evaluation focused more on whether the Defendant was competent, which he was found to be.

The Defendant also claims that the district court aggravated the conflict when it did nothing to shut down defense counsel when he went beyond factual statements into "confidential client communications" and started advocating against his client. (Appellant's Brief, 25.) Here, defense counsel was merely responding to the Defendant's claims at the request of the district court during an in camera hearing. Defense counsel did not disclose confidential client communications, nor did he advocate against his client's position. Defense counsel informed the district court about his work with the Defendant on the case and left the ultimate decision about whether new counsel should be appointed up to the district court. Defense counsel provided his honest opinion to the district court that he did not believe there was any legal reason for him to withdraw as counsel.

Nor should this Court conclude that there is a duty to advocate to be removed as counsel. If this duty existed, courts would have an even more challenging time finding attorneys willing and able to remain on cases with difficult clients.

Lastly, the district court did not place undue emphasis on defense counsel's statement that the Defendant was present at his juvenile hearing and preliminary hearing as support that the Defendant was aware of the evidence and alleged facts of the case and the State's theory of aiding and abetting. The Defendant's claim was that defense counsel never explained the State's theory of the case or any of the evidence to him, essentially that he knew nothing of the case. Defense counsel

simply noted that the Defendant was present at two hearings where evidence was presented and he had to have some knowledge as to the allegations and evidence against him.

None of these reasons establish an abuse of discretion by the district court. The Defendant did not establish justifiable dissatisfaction with defense counsel, e.g., an irreconcilable conflict or a complete breakdown in communication. Accordingly, it was not unreasonable for the district court to deny the Defendant's request.

II. The Defendant was not denied the right to effective assistance of counsel at sentencing under *Cronic*.

Preservation

As noted by the Defendant, this issue was not raised before the district court and is not preserved for this Court's review. "Claims of ineffective assistance of counsel, as a general rule, cannot be raised for the first time on appeal. Rather, in most cases a trial court must consider the evidence to determine the two-prong test for establishing ineffective assistance of counsel." *Trotter v. State*, 288 Kan. 112, Syl. ¶ 1, 200 P.3d 1236 (2009). An appellate court may consider a claim of ineffective assistance for the first time on appeal if: (1) there are no factual issues in dispute, and (2) the test for ineffective assistance of counsel can be resolved as a matter of law based on the record. *State v. Salary*, 309 Kan. 479, 483-84, 437 P.3d 953 (2019).

The Defendant claims that this Court may consider the issue because it presents a case-dispositive question of law, based on undisputed facts. The

Defendant also notes that this issue concerns his fundamental constitutional right to counsel. However, neither reason requires this Court to address the issue.

An appellate court's decision to review an unpreserved claim under an exception is a prudential decision, and even when an exception is satisfied, appellate courts need not review the newly asserted claim. *State v. Gray*, 311 Kan. 164, 170, 459 P.3d 165 (2020). In *Gray*, this Court held: "The decision to review an unpreserved claim under an exception is a prudential one. Even if an exception would support a decision to review a new claim, we have no obligation to do so." 311 Kan. 164, Syl. ¶ 1. It then "decline[d] to utilize any potentially applicable exception to review Gray's new [identical offense doctrine] claim" based on this rule. 311 Kan. at 170. In fact, it clarified that it would not consider Gray's identical offense doctrine argument because by not making the argument before the district court, Gray "deprived the trial judge of the opportunity to address the issue in the context of [his] case" and therefore also deprived it of significant analysis that would have benefited its review. 311 Kan. at 170.

Here, by not making his argument below, the Defendant deprived the district court of the opportunity to consider his argument. As such, this Court should decline to address the Defendant's claim that he was denied his right to effective counsel at sentencing raised for the first time on appeal.

Standard of Review

Whether an issue is preserved for appellate review is a question of law, over which this court exercises unlimited review. *State v. Plummer*, 295 Kan. 156, Syl. ¶

1, 283 P.3d 202 (2012). Additionally, the Defendant claims that his Sixth Amendment right to counsel was violated—a question that this Court reviews de novo. See *State v. Robinson*, 303 Kan. 11, 85, 363 P.3d 875 (2015), *disapproved of on other grounds by State v. Cheever*, 304 Kan. 866, 375 P.3d 979 (2016).

Argument

Ineffective assistance of counsel claims based on deficient performance are controlled by the two-prong *Strickland* analysis. To establish ineffective assistance of counsel, the defendant must show (1) his attorney's performance fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defense. *Balbirnie v. State*, 311 Kan. 893, 894, 468 P.3d 334 (2020) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 [1984]).

There is an exception to the general *Strickland* rule known as the *Cronic* exception. The *Cronic* exception applies only when a defendant is denied the assistance of counsel or denied counsel at a critical stage of a proceeding. Under these circumstances, a court may presume the defendant was prejudiced. *Fuller v. State*, 303 Kan. 478, 486-87, 363 P.3d 373 (2015) (relying on *United States v. Cronic*, 466 U.S. 648, 658-59, 104 S. Ct. 2039, 80 L. Ed. 2d 657 [1984]). *Cronic* applies in rare circumstances: "This narrow exception, referred to as the *Cronic* exception, is 'reserved for situations in which counsel has entirely failed to function as the client's advocate.' This Court has stressed this last point, emphasizing 'the attorney's failure must be complete,' that is, the *Cronic*-type presumption applies

only ' "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." ' [Citations omitted.]" *Edgar v. State*, 294 Kan. 828, 840, 283 P.3d 152 (2012).

The Defendant argues that the *Cronic* exception should apply because his attorney denied him counsel at sentencing by failing to file a departure motion and his attorney's comments. The Defendant only argues that the *Cronic* exception applies and does not argue that he can establish deficiency and prejudice under the *Strickland* standard. Thus, he has waived any such argument. See *State v. Boleyn*, 297 Kan. 610, 633, 303 P.3d 680 (2013) (Issues not briefed are deemed waived or abandoned).

This is not a rare circumstance where the *Cronic* exception applies. Defense counsel did not completely abandon his role as an advocate. Here, the only witness presented by the State at sentencing was J.M.'s mother, who made a very brief statement to the court asking it to impose a life sentence. (R. 17, 7.) The State presented no other evidence. During the State's sentencing recommendation, the prosecutor asked the district court to sentence the Defendant on both counts of first-degree murder, although it had no authority to support that request. (R. 17, 8-10.) Defense counsel objected to sentencing on the felony murder count, argued the conviction was multiplicitous, and asked the court to dismiss that count. (R. 17, 10-11.) As such, defense counsel advocated for his client and correctly argued that the counts were multiplicitous and that he should not be separately sentenced on both counts.

Defense counsel did not call any witnesses but did make argument as to his sentence. Defense counsel argued:

> All right. Thank you, Judge. Your Honor, I would submit to the Court that this is one of those cases that unfortunately we're seeing way too often. Another senseless homicide. Not that homicides are supposed to make sense anyway, but in this particular case, we have, basically, kids killing kids. As I understand it factually, [the Defendant] is in fact a friend of the victim in this particular case. And, Judge, I would also submit to the Court, and this is primarily an argument in opposition to the State's request that Counts 1 and 3 run – run consecutive.
>
> Also, Judge, this is just one of those cases that we see where – and I'll have to be perfectly frank with the Court. [The Defendant], he's young. Notwithstanding that, he's had the opportunity to observe and be [a part] of the litigation in this case. As the Court recalls, we had a preliminary hearing. I believe it was bifurcated. It went a total of almost a day. [The Defendant] had the opportunity to listen to the testimony that was presented in that particular case. As his counsel, I had the opportunity to cross examine these witnesses.
>
> [The Defendant] also had the benefit of my advice and explanation of the law, the review of discovery. In fact, he also has the benefit of the fact that he was there. 'Um, notwithstanding all of that, he made the decision, and it was his decision to make to go to trial in this matter. Also, at that particular time and during that week, [the Defendant] had the opportunity to listen to the witness' testimony. Through me, he had the opportunity to cross examine witnesses. He also – today, he's even had the opportunity to listen to the victim's mother explaining the horrific loss that she had suffered.
>
> Notwithstanding all of that, Judge, I am 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 [the Defendant]. 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.

'Um the only thing that I have to say, Judge, is what my hope is, and something I would like the Court to consider is his youth and the fact that first degree murder count is a hard-50. 50 years, that's a lot of time, Judge. There's no good-time associated with that, and as the Court knows, it's a – it's a flat 50. What my hope is for this young man is that at some point in time, the light bulb will go on in his mind once he is in prison thinking about what happened here. And maybe at some point in time, he'll accept, or at least at a minimum, acknowledge what his conduct has resulted in and the loss that was created, and maybe the hope that he can turn his life around, and whether it be from prison or –

[...]

That's alright, Judge. What my hope is for [the Defendant] is that at some point in time, that happens, and that he made a choice, a concerted choice to devote the rest of his life to be constructively engaged in contributing something positive to our society, whether it be still in prison or at some point be released. And I say, this, Judge, and I understand the victim in this case didn't have a second choice. In fact, he didn't have a first choice, but what I would request and suggest to the Court, given the fact that [the Defendant's] age and given the fact that he was not the shooter in this particular case is that the Court not to impose Counts 1 and Counts 3 consecutive so that there is at least some opportunity at some point in time, hopefully, that the light bulb goes on with him and he realizes what he's done and what he needs to do with the rest of his life. I would make that request on his behalf.

(R. 17, 12-16.)

Defense counsel's argument was frank, recognized the overwhelming evidence against the Defendant, and the Defendant's attitude throughout the case. Nevertheless, defense counsel opposed the State's request to run counts 1 and 3 consecutive. Defense counsel asked the district court to consider the Defendant's youth and the fact that he was not the shooter here, but merely the driver. Ultimately, the district court did not sentence counts 1 and 3 consecutively but

ordered them to run concurrent. As such, defense counsel did advocate for the Defendant and there was no complete denial of counsel at sentencing.

The *Cronic* exception is "reserved for situations in which counsel has entirely failed to function as the client's advocate." *Florida v. Nixon*, 543 U.S. 175, 177, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004) (noting that *Cronic*, which did not apply the exception, itself illustrates "just how infrequently" cases will fall into its exception); *State v. Adams*, 297 Kan. 665, 670-71, 304 P.3d 311 (2013) (*Cronic* exception to ineffective assistance of counsel claim is rare, and in most cases the analysis is controlled by *Strickland*). This is not one of those situations.

III. The prosecutor did not misstate the law, and thus, did not commit prosecutorial error.

Standard of Review

When analyzing claims of prosecutorial error, this Court first asks whether the prosecutor's comments were improper and outside the wide latitude that the State has to prove its case. If they were, the Court then asks whether the improper comments prejudiced the jury against the defendant and denied the defendant a fair trial. *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016). Appellate courts will review a prosecutorial error claim based on a prosecutor's comments made during voir dire, opening statement, or closing argument even without a timely objection, but the court may figure the presence or absence of an objection into its analysis of the alleged error. *State v. Butler*, 307 Kan. 831, 864, 416 P.3d 116 (2018).

Argument

A. The prosecutor did not misstate the law on aiding and abetting, premeditation, or first-degree murder.

The Defendant next argues that the prosecutor committed prosecutorial error in closing argument by misstating the law on aiding and abetting, premeditation, and first-degree murder. (Appellant's Brief, 32-37.) The State disagrees. Of note, the State waived rebuttal closing so there was only the initial closing argument by the State in this case.

In determining whether a particular statement falls outside of the wide latitude given to prosecutors, this Court considers the context in which the statement was made, rather than analyzing the statement in isolation. *State v. Thomas*, 307 Kan. 733, 744, 415 P.3d 430 (2018). A prosecutor's misstatement of law constitutes prosecutorial error. *State v. Davis*, 306 Kan. 400, 413, 394 P.3d 817 (2017).

Jordan first complains of the prosecutor's comments about aiding and abetting. As the prosecutor recited a lengthy and detailed summary of the evidence, the prosecutor stated,

> And then you hear testimony about additional shots fired that sounded different than the 7.62. That's what the witnesses said, and yet we found evidence to support that. We found five 9-millimeter shell casings just east of where the white Grand Marquis wrecked. And you heard testimony from Mr. Wolfley, and I believe Mr. Stokes that there were – there was a second shooter shooting from the Grand Marquis from the driver's side. Was it the defendant? Was it [D.W.]? Was it ["Tay"] popping back in and sliding over to the other side shooting out the driver's side? I don't know. Doesn't really matter. We know that 9-millimeter didn't result in [J.M.'s] death. We know he was struck, based on the location and based on the damage, that his brain injury wasn't

just an injury. It was catastrophic. It was what killed him. We know that came from the 7.62; don't we? -- based on the evidence that was presented? It came through the back, through his headrest, and into the back of his head, where the 9-millimeter was shot or fired from next to and east of the Grand Marquis, but fired, nonetheless.

We are not required to nor are we attempting to prove that [the Defendant] fired the 9-millimeter, possessed the 9-millimeter, had the 9-millimeter. It doesn't matter. That is just part of what happened. What matters is [J.M.] was murdered on 37th Street on that day, that he [was] shot from behind with a 7.62 from a car that was trailing them from an individual who had seated himself on the window ledge, propped up that 7.62 up over the roof and left off 20 shots – pow, pow, pow, pow, pow, pow, pow –killing him. That's what matters.

So why [the Defendant]? [Prosecutor], you're saying that he may not even have shot that 9-. We know he didn't shoot the 7.62, because he was driving. So why is he here for murder? We talked about that on Monday, aiding and abetting. 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 are all 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 was nearby. They were merely present. They weren't participants. They couldn't be charged with this crime. But what about [the Defendant]? 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 crimes. And I'm not just saying that, because but for him, this doesn't happen this way; right? If [D.W.] or ["Tay"] 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 [the Defendant] 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 passenger said, Go, go, go, go," with a gun. And what does [the Defendant] 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 [D.W.'s]. He even said [D.W.'s]. "We just made 'em wreck." There's

> a reason there. He's part of it. He knows that. This took all their efforts to commit this crime, not just ["Tay"] or [D.W.]. It took a driver, and [the Defendant] is that guy.
>
> Ladies and gentlemen, the evidence is overwhelming that [the Defendant] is criminally responsible for the murder of [J.M.]. Just like ["Tay"] will have his day in court as will [D.W.]. They will have their day. But today is [the Defendant's] day.

(R. 15, 1039-1043.)

The Defendant contends that in these comments the prosecutor misstated how aiding and abetting liability works because the prosecutor never stated that the State had to prove that the Defendant had the same specific intent to commit the crime as the principle. But the prosecutor was specifically referencing the fact that the State, under an aiding and abetting theory, did not have to prove that the Defendant was the actual shooter, which is an accurate statement of the law. And the prosecutor stated that there had to be more than mere presence or association, which is another accurate statement of the law. The prosecutor was telling the jury that the Defendant could be liable for first-degree premeditated murder, under an aiding and abetting theory, as the driver. The State had to prove that the Defendant aided in the commission of the crime, by being the driver of the car, and was equally as responsible as the shooters. The prosecutor did not misstate the law or otherwise misinform the jury on what was required to convict the Defendant under an aiding and abetting theory.

Moreover, in the next two paragraphs, the prosecutor focused on the first-degree premeditated murder instruction. In those two paragraphs the prosecutor

accurately stated the elements needed to establish first-degree premeditated murder, under an aiding and abetting theory. The prosecutor stated:

> I want to talk to you a little bit about some of the instructions, because there's quite a bit overwhelming when you look at the charges. As an example, the defendant is charged in Count 1 with first degree premeditated murder. Those are the – then you see the elements in there, right, that the killing was done by the defendant, or another as the aiding and abetting element here. You know the evidence to support that, that it was done intentionally, meaning not by accident. It wasn't done recklessly. They set out to do exactly what they did, and they did it. They accomplished it.
>
> 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 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.)

Accordingly, the prosecutor properly informed the jury about the elements of premeditated first-degree murder right after discussing aiding and abetting. The prosecutor mentioned both that the killing had to be done intentionally and with premeditation, as stated in the jury instruction, which he referenced. The prosecutor's comments on aiding and abetting were not made in error.

Next, the Defendant argues that the prosecutor misstated the law on premeditation. The Defendant argues that the prosecutor erred because these comments told the jury that premeditation was some "undefined thing that was more than instantaneous" and then referenced time. (Appellant's Brief, 35.)

As noted above, the prosecutor stated,

> 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 more than instantaneous. In this particular cause, 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.)

As an element of first-degree murder, premeditation is the process of thinking about a proposed killing before engaging in the homicidal conduct. *State v. Hilyard*, 316 Kan. 326, 331, 515 P.3d 267 (2022). The prosecutor's comments on premeditation here properly stated the law. There is no specific time required for premeditation, but the concept of premeditation requires more than the instantaneous, intentional act of taking another's life. *State v. Moore*, 311 Kan. 1019, 1040, 469 P.3d 648 (2020). As noted by the prosecutor, premeditation must be more than instantaneous. The prosecutor correctly informed the jury that there need not be a specific written contract or weeks long plan in order to have premeditation. The prosecutor's reference to time was noting that here, the evidence established that the Defendant, D.W. and "Tay" thought about the killing beforehand and that it was not just the instantaneous taking of J.M.'s life. This was not an improper reference to time or a misstatement of the law on premeditation. This claim of prosecutorial error has no merit.

Lastly, the Defendant complains that the prosecutor misstated the law on the first-degree murder instructions by making it appear that felony murder was a lesser included offense of premeditated murder and stating that they were two different crimes. The State disagrees. The prosecutor accurately explained the separate charges of premeditated first-degree murder and felony murder. Directly after his comments about premeditated first-degree murder above, the prosecutor stated,

> 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 some 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.M.], that the killing was done while the defendant, or another was committing the crime of criminal discharge of a firearm. Well, that's not even in dispute, right? Either [D.W.] or ["Tay"] was firing off rounds on the 7.62 into that occupied vehicle. And as a result of that [J.M.] was filled. And again, under aiding and abetting, [the Defendant] 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 only 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.

(R. 15, 1044-45.)

Contrary to the Defendant's claim, the prosecutor did not make it appear that felony murder was a lesser included offense of premeditated murder. The prosecutor explained that premeditated first-degree murder and felony murder were two alternative crimes that have separate elements. The prosecutor never told the jury that felony murder was a lesser included offense of premeditated first-degree murder or made it appear so. As such, there was no prosecutorial error.

B. If this Court determines that any of the prosecutor's statements amounts to error, the error was harmless.

If, however, this Court determines that the statement by the prosecutor was made in error, it was harmless error.

> If error is found, the appellate court must next determine whether the error prejudiced the defendant's due process rights to a fair trial. In evaluating prejudice, we simply adopt the traditional constitutional harmlessness inquiry demanded by *Chapman*. In other words, prosecutorial error is harmless if the State can demonstrate 'beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, i.e., where there is no reasonable possibility that the error contributed to the verdict.' *State v. Ward*, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 (2011), *cert. denied* [565 U.S. 1221] (2012). We continue to acknowledge that the statutory harmlessness test also applies to prosecutorial error, but when 'analyzing both constitutional and nonconstitutional error, an appellate court need only address the higher standard of constitutional error.' *State v. Sprague*, 303 Kan. 418, 430, 362 P.3d 828 (2015).

Sherman, 305 Kan. at 109.

"Multiple and varied individualized factors can and likely will affect the *Chapman* analysis." 305 Kan. at 109. Every instance of prosecutorial error will be fact specific, and appellate courts "must simply consider any and all alleged indicators of prejudice, as argued by the parties, and then determine whether the

State has met its burden—*i.e.*, shown that there is no reasonable possibility that the error contributed to the verdict." 305 Kan. at 109. The focus of the inquiry is on the impact of the error on the verdict. 305 Kan. at 109.

The district court instructed the jury properly on aiding and abetting in Jury Instruction 9:

> A person is criminally responsible for a crime if the person, either before or during its commission, and with the mental capacity required to commit the crime intentionally aids another to commit the crime, or advises, 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, 134; R. 15, 1023.)

As a general rule, juries are presumed to have followed the instructions given by the district court. *State v. Rogers*, 276 Kan. 497, 503, 78 P.3d 793 (2003). The effect of any error during closing arguments would have been likely erased by these correct instructions. See *State v. Huddleston*, 298 Kan. 941, 956, 318 P.3d 140 (2014) ("Although these instructions do not give the prosecutor a free pass on misconduct, they are appropriate considerations when evaluating whether a jury was misled."). This Court should presume that the jury followed the instructions given, which properly advised the jury of aiding and abetting, and that correct statement of the law would have mitigated any possible misstatement by the prosecutor regarding aiding and abetting.

Lastly, in *Sherman*, the Court noted that while the primary focus was on the impact of the error on the verdict, the strength of the evidence may secondarily impact the second part of the analysis.

Here, there was substantial evidence presented to find the Defendant guilty beyond a reasonable doubt. The State presented evidence that the Defendant, J.M. and D.C. had been feuding and made a plan to meet at the park to fight. (R. 14, 721, 750-52; R. 15, 964.) J.M. and his friends went to the park but the Defendant never showed. (R. 12, 280; R. 14, 697-98, 701, 731, 752; R. 15, 953, 980.) J.M. and "Bop" then shot their firearms out the window of the car and drove off. (R. 13, 649, 653-54; R. 14, 704-06, 730, 740-41, 752-53, 761, 763-65, 767; R. 15, 945.) After those shots, the Defendant and D.W. arrived in the same area in his Pontiac G6. (R. 12, 352; R. 13, 655, 657; R. 15, 957.) "Tay" then appeared from a nearby house with a long bag and got into the backseat. (R. 13, 655, 660, 663-65; R. 15, 957.) Disney heard "Tay" say "Let's go get 'em" and D.W. answer "yeah." (R. 13, 665; R. 15, 948.) Disney knew they were talking about the group of boys in J.M.'s white Grand Marquis. (R. 13, 665-66.)

The Defendant and D.W. returned to the car and drove away; the Defendant was the driver. (R. 13, 661; R. 15, 948.) The car pulled up to Keeler and D.W. asked him where the white car went. (R. 14, 768, 770, 772-74.) D.W. had a handgun and "Tay" had an assault rifle out in the backseat. (R. 14, 773-74.) Keeler told them that he did not know where the white car went and the Defendant drove off. (R. 14, 768, 776.)

At 37th and Adams, the Defendant's car pulled behind J.M.'s car and either D.W. or "Tay" began shooting at it. The shooter was sitting on the windowsill of the car with the rifle on the roof of the car, shooting 20 rounds at J.M.'s car. (R. 12, 237, 239, 252-53, 257-58, 260, 263-64, 267-69, 273-77; R. 13, 486-87, 490, 508, 665; R. 14, 753; R. 15, 946, 969.) Additional shots were fired from another gun from the driver's side of the Defendant's car. (R. 12, 240, 250, 277-78; R. 13, 489-90, 506, 508-09, 602, 606-07.) J.M. was shot in the back of the head by the rifle and died from the gunshot wound. (R. 12, 384, 386-88; R. 13, 519-23, 530; R. 14, 713, 754.) Numerous witnesses watched the shooting and there was video evidence from several surrounding surveillance cameras that showed the Defendant's car following and shooting at J.M.'s white car.

A recorded phone call from the Defendant to his brother captured the shooting. (R. 20, 9, State's Exhibit 143.) The Defendant told his brother that J.M. "slid on" us, that he was going to slide back on them, and that they were on Adams. After the shots, the Defendant told his brother that they just made them wreck and that they were heading back to D.W.'s house. (R. 20, 9, State's Exhibit 143.) Lee then picked up the Defendant from D.W.'s house and took him to their father's house. (R. 14, 902-03; R. 15, 989.) The Defendant spoke to Orender at his father's house and told him that someone had just been shot or killed. (R. 14, 880-82.) The Defendant also called his father and told him that someone had been shot. (r. 14, 883.)

D.W.'s DNA was found on the assault rifle found inside his home. (R. 14, 802, 809, 843; R. 15, 943, 959, 961.) The 20 shell casings collected at the scene of the shooting matched that rifle. (R. 14, 861-65.)

Jail phone calls and rap lyrics also supported the Defendant's involvement in the shooting. (R. 15, 942; R. 20, 12, State's Exhibit 224 at 00:21-00:38.) The Defendant admitted that he wrote the raps that were taken from his jail cell. (R. 20, 13, State's Exhibit 225 at 00:56-09:40, 10:29-13:30, 13:42-16:07, 17:39-18:53; R. 15, 979-80.) Those raps included references to shooting J.M. with a rifle and acknowledged D.W. and "Tay" as the shooters. (R. 15, 969-980; R. 19, 64-75, State's Exhibit 186.)

It cannot be said that this comment diverted the attention of the jury away from the evidence in this case. There is no likelihood that the verdict would be different had the prosecutor not made the comment. As such, any error was harmless.

IV. The jury instructions on aiding and abetting, first-degree murder, and second-degree murder were not clearly erroneous.

Preservation and Standard of Review

At the instructions conference, defense counsel informed the district court that he had reviewed the jury instructions and stated he would not have any objections to them. (R. 15, 998.) When no objection is made to the instruction below, this Court first determines whether the instruction is erroneous using an unlimited standard of review. *State v. Gentry*, 310 Kan. 715, 720, 449 P.3d 429

(2019). An instruction is erroneous if it is not legally or factually appropriate. 310 Kan. at 720. If error is found, this Court applies a clear error standard to determine if the error is reversible. 310 Kan. at 720. To obtain relief, the Defendant bears the burden of firmly convincing this Court that the jury would have reached a different verdict if the error had not occurred. 310 Kan. at 720.

Argument

In this case, the State charged the Defendant with first-degree premeditated murder in count 1 and first-degree felony murder in count 2. (R. 1, 18-19.) When discussing the instructions for premeditated first-degree murder and felony murder, the district court suggested that PIK Crim. 4th 54.130, Murder in the First Degree – Alternative Theories – Premeditated and Felony Murder, be given, but also noted that the first-degree murder charges were in separate counts. (R. 15, 1005-06.) The prosecutor responded, "They are alternative charges not alternative theories for the same charge." (R. 15, 1005.) The district court then stated, "Okay. Then we don't need to worry about that" and the instruction was not given. (R. 15, 1006.)

In Jury Instruction 9, the district court gave the aiding and abetting instruction. (R. 1, 134.) The district court gave the elements instruction for premeditated first-degree murder in Jury Instruction 10. (R. 1, 135); PIK Crim. 4th 54.110. Jury Instruction 11 addressed the consideration of the lesser included offense of second-degree murder. (R. 1, 136); PIK Crim. 4th 68.080. Jury Instruction 12 gave the elements for second-degree murder. (R. 1, 137.) Jury Instruction 13 was the instruction for felony murder. (R. 1, 138); PIK Crim. 4th

54.120. The elements of criminal discharge of a firearm at an occupied vehicle were given in Jury Instruction 14. (R. 1, 139.) And Jury Instruction 15 stated that each crime charged against the defendant was a separate and distinct offense. (R. 1, 140.) Three separate verdict forms were given to the jury, one for each count. (R. 1, 142-44.)

The Defendant argues that the district court erred in failing to give PIK Crim. 4th 54.130 and erred in failing to give the verdict forms in PIK Crim. 4th 68.190 and 68.200 because the State presented alternative theories of first-degree murder here. But it does not appear that the instruction and verdict forms were factually and legally appropriate because the murder charges here were not charged in the alternative. The murder charges were charged separately in counts 1 and 2.

The Defendant relies on *State v. Dominguez*, 299 Kan. 567, 328 P.3d 1094 (2014), for support that the jury instructions here were clearly erroneous. But the charges and jury instructions found to be erroneous in *Dominguez* are distinguishable from those in this case.

In *Dominguez*, the State charged the defendant with the premeditated first-degree murder of the victim or, in the alternative, felony murder. Here, however, the State charged the Defendant in Count 1 with premeditated first-degree murder and separately in Count 2 with felony murder. The State did not charge one count of first-degree murder in the alternative.

Additionally, the way in which the jury was instructed in *Dominguez* was substantially different than the way the jury was instructed in this case. In

Dominguez, the jury was first instructed on elements of first-degree premeditated murder and there was no mention of felony murder. Then, the next instruction addressed the consideration of second-degree murder as a lesser included offense. In that instruction, it stated: "Under Count One you may find the defendant guilty of murder in the first degree, murder in the second degree, ***felony murder***, or not guilty." 299 Kan. at 579 (emphasis added). After that, the jury was instructed on the elements of felony murder. But rather than explaining that felony murder was an alternative charge to premeditated murder and was a form of first-degree murder, the instruction was modified and stated: "As an alternative charge to ***Murder in the First Degree***, the defendant is charged in Alternative Count I with the crime of Felony Murder." 299 Kan. at 579 (emphasis added). Thus, the sequence and substance of the modified instructions given in *Dominguez* did not accurately explain that premeditated murder and felony murder were alternatives of first-degree murder and made it appear that felony murder was something entirely different. Furthermore, the way the lesser included offense instruction was written made it appear that felony murder was a lesser included offense. As such, this Court held that the jury instructions were legally inappropriate, and therefore, erroneous. 299 Kan. at 581.

In finding the error to be clearly erroneous, this Court focused on the fact that the sequence of the jury instructions listing felony murder after the lesser included offense of second-degree murder left the impression that felony murder was to be considered after premeditated first-degree murder and second-degree

murder. 299 Kan. at 583. This Court further noted that although the prosecutor correctly explained that felony murder and premeditated murder were different theories of first degree murder, they did not explain that "the jury had to consider felony murder as well as premeditated first-degree murder before reaching a verdict on Count 1." 299 Kan. at 583.

As noted above, the State did not charge one count of first-degree murder in the alternative. The State charged two counts of first-degree murder. Jury Instruction 10 properly informed the jury of the elements of premeditated first-degree murder, under an aiding or abetting theory. Next, the jury was properly instructed to consider the lesser included offense of second-degree murder in Jury Instruction 11 and the elements of second-degree murder, under an aiding or abetting theory, in Jury Instruction 12. Unlike in *Dominguez*, the lesser included offense instruction did not make it appear that felony murder was a lesser included offense or even mention felony murder at all. Then in Jury Instruction 13, the elements of felony murder were properly listed and appropriately referenced felony murder as a charge of first-degree murder. Again, contrary to *Dominguez*, this instruction did not reference felony murder as something different than first-degree murder.

These instructions properly informed the jury the elements of first-degree premeditated murder for count 1, that the lesser included offense of second-degree murder only applied to the premeditated murder count, and properly informed the jury of the elements of first-degree felony murder for count 2. There were no

improper alterations of the instructions making it appear that felony murder was a lesser included offense. Jury Instructions 10 and 13 accurately stated that premeditated murder and felony murder were both counts of first-degree murder. Thus, the jury instructions, viewed together and as a whole, fairly and accurately stated the law, and did not mislead the jury.

Moreover, the State disagrees that the prosecutor's statements in closing argument confused or misled the jury on the murder instructions. As discussed in Issue III, the prosecutor properly explained both murder instructions in closing argument:

> 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 some 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.M.], that the killing was done while the defendant, or another was committing the crime of criminal discharge of a firearm. Well, that's not even in dispute, right? Either [D.W.] or ["Tay"] was firing off rounds on the 7.62 into that occupied vehicle. And as a result of that [J.M.] was filled. And again, under aiding and abetting, [the Defendant] 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 only 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.

(R. 15, 1044-45.)

The prosecutor referenced premeditated murder and felony murder together and correctly stated that they were both alternative charges of first-degree murder for the same homicide. (R. 15, 1044-45.) The jury's verdicts also show that it considered each count. (R. 1, 142-44; R. 15, 1053.)

The Defendant also argues that the failure to instruct on the shared-intent requirement of aiding and abetting was clear error. In Jury Instruction 9, the district court gave the following instruction (based on PIK Crim. 4th 52.140) regarding aiding and abetting culpability:

> 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 advises, 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.

As the Defendant acknowledges, the instruction was factually appropriate as the State's theory was that he aided and abetting D.W. and "Tay" in the murder of J.M. This instruction was also legally appropriate. The language of the instruction conforms with K.S.A. 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."). And as the Defendant also acknowledges, the term "mental culpability" used in the instruction mirrors the statutory language from K.S.A. 21-5210. While the Defendant argues that there should be an explanation of this term, he cites to no authority that requires a definition or explanation of the term "mental culpability" used in the instruction.

The culpable mental state is listed for each of the crimes in their elements instructions. The Defendant makes no claim that the instructions defining premeditated first-degree murder, second-degree murder, felony murder, or criminal discharge of a firearm at an occupied dwelling omitted or incorrectly stated the required mental culpabilities for those crimes. In the prosecutor's closing argument, he informed the jury that in order to find the Defendant guilty of first-degree premeditated murder, it had to be done intentionally not recklessly or by accident. (R. 15, 1043.)

As such, read together, the instructions accurately stated Kansas law and did not mislead or confuse the jury about the level of intent a defendant must have to be found guilty under an aiding and abetting theory. Even if some error occurred, none of these instructions were clearly erroneous.

V. The Defendant was not denied his right to a fair trial by cumulative error.

Standard of Review

The test for cumulative error is whether the errors substantially prejudiced the defendant and denied the defendant a fair trial given the totality of the

circumstances. *State v. Thomas*, 311 Kan. 905, 914, 468 P.3d 323 (2020). In making the assessment, an appellate court examines the errors in context, considers how the district court judge addressed the errors, reviews the nature and number of errors and whether they are connected, and weighs the strength of the evidence. *State v. Holt*, 300 Kan. 985, 1007-08, 336 P.3d 312 (2014).

If any of the errors being aggregated are constitutional, the constitutional harmless error test of *Chapman* applies, and the party benefitting from the errors must establish beyond a reasonable doubt that the cumulative effect of the errors did not affect the outcome. *State v. Tully*, 293 Kan. 176, 205, 262 P.3d 314 (2011); *State v. Ward*, 292 Kan. 541, 569-70, 256 P.3d 801 (2011). Where, as here, the State benefitted from the errors, it has the burden of establishing the errors were harmless. See *State v. Akins*, 298 Kan. 592, 600, 315 P.3d 868 (2014) ("The State bears a higher burden to demonstrate harmlessness when the error is of constitutional magnitude.").

Argument

Several considerations are relevant when weighing whether errors were cumulatively harmful, including the effectiveness of any remedial efforts by the district court at the time the error arose; the nature and number of errors committed and their interrelationship, if any; and the strength of the evidence. *State v. Armstrong*, 299 Kan. 405, 445, 324 P.3d 1052 (2014). The court will find no cumulative error when the record fails to support the errors defendant raises on

appeal. See *State v. Betancourt*, 299 Kan. 131, 147, 322 P.3d 353 (2014). Here, the record fails to support any of the errors raised by the Defendant.

Even if this Court finds multiple errors, their cumulative effect still does not require reversal because the Defendant's right to a fair trial was not violated. These errors are not meaningfully more prejudicial when considered together. And the State can meet its burden to establish harmless error. Moreover, the evidence here was overwhelming. There is no prejudicial effect when the evidence is overwhelming. *State v. Rhoiney*, 314 Kan. 497, 505, 501 P.3d 368 (2021). Thus, the Defendant is not entitled to a new trial based on cumulative error.

CONCLUSION

For the above reasons, the State respectfully requests this Court affirm the Defendant's convictions and sentence.

Respectfully submitted,

OFFICE OF SHAWNEE COUNTY
DISTRICT ATTORNEY

/s/ Jodi Litfin
JODI LITFIN, # 24638
Deputy District Attorney
Office of the District Attorney
200 SE 7th Street, Suite 214
Topeka, Kansas 66603
(785) 251-4330
Fax: (785) 251-4909
jodi.litfin@snco.us

KRIS W. KOBACH
KANSAS ATTORNEY GENERAL

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the Appellee's Brief was sent by e-mailing a copy to the Kansas Appellate Defender Office, at adoservice@sibids.com, on May 19, 2023, and the original was electronically filed with:

Clerk of the Appellate Court
Kansas Judicial Center
301 SW 10th Avenue
Topeka, KS 66612

/s/ Jodi Litfin
Jodi Litfin, #24638
Deputy District Attorney