No. 18-119872-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

v.

THEODORE JAMES PURDY
Defendant-Appellant

BRIEF OF APPELLEE

Appeal from the District Court of Jackson County, Kansas
Honorable Norbert Marek, Judge
District Court Case No. 16-CR-414

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NATURE OF THE CASE

Theodore James Purdy was convicted by a jury of one count of off-grid rape and one count of off-grid aggravated indecent liberties with a child. The district court imposed concurrent life sentences without the possibility of parole for 25 years. Purdy appeals his convictions.

STATEMENT OF THE ISSUES

I. **Purdy's confession was not coerced or involuntarily made.**

II. **Purdy's confession was sufficiently trustworthy to support the convictions.**

III. **The district court did not improperly admit hearsay evidence.**

IV. **The district court's admission of a certain portion of the interview between Agent Bridges and Purdy did not violate *State v. Elnicki*.**

V. **Any error in the jury instruction for the culpable mental state for aggravated indecent liberties does not amount to clear error.**

VI. **The prosecutor did not improperly argue facts not in evidence and thus did not commit prosecutorial error.**

VII. **Purdy was not denied his right to a fair trial by cumulative error.**

STATEMENT OF THE FACTS

Purdy met Allison Lane while working at the Topeka Correctional Facility. (R. 6, 155.) Purdy and Allison began dating, and Purdy was quickly introduced to Allison's three year old daughter, A.L. (R. 6, 109, 155.) Shortly after the two began dating, Allison and A.L. moved into Purdy's home in Hoyt, Jackson County, Kansas. (R. 6, 109, 130, 155-56.) Purdy stepped into the role of stepfather for A.L. (R. 6, 109, 155.) Purdy cared for A.L. while Allison worked nights. (R. 6, 110.) Purdy helped with potty training and gave A.L. baths as part of their nightly routine. (R. 6, 109-10.) Purdy was 26 years old at the time. (R. 6, 107, 129.)

For a time, Allison's father, Donald Lane, also lived at Purdy's house. (R. 6, 156.) Donald helped care for A.L. several days during the week while Purdy and Allison were at work. Eventually, the couple asked Donald to move out. (R. 6, 156.) In October of 2016, Donald was in the process of moving from Purdy's house in Hoyt to the Lawrence/Eudora area. (R. 6, 156.) Donald continued to watch A.L. several days a week.

On October 14, 2016, Purdy and Allison returned home from work and found that Donald and A.L. were not there. (R. 6, 156-57.) The couple learned that A.L. had been taken to Allison's friend Sidney's house. (R. 6. 157.) The couple drove

from Hoyt to Lawrence/Eudora to see Donald. (R. 6, 157.) Through either Sidney or Donald, Allison learned that A.L. told Donald that Purdy had inserted something into her vagina. (R. 6, 158.) Allison then told Purdy about the allegation made by A.L. (R. 6, 158.)

That day, Detective Mark Montague received a call from Eudora Police Department and learned what A.L. disclosed to Donald. (R. 6, 125-26, 139.) The next day, Detective Montague made contact with Purdy. (R. 6, 126, 159.) Purdy voluntarily came to the Sheriff's Office and agreed to speak with Detective Montague. (R. 6, 127, 159.) Purdy waived his *Miranda* rights and was interviewed by Detective Montague. (R. 6, 127, 128.) Detective Montague informed Purdy of that A.L. alleged that Purdy put something, possibly crayons, into her vagina. (R. 6, 110, 128-29.) Purdy denied the allegation. (R. 6, 129.) Purdy consented to a search of his home. (R. 6, 130-31, 159.) Some crayons were found but were never sent to be tested for DNA. (R. 6, 130-31, 137.)

Detective Montague asked Purdy if he would also be willing to speak to Agent James Bridges with the Kansas Bureau of Investigation and take a polygraph examination. (R. 6, 131-32.) Purdy agreed and voluntarily met with Agent Bridges on October 20, 2016. (R. 6, 106, 108.) During that interview, Agent Bridges informed Purdy that the allegation was that Purdy put a crayon or crayons inside A.L.'s vagina. (R. 6, 110.) Initially, Purdy denied putting crayons or anything inside A.L.'s vagina. (R. 6, 111.)

As the interview progressed, however, Purdy admitted that once when he was giving A.L. a bath he inserted his finger into her vagina. (R. 6, 112; R. 11, State's Exhibit 1 at 2:29:56-2:30:18; 2:30:35-40; 2:30:44-2:31:05; 2:34:54-58; 2:38:30-54.) Purdy stated that when it happened he thought, "was that wrong." (R. 11, State's Exhibit 1 at 2:29:58-2:30:20.)

Specifically, Purdy stated he used his middle finger on his right hand and that it went up to the first knuckle and was inside A.L.'s vagina for five or six seconds. (R. 6, 112; R. 11, State's Exhibit 1 at 2:31:46-2:34:42.) Purdy and A.L. were the only ones home and it happened between 8:00 and 9:00 p.m., the time he normally gave A.L. a bath and put her to bed. (R. 11, State's Exhibit 1 at 2:36:07-2:37:03; 2:46:18-30.) Purdy stated that this occurred about a month prior. (R. 11, State's Exhibit 1 at 2:36:28-37. Purdy told Agent Bridges it was an accident. (R. 6, 112; R. 11, State's Exhibit 1 at 2:37:54-58; 2:39:11-20; 2:39:55-2:40:00.)

Agent Bridges then left the room and Detective Montague entered. (R. 6, 132; (R. 11, State's Exhibit 1 at 2:44:12-3:01:10.) Detective Montague briefly recapped what Purdy had just admitted to Agent Bridges. (R. 6, 132.) Purdy confirmed that about a month prior he inserted his middle finger—up to the first knuckle—into A.L.'s vagina for five or six seconds. (R. 11, State's Exhibit 1 at 2:45:46-2:46:38; 2:52:43-51.) Purdy again stated it only happened once. (R. 11, State's Exhibit 1 at 2:45:13-42; 2:49:42.) Detective Montague asked Purdy why he did not tell him about this during the first interview, on October 15, 2016. (R. 11, State's Exhibit 1 at 2:46:49-2:50:34.) Purdy responded, that all he could say was

that he was sorry and "didn't want to lose his family." (R. 11, State's Exhibit 1 at 2:50:56-2:51:12.) Purdy later stated that he wanted to talk to Allison and tell her the reason that he lied was because he was "so afraid of losing them." (R. 11, State's Exhibit 1 at 2:53:23-31.)

Detective Montague asked Purdy why he should believe Purdy when he said that it only happened once. Purdy answered, "I wouldn't believe it... because I already lied to you." (R. 11, State's Exhibit 1 at 2:51:51-2:52:17.) Purdy told Detective Montague that he "should have just said it... I should have just told you straight the first time...I should have...I should have just told you in the beginning..." (R. 11, State's Exhibit 1 at 2:57:23-2:58:10.)

Purdy was then arrested and booked into the jail. (R. 6, 133; R. 11, State's Exhibit 1 at 3:09:49-3:10:53.) Later, while sitting in jail, Purdy requested to speak to Detective Montague again. (R. 6, 134.) Detective Montague went over to the jail to speak to Purdy. At the jail, Purdy told Detective Montague that it was not an accident when he inserted his finger into A.L.'s vagina. (R. 6, 134.) Purdy stated he did it out of curiosity. (R. 6, 134.) Detective Montague asked Purdy if he would come back over to the Sheriff's Office so they could record his statement. Purdy agreed. (R. 6, 134; R. 11, State's Exhibit 2.)

During that statement, Purdy told Detective Montague:

> A month ago while I was giving [A.L.] a bath, I had out of curiosity put the tip of my middle finger in her vagina. About five seconds after that my brain clicked on and I realized that it was wrong and I instantly (inaudible) finger out and I made sure she put clothes on and put her to bed. And I made sure after that to never put myself in the situation again um to which where if I happened to be the one to give her a bath

> all I did was wash her hair. Um the reason why I didn't say anything in the initial interview is because I was fearful of losing my family and a month ago when it happened back then I just didn't tell anyone because I was fearful that I would lose my family and I didn't think that ... I convinced myself that it was an accident so I left it as such. (R. 11, State's Exhibit 2 at 2:25-4:00.)

Purdy told Detective Montague that it was not an accident but out of curiosity. Purdy stated, "that's the only thing I can imagine of why I would do something like that." (R. 11, State's Exhibit 2 at 4:15-30.)

A jury trial was held and Purdy testified. According to Purdy, what he told Agent Bridges during his interview was not accurate. (R. 6, 160.) Purdy testified, "all I was doing was cleaning her." (R. 6, 160.) Purdy explained, "I was so cooperative because I hadn't done anything wrong. And I thought they had my best interests at heart." (R. 6, 161.) Purdy also testified that due to his military history and his anxiety he gets "into a bubble or a little thing, and will just say what they want to say to get out of it." (R. 6, 161, 162.)

Purdy explained that he talked to Detective Montague a second time because he wanted to know if Detective Montague talked to Allison. (R. 6, 162.) Purdy testified that during his second statement to Detective Montague he was "already mentally done" so he "just said what they wanted to hear." (R. 6, 163.) Purdy testified that the night of the incident A.L. had a "very big" accident so when he gave A.L. a bath he used his finger to "brush it off into the water, make sure it was clean." (R. 6, 163.) Purdy testified that he did not tell anyone because he "felt that if I told my fiancé that I wasn't ready to have kids, then we wouldn't be together

anymore." (R. 6, 163-64.) On cross-examination, however, Purdy denied he touched A.L. at all. (R. 6, 173-74.)

The jury convicted Purdy of rape and aggravated indecent liberties, both off-grid felonies. (R. 1, 182; R. 6, 203-04.) The district court sentenced Purdy to two concurrent life sentences. (R. 1, 213-24, 230-41; R. 18.31-32.) Purdy now appeals. (R. 1, 225.)

Additional facts will be set forth within the argument as necessary.

ARGUMENTS AND AUTHORITIES

I. Purdy's confession was not coerced or involuntary.

Preservation and Relevant Facts

Prior to trial, Purdy filed a motion to suppress his statements to law enforcement arguing his statements were coerced and involuntary. (R. 1, 81-84, 121-30.) The State requested Purdy's motion be denied. (R. 1, 112-14, 118-20.) A hearing was held, and the State presented testimony from Detective Montague. (R. 3, 38-61.) Purdy also testified briefly. (R. 3, 64-70.) The district court denied the motion. (R. 1, 133-41.)

At trial, Purdy renewed his motion to suppress his statements, which was again denied. (R. 6, 103.) Purdy also objected the admission of both State's Exhibits 1 and 2, the recordings of the interviews. (R. 6, 121, 135.)

Standard of Review

" 'An appellate court generally reviews a trial court's decision on a motion to suppress using a bifurcated standard. The trial court's findings are first reviewed

to determine whether they are supported by substantial competent evidence. Appellate courts do not reweigh the evidence, assess the credibility of the witnesses, or resolve conflicting evidence. The ultimate legal conclusion regarding the suppression of evidence is then reviewed de novo. If the material facts [underlying] a trial court's decision on a motion to suppress evidence are not in dispute, the question of whether to suppress is [one] of law over which an appellate court [exercises] unlimited review.' [Citations omitted.]" *State v. Patterson*, 304 Kan. 272, 274, 371 P.3d 893 (2016).

Also, the prosecution bears the burden of proving that a confession is admissible by a preponderance of the evidence." *State v. Gilliland*, 294 Kan. 519, Syl. ¶ 3, 276 P.3d 165 (2012).

Argument

Purdy argues his confessions were "a product of a combination of coercive police interrogation tactics and mental illness." (Appellant's Brief, 6.) However, the recorded interviews do not support Purdy's assertion. "The primary consideration to be given to a criminal defendant's inculpatory statement is its voluntariness." *State v. Swindler*, 296 Kan. 670, 678, 294 P.3d 308 (2013). And this Court considers the totality of the circumstances when evaluating whether a confession was voluntary. 296 Kan. at 678. A nonexclusive list of factors to be examined includes:

> "(1) the accused's mental condition; (2) the duration and manner of the interrogation; (3) the ability of the accused on request to communicate with the outside world; (4) the accused's age, intellect, and background; (5) the fairness of the officers in conducting the interrogation; and (6) the accused's fluency with the English language. [Citations omitted.]

....

> " ' "[T]hese factors are not to be weighed against one another ..., with those favorable to a free and voluntary confession offsetting those tending to the contrary. Instead, the situation surrounding the giving of a confession may dissipate the import of an individual factor that might otherwise have a coercive effect. [Citation omitted.] Even after analyzing such dilution, if any, a single factor or a combination of factors considered together may inevitably lead to a conclusion that under the totality of circumstances a suspect's will was overborne and the confession was not therefore a free and voluntary act." [Citations omitted.]' " *State v. Gilliland*, 294 Kan. 519, 528-29, 276 P.3d 165 (2012).

A. Purdy's Mental Condition

At the hearing, Detective Montague testified that he did not recall whether Purdy asked him whether he should or should not take his prescribed medications for depression and anxiety on the day of the polygraph examination. (R. 3, 55-56.) Detective Montague testified that had Purdy asked him that question he "would suggest to [Purdy] that if he was on prescription medication, go ahead and take his prescription as prescribed." (R. 3, 56.) Although Purdy testified to the contrary, the district court did not find Purdy's testimony credible. (R. 1, 137-38; R. 3, 64-68.) During the October 20, 2019 interview, Purdy told Agent Bridges that currently he was only taking methocarbamol, a prescription medication, and ibuprofen for his degenerative joint lumbar disease in his back and knees. Purdy stated he took the medications for pain. Purdy agreed that he had taken all his medication as prescribed that day. (R. 10, State's Exhibit 3, at 14:32-16:40.)

Purdy admitted that he suffered from depression and anxiety but told Agent Bridges that he was not taking prescription medication for either. Specifically, Purdy stated that once he met Allison he stopped taking the medication. (R. 10,

State's Exhibit 3, at 17:06-18:05.) The district court found Purdy's statements to Agent Bridges at the time of the interview to be credible. (R. 1, 137-38.)

The evidence established that Purdy suffered from combat related mental conditions, post-traumatic stress disorder for example, and the district court agreed. (R. 1, 137-38.) But mental disorders do not automatically establish involuntariness; and the court must consider all circumstances surrounding the giving of a statement to determine if a mental health problem prevented the accused from voluntarily making a statement. See *State v. Bethel*, 275 Kan. 456, 476-77, 66 P.3d 840 (2003). Despite his combat related mental conditions, Purdy maintained full time employment at the Topeka Correctional Facility, bought and maintained a home, and was engaged to be married. Thus, the district court concluded that his mental conditions did not substantially impair his ability to maintain a career and relationship. (R. 1, 137-38.)

The interview began as courteous and pleasant, and Purdy appeared relaxed but admittedly nervous. Once confronted with the results of the polygraph examination, Purdy's demeanor changed to frustration and disbelief. This change was not due Purdy's mental condition but rather the result of being confronted with criminal activity and his attempt to explain it. State's Exhibit 3 does not reflect that Purdy became a "completely different person" prior to his confession. There was no evidence that Purdy disassociated, withdrew, or became overcome with anxiety. Purdy never retreated to silence and continued to provide coherent answers to Agent Bridges's questions. As the district court concluded, nothing

about Purdy's mental condition suggests he was coerced. This factor weighs in favor of voluntariness.

B. The Duration and Manner of the Interrogation

The entire interview between Agent Bridges, Purdy, and Detective Montague was 3 hours and 12 minutes in length. (R. 10, State's Exhibit 3.) Our Supreme Court has found interview statements voluntary where the defendant's interrogation lasted considerably longer. See *State v. Walker*, 283 Kan. 587, 597, 153 P.3d 1257 (2007) (approximately 8 hours); *State v. Ackward*, 281 Kan. 2, 8, 128 P.3d 382 (2006) (8 or 9 hours). Here there is nothing inherently coercive in an interview that lasted 3 hours. The first part of the interview consisted of Agent Bridges asking preliminary questions. Agent Bridges then administered the polygraph examination and scored the examination. The actual interrogation portion of the interaction was less than 45 minutes. (R. 10, State's Exhibit 3.)

At the outset, Purdy agreed that his participation in the polygraph examination was voluntary. (R. 10, State's Exhibit 3 at 2:46-4:15.) Purdy was informed that he could leave at any time and agreed he was not coerced or made any promises for taking the examination. (R. 10, State's Exhibit 3 at 2:46-4:15; R. 3, 44.) Within the first six minutes Agent Bridges informed Purdy that they would take at least one break and told Purdy to let him know if he needed to use the restroom or get something to eat or drink and he would take care of that for him. (R. 10, State's Exhibit 3 at 6:25-32.) Purdy requested one break 30 minutes into the

interview to use the restroom and was allowed to do so. (R. 10, State's Exhibit 3 at 30:30-33:00.) Later, Agent Bridges offered Purdy another break and he declined.

During the preliminary questions Agent Bridges's tone was friendly, polite, and he even joked with Purdy from time to time. (R. 10, State's Exhibit 3 at 4:15-20:00.) During the post-exam interrogation, Agent Bridges's tone was direct and inquisitive. Agent Bridges never raised his voice during the interrogation and never physically or verbally threatened Purdy.

Once Purdy admitted to a time when he could have inserted his finger into A.L.'s vagina, Agent Bridges focused on obtaining those details. While Purdy was frustrated with these questions he continued to provide more details. During Detective Montague's portion of the interview, Detective Montague was calm, spoke softly, and never threatened Purdy. Detective Montague continued to probe Purdy for details and at times simply listened to Purdy. Nothing about the manner and the duration of the interview created a coercive environment. This factor weighs in favor of voluntariness.

C. Purdy's Ability to Communicate on Request with the Outside World

Purdy never requested to communicate with the outside world and was not denied any opportunity to do so. This factor does not appear to weigh either for or against voluntariness.

D. Purdy's Age, Intellect, and Background

Purdy was 26 years old and had a high school education. Purdy was in the Marines from 2009-2014 and ended his service as a corporal. (R. 10, State's Exhibit

3 at 11:22-58.) Purdy had been an employee of Topeka Correctional Facility for a year and a half at the time of the interview. (R. 3, 41; R. 10, State's Exhibit 3 at 12:00-21.) Purdy gave appropriate answers to both Agent Bridges and Detective Montague's questions and never appeared confused or as though he did not understand. Purdy presented no evidence that he had any learning disability or low intelligence. As the district court concluded, nothing about Purdy's age, intellect, and background suggest that he would be easily coerced. In fact, it was quite the opposite, Purdy was an intelligent man with a full time job, a homeowner, and engaged to be married. This factor weighs in favor of voluntariness.

E. The Fairness of the Officers Conducting the Interrogation

The bulk of Purdy's analysis of this factor focuses specifically on the fairness of Agent Bridges. Purdy argues that the method used by Agent Bridges was coercive and that he made improper promises of alternative possible dispositions. As noted above, neither officer raised their voices when questioning Purdy. Agent Bridges's demeanor was calm, he never raised his voice, and he remained seated during the entirety of the interrogation portion of the interview. Agent Bridges made no threats or promises to Purdy.

It is true that Agent Bridges repeatedly urged Purdy to be honest with him and Detective Montague. But "[a]n officer's exhortation to a suspect to tell the truth during questioning is insufficient to make a confession involuntary." *State v. Swanigan*, 279 Kan. 18, Syl. ¶ 5, 106 P.3d 39 (2005). Agent Bridges did not make any explicit or implicit promise to Purdy that he would get him treatment or family

therapy or counseling if he confessed. Agent Bridges did mention that some suspects had made mistakes and as a result changed their lifestyles or received therapy or family counseling, but in context he was merely informing Purdy about the types of suspects he has interviewed and their circumstances. Agent Bridges simply urged Purdy to provide an explanation for why he inserted his finger into A.L.'s vagina and stressed the importance of having an explanation to provide to the prosecutor. Asking for an explanation for why Purdy inserted his finger into A.L.'s vagina is not a promise for a benefit in exchange for his confession.

Asking for an explanation to provide to the prosecutor is similar to telling the prosecutor that Purdy was cooperative in the investigation. In *State v. Johnson*, 253 Kan. 75, 853 P.2d 34 (1993), our Supreme Court found that promises by law enforcement to speak with the District Attorney and tell him if the defendant was being cooperative was not considered coercive as long as the officers did not bargain for or promise anything to the defendant. 253 Kan. at 84; see also *State v. Ninci*, 262 Kan. 21, 39-40, 936 P.2d 1364 (1997) (finding that police officer's statement, " '[Y]ou can do some things to help yourself now,' " did not render confession involuntary).

Moreover,

> [I]in order to render a confession involuntary as a product of a promise of some benefit to the accused, including leniency, the promise must concern action to be taken by a public official; it must be such that it would be likely to cause the accused to make a false statement to obtain the benefit of the promise; and it must be made by a person whom the accused reasonably believes to have the power or authority to execute it.

State v. Brown, 285 Kan. 261, 276, 173 P.3d 612 (2007). Here, there was no evidence of any such promise or benefit to Purdy if he confessed. Agent Bridges did not promise that a public official would perform any specific benefit for Purdy.

Also, the confession here did not mirror the allegation by A.L. that Purdy inserted crayons into her vagina indicating that Purdy's confession was coerced. Purdy offered his own version of an accidental insertion of his right middle finger, up to the first knuckle, once, when he was giving A.L. a bath. Agent Bridges repeatedly returned to the allegation about the crayons and Purdy did not confess to inserting any crayons or any other object into A.L.'s vagina. (R. 10, State's Exhibit 3 at 2:37:04-2:38:17.) Agent Bridges, Detective Montague, and Detective Caverness (the third detective who actually arrested Purdy) asked Purdy numerous times if it happened more than once. In fact, Detective Montague and Detective Caverness specifically told Purdy they did not believe he was being honest when Purdy claimed it only happened once. Despite the repeated notion that Purdy had inserted his finger into A.L.'s vagina more than once, Purdy consistently stated it only happened one time.

This further establishes that Purdy was not worn down by the officers' suggestion that he had done this multiple times or that he was simply saying what the officers wanted to hear. Had Purdy been overcome with anxiety and retreated within himself, he would have agreed with the officers that it happened numerous times. Yet Purdy never admitted to doing this more than one time. The nature of Purdy's confession to inserting his finger once when he gave A.L. a bath as opposed

to inserting crayons into A.L.'s vagina established that Purdy was not unduly coerced into admitting the rape. See *State v. Stone*, 291 Kan. 13, 29, 237 P.3d 1229 (2010) ("Stone did not volunteer facts but rather he adopted facts as they were suggested to him by the detective and as her insistence that he tell 'the truth' became more adamant.").

Purdy cites to *State v. Swanigan*, 279 Kan. 18, 106 P.3d 39 (2005), to support that his confession was coerced. In *Swanigan*, our Supreme Court found a defendant's confession to be involuntary when law enforcement officers repeatedly used false information and evidence; law enforcement threated to convey defendant's lack of cooperation to the county attorney and to charge him with additional crimes unless he confessed; and there was evidence of the defendant's low intellect and susceptibility to anxiety. In that case, the Court expressly noted that any one of these factors—when considered in isolation—might not be sufficient to show coercion. Rather, the combination of all of these factors led the Court to find the statement was involuntary. 279 Kan. at 39. Notably, the Swanigan court "cautioned lower courts against extending their holdings beyond their particular facts." *State v. Swindler*, 296 Kan. 670, 680, 294 P.3d 308 (2013), *cert. denied* ___ U.S. ___, 134 S.Ct. 1000, 187 L. Ed. 2d 863 (2014) (citing *Swanigan*, 279 Kan. at 44).

Here, Agent Bridges did not use the interrogation tactics that were held to be improper in *Swanigan*. Unlike in *Swanigan*, Agent Bridges did not falsely represent that he had information or evidence implicating Purdy in the rape of A.L.

Nor did Agent Bridges suggest negative consequences if Purdy did not cooperate. Purdy's statements were not a result of leading and suggestive questioning by Agent Bridges. This factor weighs in favor of voluntariness.

F. Purdy's Fluency with the English Language

There was no evidence that Purdy was unable to read or understand the English language. In fact, Detective Montague testified that Purdy accurately read the *Miranda* warning aloud to him during the October 15, 2019, interview and that Purdy "read the form quite well." (R. 3, 40, 41.) Purdy then initialed the document. (R. 3, 40.) During the October 20, 2019, interview, Purdy was given another *Miranda* warning, and Purdy did not exhibit any signs that he did not understand the warning. (R. 3, 43.) A third *Miranda* warning was given for Detective Montague's second interview, and Detective Montague had no concerns with Purdy's understanding of that warning. (R. 3, 48.) Purdy agrees there was no evidence that he had any difficulty understanding the English language. This factor weighs in favor of voluntariness.

In evaluating the totality of the circumstances, the district court properly concluded that Purdy's statements were voluntary.

Additionally, Purdy briefly argues that, although there was a short period between Purdy's confession to Agent Bridges and his third confession to Detective Montague after being booked into jail, there was no attenuation that would make it clear that the second statement was not the fruit of the first interrogation. See *Missouri v. Seibert*, 542 U.S. 600 (2004). The State disagrees. Nearly two hours

after Purdy's first confession to Agent Bridges, Purdy requests to speak to Detective Montague again. During that second interview with Detective Montague, Purdy confessed that he did not insert his finger into A.L.'s vagina by accident but instead acted out of curiosity. Detective Montague again Mirandized Purdy, who agreed to repeat his statement and have it recorded. Detective Montague did not use any improper tactics to obtain Purdy's confession. The entire interview was seven minutes long. Thus, the attenuation doctrine applies to Purdy's confession during the second interview with Detective Montague. The district court properly concluded that "[b]ased on the passage of time, the intervening voluntary request to talk with Montague, and the lack of flagrancy in any potential prior misconduct" the attenuation doctrine applied to Purdy's statements in the second interview with Detective Montague. (R. 1, 139-41.) Thus, any error was harmless error.

II. Purdy's confession was sufficiently trustworthy to support the convictions.

Standard of Review

When a defendant challenges the sufficiency of the evidence, an appellate court reviews all the evidence in the light most favorable to the State. *State v. Williams*, 299 Kan. 509, 525, 324 P.3d 1078 (2014). So long as a rational factfinder could have found the defendant guilty beyond a reasonable doubt, an appellate court will uphold the defendant's conviction. 299 Kan. at 525. Thus, it is only in the rarest cases where the testimony is so incredible that no reasonable factfinder could find the defendant guilty beyond a reasonable doubt that the verdict will be reversed. *State v. Matlock*, 233 Kan. 1, 5-6, 660 P.2d 945 (1983). In making this

determination, this court will not reweigh the evidence or the credibility of witnesses. *Williams*, 299 Kan. at 525.

Argument

Next, Purdy argues that under the modified corpus delecti rule, set forth in *State v. Dern*, 303 Kan. 384, 362 P.3d 566 (2012), the State failed to establish sufficient evidence to support his convictions. As set out by our Supreme Court in *Dern*, "the corpus delicti rule's purpose is commonly summarized as: (1) a protection against convicting defendants of imaginary crimes; (2) a means to avoid reliance on false confessions; and (3) a means to promote better police investigations by ensuring that they extend beyond the words of the accused. [Citation omitted.]" 303 Kan. at 401. The majority of the corpus delicti rule cases focus on the second factor concerning false confessions. As such, the formal corpus delicti rule prevents convictions based on extrajudicial admissions or confessions unless there is additional and independent evidence supporting that the crime occurred. 303 Kan. at 401-02.

As explained in *Dern*, however, because there are several problems regarding the rigidity of the formal corpus delicti rule, many jurisdictions, including Kansas, have adopted the trustworthiness standard. 303 Kan. at 401-11. The trustworthiness standard "provide[s] an alternative path for the State to take when making its prima facie showing of the alleged crime's corpus delicti when the nature and circumstances of that crime are such that it did not produce a tangible injury." 303 Kan. at 410. Under the trustworthiness standard: "That alternative route is a

trustworthy confession or admission to crimes that do not naturally or obviously produce a tangible injury easily susceptible to physical proof." 303 Kan. at 410. This means if independent evidence establishing the corpus delicti does not exist, an appellate court may still uphold a defendant's conviction so long as some evidence bolsters the validity of the confession itself. 303 Kan. at 410.

To determine if a confession is trustworthy, a court must look to the totality of the circumstances and may also consider the following nonexclusive factors or indicia of reliability:

> "(1) independent corroboration of details or specific facts contained in the confession; (2) the number of times the confession was made and the consistency or lack thereof between different versions of the confession; (3) the circumstances of the confession, including the identity of the person or persons to whom the confession was made and the state of mind of the defendant at the time of the confession; (4) the availability of the facts or details contained in the confession from sources outside the defendant's personal knowledge; (5) the defendant's age, education, experience, and mental health; and, (6) if the confession was made to law enforcement, then the overall fairness of the exchange including whether there was deception, trickery, undue pressure, or excessive length." 303 Kan. at 410-11.

A. Independent Corroboration of Details or Specific Facts Contained in the Confession

In addition to Purdy's confession there was evidence of A.L.'s allegation that was admitted without objection. During Detective Montague's direct examination, the prosecutor asked him if "one of the specific details is that [A.L.] was complaining that he had inserted something into her vagina. Is that correct?" (R. 6, 129.) Detective Montague answered, "That's correct." (R. 6, 129.) Also, Detective Montague testified that Purdy consented to a search of Purdy's house because

"originally there were some allegations of items that may have been inserted into [A.L.'s] vagina." (R. 6, 130.) This testimony was also admitted without objection. Lastly, Detective Montague agreed that during the search of Purdy's house he documented "the outlay of the house" and took some photographs. (R. 6, 131.) The prosecutor asked Detective Montague if he corroborated that there was a bathtub in the house. Detective Montague answered, "Yeah." (R. 6, 131.) Thus, there was some independent corroboration of facts contained in Purdy's confession.

B. The Number of Times the Confession was Made and the Consistency or Lack Thereof Between Different Versions of the Confession

During the October 20, 2016, interview with Agent Bridges, Purdy ultimately admitted that one time, when he was giving A.L. a bath, he inserted his right middle finger—up to the first knuckle—into A.L.'s vagina for five to six seconds. Purdy stated that it happened about a month prior to the interview around A.L.'s bedtime and that he and A.L. were the only ones home. (R. 6, 112; R. 11, State's Exhibit 1 at 2:29:56-2:30:18; 2:30:35-40; 2:30:44-2:31:08; 2:31:46-2:34:42; 2:34:54-58; 2:36:07-2:37:03; 2:38:30-54.) Purdy told Agent Bridges it was an accident. (R. 6, 112; R. 11, State's Exhibit 1 at 2:37:54-58; 2:39:11-20; 2:39:55-2:40:00.) Purdy said when it happened it made him think, "was that wrong." (R. 11, State's Exhibit 1 at 2:30:00-19.)

Eventually, Agent Bridges left the room and Detective Montague entered the room to speak to Purdy. Purdy confessed to the same touching of A.L. and provided the same details. Purdy again stated that he inserted his middle finger—up to the

first knuckle—into A.L.'s vagina for five to six seconds and that it was an accident. (R. 6, 132; R. 11, State's Exhibit 1 at 2:44:12-3:01:10; 2:45:46-2:46:38; 2:52:43-51.) Purdy again stated it only happened once. (R. 11, State's Exhibit 1 at 2:45:13-42; 2:49:42.)

Within that three hour interview, Purdy confessed twice with the same details. Purdy never wavered that it only happened one time, when he was giving A.L. a bath. Purdy repeatedly stated that it was his right middle finger, that he only inserted his finger into A.L.'s vagina up to the first knuckle, and that it was only for five to six seconds. Purdy's details were consistent.

About two hours later, while Purdy was sitting in jail, Purdy requested to speak to Detective Montague again. (R. 6, 133-34; R. 11, State's Exhibit 1 at 3:09:49-3:10:53.) At the jail, Purdy told Detective Montague that it was not an accident when he inserted his finger into A.L.'s vagina. (R. 6, 134.) Purdy stated he did it out of curiosity. (R. 6, 134.) Detective Montague asked Purdy if he would come back over to the Sheriff's Office so they could record his statement. Purdy agreed. (R. 6, 134; R. 11, State's Exhibit 2.)

During that statement, Purdy told Detective Montague:

> A month ago while I was giving [A.L.] a bath, I had out of curiosity put the tip of my middle finger in her vagina. About five seconds after that my brain clicked on and I realized that it was wrong and I instantly (inaudible) finger out and I made sure she put clothes on and put her to bed. And I made sure after that to never put myself in the situation again um to which where if I happened to be the one to give her a bath all I did was wash her hair. Um the reason why I didn't say anything in the initial interview is because I was fearful of losing my family and a month ago when it happened back then I just didn't tell anyone because I was fearful that I would lose my family and I didn't think that ... I

convinced myself that it was an accident so I left it as such. (R. 11, State's Exhibit 2 at 2:25-4:00.)

Purdy told Detective Montague that it was not an accident but out of curiosity. Purdy stated, "that's the only thing I can imagine of why I would do something like that." (R. 11, State's Exhibit 2 at 4:15-30.) Though Purdy changed his statement that the touching was accidental to done out of curiosity, the details remained the same. Purdy admitted that about a month before the interview, he put the tip of his middle finger inside A.L.'s vagina when he was giving her a bath. After about five seconds, Purdy realized it was wrong and removed his finger. While at the jail, on his own initiative, Purdy requested to speak to Detective Montague and confessed a third time. Purdy agreed to return to the Sheriff's Office to repeat what he had confessed to at the jail and be recorded. In total, Purdy gave four consistent confessions on October 20, 2016. Two during the interview, a third unrecorded confession at the jail—completely initiated by Purdy, and a fourth back at the Sheriff's Office. Thus, the fact that Purdy confessed numerous times, all with consistent details of what happened supports that Purdy's confession was sufficiently trustworthy.

C. The Circumstances of the Confession, Including the Identity of the Person or Persons to Whom the Confession was Made and the State of Mind of the Defendant at the Time of the Confession

Purdy confessed once to Agent Bridges and three times to Detective Montague. Three of the confessions were video recorded and one unrecorded while Purdy was in jail. As explained in Issue I, the recordings reflect that Purdy provided clear and coherent answers to the questions. Purdy had no difficulty in

understanding Agent Bridges and Detective Montague's questions. Purdy engaged in meaningful and rational conversations with both officers. Purdy never requested a break or to asked stop the interview at any time. The State disagrees that the recordings show Purdy in an obvious state of mental distress. The recordings show Purdy frustrated at the results of the polygraph and struggling to adequately explain his actions. Thus, the circumstances support that Purdy's confession was trustworthy.

D. The Availability of the Facts or Details Contained in the Confession from Sources Outside the Defendant's Personal Knowledge

Purdy's confession did not contain facts or details from outside his personal knowledge.

E. The Defendant's Age, Education, Experience, and Mental Health

For the same reasons as argued in Issue I, subsection D, nothing about Purdy's age, education, experience, or mental health establishes that his confession was untrustworthy. Despite Purdy's anxiety, he was able to participate adequately in the interviews and answer all the questions appropriately. Purdy never appeared overwhelmed, withdrawn, or otherwise confused. The only evidence Purdy presented of his susceptibility to coercion and distress was his own testimony that he became "really anxious" when he did not take his prescribed medications for anxiety and depression. (R. 3, 64-68.) However, the district court specifically found Purdy's testimony about failing to take his anxiety medication and resulting state of

mind was not credible. This Court cannot now reweigh the district court's credibility determination. *Patterson*, 304 Kan. at 274.

F. The Overall Fairness of the Exchange Including Whether there was Deception, Trickery, Undue Pressure, or Excessive Length of Law Enforcement

For the same reasons as argued in Issue I, subsection E, Purdy's confession is not untrustworthy due to unfairness of Agent Bridges, deception, trickery, undue pressure, or excessive length. The entire interview was a little over three hours. Neither Agent Bridges nor Detective Montague used deception, trickery, or undue pressure. Both used a calm conversational tone when questioning Purdy, did not raise their voices, and did not speak to Purdy in an aggressive manner. Overall, the interviews were fair and do not support a conclusion that Purdy's confession was untrustworthy.

Under the trustworthy analysis set forth in *Dern*, Purdy's confession was sufficiently trustworthy to support his convictions.

III. The district court did not improperly admit hearsay evidence.

Preservation and Relevant Facts

Prior to trial, A.L. was found to be an available witness. (R. 3, 31-34.) But the State did not call A.L. to testify at trial. During the direct examination of Agent Bridges, the prosecutor asked about A.L's allegation:

> Q. Now, this allegation that was made, it was – was it pretty specific as far as what had occurred with this child's genitalia?
>
> A. Yes. The allegation I was made aware of –

[Defense Counsel]: Object as to hearsay.

[Prosecutor]: Judge, it goes to the reason for his investigation as well as the reason that he asked Mr. Purdy certain questions.

The Court: I will overrule. You can proceed.

A. The allegation I was made aware of was that Mr. Purdy had put a crayon or crayons into the little girl's vagina. And I asked Mr. Purdy about that. And he said that he had never put anything, crayons or anything else into the little girl's vagina.

(R. 6, 110-11.)

Purdy's attorney preserved this issue with a contemporaneous hearsay objection to the question. See K.S.A. 60–404; *State v. Dukes*, 290 Kan. 485, 488, 231 P.3d 558 (2010).

Standard of Review

When considering the legal basis for a district court's admission of evidence, an appellate court's review is de novo. See *State v. Cosby*, 293 Kan. 121, 126-27, 262 P.3d 285 (2001) (reviewing de novo party's claim that statement was admissible because it was not hearsay).

Argument

Purdy argues that Agent Bridges's testimony about A.L.'s allegation was inadmissible hearsay. Hearsay evidence is generally inadmissible. K.S.A. 60-460. K.S.A. 60-460 defines hearsay as "[e]vidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated."

Conversely, out-of-court statements that are not offered to prove the truth of the matter stated are not hearsay under K.S.A. 60-460. See *State v. Becker*, 290 Kan. 842, 846, 235 P.3d 424 (2010). "The theory behind the hearsay rule is that when a statement is offered as evidence of the truth of the matter stated, the credibility of the declarant is the basis for its reliability, and the declarant must therefore be subject to cross-examination." 290 Kan. at 846 (citing B*oldridge v. State*, 289 Kan. 618, 634, 215 P.3d 585 [2009]).

If a statement is offered not to prove the truth of the matter asserted but to prove that the statement was made, it is not hearsay. *State v. Harris*, 259 Kan. 689, 698, 915 P.2d 758 (1996); see also *State v. Vontress*, 266 Kan. 248, 253, 970 P.2d 42 (1998) (if an out-of-court statement is offered "merely for the purpose of establishing what was then said, and not for the purpose of establishing the truth of the statement, the statement is not hearsay"). "If relevant, such a statement is admissible through the person who heard it." *Harris*, 259 Kan. at 698 (citing *State v. Getz*, 250 Kan. 560, Syl. ¶ 2, 830 P.2d 5 [1992]). The Kansas Supreme Court has also held that statements offered into evidence not to prove the truth of the matter asserted but "to show their effect on the listener" do not constitute hearsay. *Becker*, 290 Kan. at 847.

Agent Bridges's testimony about A.L.'s allegation was not hearsay as it was not offered to prove the truth of the matter asserted, i.e. that A.L.'s allegation was true. As explained by the prosecutor, the question was asked in order to explain the reason for the investigation and why Agent Bridges asked Purdy certain questions.

(R. 6, 110.) The fact that the allegation had been made was what triggered the investigation and provided the context as to why Agent Bridges asked Purdy certain specific questions.

The Kansas Supreme Court has previously held that a law enforcement officer may testify regarding the reasons an officer " 'approached a suspect or went to the scene of the crime' " because this evidence is not offered to prove the truth of the matter stated but rather to explain why an officer took certain actions. *State v. Thompson*, 221 Kan. 176, 178, 558 P.2d 93 (1976); see also *United States v. Freeman*, 816 F.2d 558, 563 (10th Cir. 1987) (out-of-court statement not hearsay if it is offered for the limited purpose of explaining why government investigation was undertaken). However, this legal premise has its limits. Where " 'the information as related to the jury directly or by necessary inference points to the guilt of the defendant, the testimony is inadmissible.' " 221 Kan. at 178-79. Here, Agent Bridges's statement about A.L.'s allegation was admissible to simply show that an allegation had been made and he was interviewing Purdy in regards to that allegation. The testimony was relevant to explain the circumstances of the investigation and provide context to Agent Bridges's interview with Purdy. Thus, the district court did not abuse its discretion when it overruled Purdy's hearsay objection.

Even if the district court erred when it allowed Agent Bridges's testimony regarding A.L.'s allegation, it was harmless error. The erroneous admission of evidence is reviewed for harmless error under K.S.A. 60-261. *State v. Perez*, 306

Kan. 655, 666, 396 P.3d 78 (2017). The harmless error analysis under K.S.A. 60-261 requires this court to determine "whether there is a reasonable probability that the error affected the outcome of the trial in light of the entire record." 306 Kan. at 666. "The State, as the party benefitting from the introduction of the evidence, has the burden of persuading the court that the error was harmless." *State v. Betancourt*, 299 Kan. 131, 144, 322 P.3d 353 (2014).

Evidence of A.L.'s allegation was also established through Detective Montague's testimony. This testimony went unchallenged. During the direct examination of Detective Montague, the prosecutor asked him:

> Q. Okay. And one of the specific details is that [A.L.] was complaining that he had inserted something into her vagina. Is that correct?
>
> A. That's correct.
>
> (R. 6, 129.)

Purdy's attorney did not object to this question, and Detective Montague's testimony about A.L.'s allegation was admitted into evidence for the jury to consider. Also, Detective Montague testified that the purpose of going to Purdy's house to conduct a search warrant was because "originally there were some allegations of items that may have been inserted into [A.L.'s] vagina." (R. 6, 130.) This testimony also went unchallenged.

Moreover, A.L.'s allegation that Purdy inserted crayons into her vagina was repeatedly presented to the jury on the recorded interview. (R. 11, State's Exhibit 1.) At trial, Purdy's attorney objected to the admission of this exhibit on the basis of

his previous motion to suppress. (R. 6, 103, 121, 135.) That motion only addressed the voluntariness of Purdy's confession and argued that it was involuntarily made, and thus, his statements should not be admitted. (R. 1, 81-84, 121-130.) Purdy did not challenge the interview on the basis of hearsay. The evidence of A.L.'s allegation was also admitted into evidence through Purdy's interview on State's Exhibit 1 and was cumulative. Thus, the statement that Purdy challenges as inadmissible hearsay was not offered for the truth of the matter asserted (not hearsay) or alternatively, its admission was harmless because the same evidence came in without objection.

Alternatively, Purdy argues that the district court should have given the jury a limiting instruction that advised the jury that Agent Bridges's testimony about A.L.'s allegation was not offered for the truth of the allegation. After the district court overruled the hearsay objection, Purdy's attorney did not request the district court advise the jury of the limited purpose of the testimony. Later, at the jury instructions conference, Purdy's attorney did not request a limiting instruction, nor did he object to the failure to provide a limiting instruction. Thus, this Court applies the clear error standard to review this claim. If a limiting instruction should have been given, this Court should reverse only if it is firmly convinced that the jury would have returned a more favorable verdict had the limiting instruction been given. See *State v. Cooper*, 303 Kan. 764, 771, 366 P.3d 232 (2016); *State v. Williams*, 295 Kan. 506, Syl. ¶¶ 4-5, 286 P.3d 195 (2012). Here, for the all the same

reasons the error was harmless, Purdy cannot meet his burden to establish clear error.

IV. The district court's admission of a certain portion of the interview between Agent Bridges and Purdy did not violate *State v. Elnicki.*

Preservation and Relevant Facts

During the direct examination of Agent Bridges, the prosecutor moved for admission of State's Exhibit 1, the video recording of the interview between Agent Bridges and Purdy. Purdy's attorney objected, "I would object, Judge. I think we've already had a ruling on the admissibility of that. And I don't think that's a redacted copy." (R. 6, 121.) The portion of the interview between Agent Bridges and Purdy was then published for the jury. (R. 6, 121.)

During the direct examination of Detective Montague, the prosecutor moved to publish another portion of State's Exhibit 1. (R. 6, 133.) Specifically, the portion of the interview where Detective Montague enters the room and recapped what Purdy had just admitted to Agent Bridges. (R. 6, 133.) Purdy's attorney did not object to the publishing of this portion of the interview. (R. 6, 133.) Later in Detective Montague's direct examination, the State moved to admit State's Exhibit 2, the video recording of the second interview between Detective Montague and Purdy. (R. 6, 135.) Purdy's attorney stated, "I renew my prior objection." (R. 6, 135.) The district court overruled the objection and admitted State's Exhibit 2. (R. 6, 135.) The State then published the interview. (R. 6, 135-36.) Following the cross-examination of Detective Montague, the State rested. (R. 6, 140-41.)

After the State rested, Purdy's attorney moved for a mistrial. (R. 6, 142-43.)

Purdy's attorney argued:

> First of all, I'm going to move for a mistrial based on the video that was played, not this last six-minute video, but the three hour video. Only a portion of it was played. That video was not redacted and should have been redacted. There were some things in there that I think weren't appropriate for the jury to hear. The polygraph machine was still sitting on the table during the interview. It's unlikely that any jurors would know what that machine was but it was sitting there. There was a motion in limine regarding the polygraph machine. In addition to that, there were a couple of specific statements that I think shouldn't have been played for the jury: At one point, Special Agent Bridges says that either [A.L.'s] a liar or Mr. Purdy committed these acts. I think that that's completely out of line as far as what the jury should have heard. That should have been redacted by the State. The burden is on the State to put on evidence that comports with the rules of evidence. So that should have been redacted. That's should that should have been done prior to trial and I should have been given a copy of it at that time.

(R. 6, 142-43.)

The prosecutor responded:

> As far as the comment about the child, something to the effect of either the child is a liar or Mr. Purdy did what he is accused of, that's already after he made certain admissions and the agent was simply solidifying, if you will, that this did indeed happen and that the child was actually either lying or what he has confessed to is true. So I don't know that that is – that's not your typical, I believe the child is lying or I believe the child is telling the truth type testimony. It's just an interview tactic. And, again, solidifying Mr. Purdy's statements.

(R. 6, 144.)

The district court denied the motion and held:

> As far as, I mean, I – frankly, Mr. Purdy said on the tape himself that he had been untruthful on a prior occasion when he originally met with Detective Montague. And the way that, again, the agent was just trying to explore those statements of the child, which Mr. Purdy here denies as far as the crayons.

(R. 6, 145.)

K.S.A. 60-404 states: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless there appears of record objection to the evidence timely interposed and so stated as to make clear the specific ground of objection." "The contemporaneous-objection requirement of K.S.A. 60-404 specifically applies to the admission or exclusion of evidence." *State v. King*, 288 Kan. 333, 346, 204 P.3d 585 (2009); see *State v. Robinson*, 306 Kan. 1012, 1028, 399 P.3d 194 (2017).

Purdy's objection to the interview was solely on the pre-trial rulings, not on the basis of improperly commenting on [A.L.] or Purdy's credibility. (R. 1, 81-84, 121-30; R. 6, 142-43.) Purdy's preservation section in Issue IV only cites to his motion for mistrial, after State's Exhibit 1 had been admitted and published. While this may have preserved Purdy's motion for mistrial on this ground, it did not satisfy raising it as an evidentiary issue on appeal. The contemporaneous objection rule is not satisfied by objecting on one ground at trial and arguing another ground on appeal. See *State v. Richmond*, 289 Kan. 419, 429, 212 P.3d 165 (2009); see *State v. Hollingsworth*, 289 Kan. 1250, 1256, 221 P.3d 1122 (2009) (It is well-settled that a party may not object at trial to the admission of evidence on one ground and then on appeal argue a different ground).

Moreover, Purdy's attorney was likely provided the recording long before trial and could have requested specific redactions been done prior to trial. It appears no such redactions were requested. Because Purdy failed object to the admission of the

interview on the basis of improper comments on either A.L.'s or his credibility, it is not preserved and this Court should not reach this issue.

Standard of Review

Generally, an appellate court's standard of review regarding a district court's admission or exclusion of evidence is abuse of discretion. *State v. Holmes*, 278 Kan. 603, 623, 102 P.3d 406 (2004). Nevertheless, a district court has no discretion to allow one witness to comment on the credibility of another witness. *State v. Elnicki*, 279 Kan. 47, 53-54, 105 P.3d 1222 (2005). Accordingly, a de novo standard of review applies to this issue. 279 Kan. at 51.

Argument

If this Court reaches the merits of this issue, Purdy is not entitled to relief. Here, Purdy claims that several comments by Agent Bridges were asking Purdy to improperly comment on A.L.'s credibility. During two minutes of the interview Agent Bridges speaks to Purdy about whether or not he believes that A.L. is telling the truth or lying. (R. 11, State's Exhibit 1 at 2:40:00-2:42:00.) Purdy does not directly address whether he believes A.L. is telling the truth or lying. Purdy does state that A.L. said a couple of times that Purdy did not touch her. But then Purdy states that that is not true because it did happen.

Purdy relies solely on *State v. Elnicki*, 279 Kan. 47, 105 P.3d 1222 (2005), to support his contentions. At issue in *Elnicki* was the admission of a videotape which portrayed a detective speaking to the defendant during an interrogation. On the tape, the detective asserted that the defendant just told " 'a flat out lie,' " accused

the defendant of " 'bullshitting him,' and 'weaving a web of lies" ' and suggested the defendant was lying because his eyes shifted. 279 Kan. at 51-52. The Kansas Supreme Court concluded that the videotape allowed the detective to improperly comment on the defendant's credibility but did not determine whether statements alone amounted to reversible error. 279 Kan. at 57. Rather, the Kansas Supreme Court reversed the convictions, finding the combined effect of the detective's accusations and the prosecutor's improper remarks on the defendant's credibility rendered the trial fundamentally unfair. 279 Kan. at 67-68.

The challenged statements in *Elnicki* are distinguishable from the portion of the interview Purdy now challenges. In *Elnicki*, during the interview with the detective, the defendant offered various explanations for where he was the night of the crime. During these explanations, the detective asserted that the defendant was lying to him. Unlike in *Elnicki*, here, Agent Bridges never explicitly asserts that Purdy was lying to him. Additionally, Agent Bridges did not engage in improper name calling or repeatedly call Purdy a liar. Agent Bridges's comments were not the equivalent of calling Purdy a liar.

But even if this Court finds error it was harmless. Under the harmless error analysis in *State v. Ward*, 292 Kan. 541, 565, 256 P.3d 801 (2001), *cert. denied* 132 S.Ct. 1594 (2012):

> Before a Kansas court can declare an error harmless it must determine the error did not affect a party's substantial rights, meaning it will not or did not affect the trial's outcome. The degree of certainty by which the court must be persuaded that the error did not affect the outcome of the trial will vary depending on whether the error implicates a right guaranteed by the United States Constitution. If it does, a Kansas court

> must be persuaded beyond a reasonable doubt that there was no impact on the trial's outcome, *i.e.*, there is no reasonable possibility that the error contributed to the verdict. If a right guaranteed by the United States Constitution is not implicated, a Kansas court must be persuaded that there is no reasonable probability that the error will or did affect the outcome of the trial.

Purdy was convicted because he repeatedly confessed to inserting his finger into A.L.'s vagina for five to six seconds. Agent Bridges's belief or disbelief of A.L. would not have swayed the jury's verdict. Thus, any error was harmless.

V. Any error in the jury instruction for the culpable mental state for aggravated indecent liberties with a child does not amount to clear error.

Standard of Review

As acknowledged by Purdy, there was no objection to any of the jury instructions. (R. 1, 173-181; R. 6, 176.) When a defendant fails to object to a jury instruction at trial, this Court's review is limited to whether the instruction was legally and factually appropriate and will reverse only for "clear error." See K.S.A. 22-3414(3); *State v. Barber*, 302 Kan. 367, 377, 353 P.3d 1117 (2015). Clear error occurs when, "the reviewing court is firmly convinced that the jury would have reached a different verdict had the instruction error not occurred." *State v. Williams*, 295 Kan. 506, 516, 286 P.3d 195 (2012). The party claiming a clearly erroneous instruction bears the burden to show the prejudice necessary for reversal. 295 Kan. at 516.

Argument

When determining whether an instruction is clearly erroneous, this Court engages in a two-step analysis. First, the Court must consider whether any error occurred, which requires employing an unlimited review of the entire record to determine whether the instruction was legally and factually appropriate. Second, if this Court finds error, it must assess whether it is firmly convinced that the jury would have reached a different verdict without the error. *State v. Clay*, 300 Kan. 401, 408, 329 P.3d 484 (2014). The party claiming that an instruction is clearly erroneous has the burden to establish the degree of prejudice necessary for reversal. *State v. Williams*, 295 Kan. 506, Syl. ¶¶ 4, 5, 286 P.3d 195 (2012).

Purdy argues that the district court gave conflicting jury instructions regarding the culpable mental state required for aggravated indecent liberties with a child. Jury Instruction 5, which stated the culpable mental state for aggravated indecent liberties with a child, was not legally appropriate because it stated that aggravated indecent liberties with a child could be committed knowingly and recklessly. Jury Instruction 5 stated:

> The State must prove that the defendant committed the crime of Aggravated Indecent Liberties with a Child:
>
> - Intentionally , or
> - Knowingly, or
> - Recklessly
>
> The State must prove that the defendant committed the crime of Rape:
>
> - Knowingly

A defendant acts intentionally when it is the defendant's desire or conscious objective to:

- Do the act complained about by the State, or
- Cause the result complained about by the State.

A defendant acts knowingly when the defendant is:

- aware of the nature of his conduct that the State complains about;

  or

- of the circumstances in which he was acting, or
- that his conduct was reasonably certain to cause the result complained about by the State.

A defendant acts recklessly when the defendant:

- consciously disregards a substantial and unjustifiable risk that certain circumstances exist; or
- a result of the defendant's actions will follow.

This act by the defendant disregarding the risk must be a gross deviation from the standard of care a reasonable person would use in the same situation.

PIK 4th 52.010.

(R. 1, 176-77.)

Purdy was charged with one count of aggravated indecent liberties with a child, pursuant to K.S.A. 21-5506(b)(3)(A) and (c)(3) which required the culpable mental state of an "intent to arouse or satisfy the sexual desires" of A.L. and/or Purdy. Thus, the culpable mental state was intentional. Because Jury Instruction 5 included the options of knowingly and recklessly committing the crime, the State

agrees that the inclusion of these options was not legally appropriate. Nevertheless, clear error does not exist.

Jury instructions in any particular case are to be considered together and read as a whole to determine whether the instructions properly and fairly state the law as applied to the facts of the case. If the instructions are substantially correct and the jury could not reasonably have been misled by them, the instructions will be approved on appeal. See *State v. Hall*, 292 Kan. 841, 857, 257 P.3d 272 (2011); see also *Victor v. Nebraska*, 511 U.S. 1, 5-6, 114 S.Ct. 1239, 127 L. Ed. 2d 583 (1994) (jury instructions taken as a whole must correctly convey the concept of reasonable doubt; inquiry is whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on insufficient proof).

Purdy claims the language in Jury Instruction 5 allowed him to be convicted on less than the required mental state for aggravated indecent liberties. It is crucial, however, to look at the jury instructions as a whole to determine whether they fairly stated the correct culpable mental state for aggravated indecent liberties with a child. Jury Instruction 8 specifically listed the elements of aggravated indecent liberties with a child:

> The defendant is charged with aggravated indecent liberties with a child.
>
> The defendant pleads not guilty.
>
> To establish this charge, each of the following claims must be proved:
>
> 1. The defendant engaged in lewd fondling or touching of ARL.
>
> 2. ***The defendant intended to arouse or satisfy the sexual desires of***

ARL and/or the defendant.

3. At the time of the act, ARL was less than 14 years old. The State need not prove the defendant knew the child's age.

4. The defendant was 18 or more years old at the time the act occurred.

5. This act occurred between the 1st day of September 2016 and The 14th day of October, 2016, in Jackson County, Kansas.

"Lewd fondling or touching" means fondling or touching in a manner which tends to undermine the morals of a child and is so clearly offensive as to outrage the moral senses of a reasonable person. Lewd fondling or touching does not require contact with the sex organ of one or the other.

(R. 1, 178) (emphasis added.)

Jury Instruction 8 plainly told the jury that in order to find Purdy guilty of aggravated indecent liberties with a child, it must find that Purdy intended to arouse or satisfy his sexual desires or the sexual desires of A.L. Although Jury Instruction 5 included knowing and reckless as options for the culpable mental state, the specific jury instruction for the crime of aggravated indecent liberties with a child that informed the jury of each of the elements that must be proved only included the correct required intent. The unobjected-to knowing and reckless language in Jury Instruction 5 did not mislead the jury given the specific elements and intent given in Jury Instruction 8.

Additionally, during closing argument, the prosecutor emphasized Jury Instruction 8, which listed the correct culpable mental state for aggravated indecent

liberties with a child and told the jury what they had to find in order to convict Purdy of this crime. The prosecutor went through each element and explained that the evidence that established those elements. The prosecutor stated:

> The aggravated indecent liberties offense, which is instruction number 8, is a little bit different in that you would need to find that Mr. Purdy touched or fondled [A.L.] in a way that a reasonable person would consider to be lewd or offensive ***and that he did so with intent to arouse his sexual desires.*** This is where it kind of goes back to instruction number 4. You can use your common sense under this type of situation. And, again, I would point you back to Mr. Purdy's admission that at some point while he was giving [A.L.] a bath and while he was cleaning her genital area, that at some point that act, the State would argue, aroused him to the extent that he decided to penetrate her vagina with his finger. And that's what the State is asserting is the lewd act, is the lewd fondling or touching and that, again, you don't have to check your common sense at the door. If the Defendant is admitting to doing this out of curiosity, well, what kind of curiosity is that? Is it sexual curiosity or is it what Mr. Purdy originally said during his testimony that it was curiosity to see if he got her clean? But then later in his testimony he denied doing it at all.
>
> (R. 6, 189-90) (emphasis added.)

Purdy cites to *State v. Miller*, 293 Kan. 46, 259 P.3d 701 (2011), in support of his argument that the instruction here was clearly erroneous. *Miller* was a homicide case where the Kansas Supreme Court held that the district court erred when it gave conflicting instructions regarding whether to consider the lesser included offenses of second-degree murder and voluntary manslaughter simultaneously (legally correct at the time) or sequentially (legally incorrect at the time). 293 Kan. 46 at Syl. ¶ 4.

Yet *Miller* is distinguishable from the present case. *Miller* does not pertain to jury instructions regarding the culpable mental state, but lesser included offense

instructions. Even if the jury considered that aggravated indecent liberties could be committed recklessly, there was no evidence presented to support it. The evidence the State presented was that Purdy's admission that he committed the crime out of curiosity. A reasonable inference being that Purdy's curiosity stemmed from his intent to arouse or satisfy his or A.L.'s sexual desires.

Purdy's defense was that he accidentally inserted his finger into A.L.'s vagina when he was cleaning her vagina. Had the jury believed Purdy's testimony either that he accidentally inserted his right middle finger into A.L.'s vagina for five to six seconds, or that it never actually happened, the jury would have acquitted Purdy of the crime. An accidental or mistaken insertion of Purdy's finger into A.L.'s vagina does not equal either a knowing or reckless commission of the crime. Thus, the jury would not have incorrectly convicted him of knowingly or recklessly committing aggravated indecent liberties with a child if it believed that when Purdy inserted his finger into A.L.'s vagina it was an accident; it would have acquitted him. Unlike *Miller*, the jury considered more than it should have, it did not fail to consider a lesser included offense. Even if the jury improperly considered whether Purdy committed the crime knowingly or recklessly, there was simply no evidence to support either.

Also, in *Miller* neither attorney explained that the lesser included offenses should be considered simultaneously and did nothing to clarify the contradictory instructions. Here, however, the prosecutor did clarify and properly explain the required intent to commit aggravated indecent liberties with a child. The

prosecutor's explanation undoubtedly informed the jury of the required intent.

Based on the jury instructions as a whole, the explanation of the required intent of aggravated indecent liberties during closing argument, and the evidence presented against Purdy, this Court should conclude there was no clear error.

VI. The prosecutor did not improperly argue facts not in evidence 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).

Argument

A. The prosecutor did not improperly argue facts not in evidence.

Purdy argues that the prosecutor improperly argued facts not presented in evidence in her rebuttal closing argument when she stated:

> Thank you. Ladies and gentlemen, not at any point have I asked you to fill in the blanks in this case other than what you have heard in the courtroom here today. ***What exactly happened and how much it happened or how often it happened, we will never know for sure because [A.L.] was only three years old when this happened. However, we do know that whatever happened made her tell somebody that it happened at three and a half years old. At three and a half years old she understood that what had happened was not right and she ended up telling somebody. We do know that. We do know that Theodore Purdy was brought in voluntarily on several occasions to talk about what happened. And you saw it on video that he corroborated what [A.L.] had said, that he had inserted something into her vagina.*** So, again, we're not asking you

> to fill in the blanks. I'm asking you to consider the evidence that you've heard here today and I'm asking you – as the instruction says, I'm not asking you to fill in the blanks, I'm asking you to use your common sense. You can weigh Mr. Purdy's testimony today versus the statements that he gave law enforcement previously. You determine which to find more credible or not. That is your job at this point. And I would submit to you that ultimately Mr. Purdy did tell law enforcement that he had inserted his finger into [A.L.]'s vagina for five to six seconds, and ultimately admitted to law enforcement that he had done it out of curiosity. And in going back to the common sense, I would submit to you that it was during the bathing process that he became aroused and that he ultimately did that. And that's your aggravated indecent liberties with a child.
>
> So ultimately, ladies and gentlemen, again, I'm asking you to go back to the jury room, review the instructions, speak about the evidence that you've heard today amongst yourselves and come back with a guilty verdict on both counts. Thank you.
>
> (R. 6, 199-200) (emphasis added.)

Purdy argues that this argument is problematic because A.L.'s allegations "were not in evidence, at least for substantive purposes." (Appellant's Brief, 37.) Purdy claims that without calling A.L. to testify there was no evidence presented of what A.L. alleged. Thus, the prosecutor's reference to what A.L. said, was a fact not in evidence. The State disagrees, and contends that the prosecutor's comments were proper comments on facts in evidence.

"In criminal trials, the prosecution is given wide latitude in language and in manner or presentation of closing argument as long as the argument is consistent with the evidence." *State v. Pabst*, 268 Kan. 501, 505, 996 P.2d 321 (2000). Yet a fundamental rule regarding closing argument requires prosecutors to confine their comments to matters in evidence and to not misstate the facts. See *State v. Tahah*, 293 Kan. 267, 277, 262 P.3d 1045 (2011); *State v. McCaslin*, 291 Kan. 697, Syl. ¶ 14,

245 P.3d 1030 (2011); *State v. Richmond*, 289 Kan. 419, 440–41, 212 P.3d 165 (2009) (quoting *State v. Baker*, 281 Kan. 997, Syl. ¶ 11, 135 P.3d 1098 [2006]). As noted above, the prosecutor asked Agent Bridges about A.L's allegation. (R. 6, 110.) Specifically, the prosecutor asked:

> Q. Okay. Now, this allegation that was made, it was – was it pretty specific as far as what had occurred with this child's genitalia?
>
> A. Yes. The allegation that I was made aware of –

Purdy's attorney then objected on the basis of hearsay. (R. 6, 110). The prosecutor stated, "it goes to the reason for his investigation as well as the reason that he asked Mr. Purdy certain questions." (R. 6, 110.) The district court overruled the objection. (R. 6, 110. Agent Bridges answered, "The allegation I was made aware of was that Mr. Purdy had put a crayon or crayons into the little girl's vagina. And I asked Mr. Purdy about that. And he said that he had never put anything, crayons or anything else into the little girl's vagina." (R. 6, 110-11.) Therefore, this evidence was not presented for the truth of A.L.'s allegation.

But there was other evidence of A.L.'s allegation that was admitted into evidence without objection. During the direct examination of Detective Montague, the prosecutor asked him:

> Q. Okay. And one of the specific details is that [A.L.] was complaining that he had inserted something into her vagina. Is that correct?
>
> A. That's correct.
>
> (R. 6, 129.)

Purdy's attorney did not object to this question and Detective Montague's testimony about A.L.'s allegation was properly admitted into evidence for the jury to consider. Thus, the prosecutor's statement regarding A.L.'s allegation that Purdy inserted something into her vagina was a comment based on a fact in evidence. It appears that this issue is actually an evidentiary issue, rather than an issue of prosecutorial error. See *State v. King*, 288 Kan. 333, 344, 204 P.3d 585 (2009); K.S.A. 60-404. Because Purdy did not object to this question, this evidentiary issue is not properly preserved.

Moreover, A.L.'s allegation that Purdy inserted crayons into her vagina was repeatedly presented to the jury on the recorded interview. (R. 11, State's Exhibit 1.) At trial, Purdy's attorney objected to the admission of these exhibits on the basis of his previous motion to suppress. (R. 6, 103, 121, 135.) That motion only addressed the voluntariness of Purdy's confession and argued that it was coerced, involuntarily made, and should not be admitted. (R. 1, 81-84, 121-130.) Purdy did not challenge the interviews or object to their admission on any other alternative basis at trial. Thus, the evidence of A.L.'s allegation was also admitted into evidence through Purdy's interview on State's Exhibit 1. Because the evidence of A.L.'s allegation was properly admitted into evidence for the jury to consider, the prosecutor did not comment on a fact not in evidence, and thus did not commit prosecutorial error.

B. If this Court determines the prosecutor's statements amount to error, the error is harmless.

If, however, this Court determines that any of the above statements by the prosecutor were 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 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.

Here, the jury was properly instructed, in Jury Instruction Number 3, that "[s]tatements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are not evidence. If

any statements are made that are not supported by evidence, they should be disregarded." (R. 1, 174; R. 6, 179.) And 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). This Court should presume that the jury followed the instructions given, which properly advised the jury that counsel's statements are not evidence. In fact, Purdy's attorney correctly informed the jury that comments from counsel are not evidence. (R. 6, 192.) Moreover, Purdy's attorney highlighted to the jury that there was no evidence to support the allegation that Purdy inserted crayons into A.L.'s vagina. (R. 6, 194-95.)

Also, there was no evidence in the record that the prosecutor's statements were intended to distract the jury from its duty to make decisions based on the evidence and the controlling law. The prosecutor's closing argument clearly and accurately summarized the evidence the State presented and argued that this evidence established the elements of each crime that the jury was instructed. (R. 6, 186-90, 198-200.)

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. It cannot be said that these comments diverted the attention of the jury away from the evidence in this case. The evidence established that Purdy admitted to inserting his right middle finger into A.L.'s vagina for five to six seconds. Though Purdy initially stated it was an accident, he later admitted that he had done the act out of curiosity. Although the allegation

was that Purdy inserted crayons into A.L.'s vagina, he admitted to inserting his finger in her vagina.

Thus, there was substantial evidence so that any error would likely have had little weight in the minds of the jury. Therefore, even if the prosecutor's statement constituted error, it was harmless and did not deny Purdy a fair trial.

VII. Purdy was not denied his right to a fair trial by cumulative error.

Standard of Review

Lastly, Purdy argues that if none of the above errors constitute reversible error individually, their cumulative effect denied him a fair trial. Under the cumulative error test, courts analyze whether the totality of the circumstances establish the defendant was substantially prejudiced by cumulative errors and was thus denied a fair trial. In assessing the cumulative effect of errors during the trial, the appellate court examines the errors in the context of the entire record, considering how the trial judges dealt with the errors as they arose; the nature and number of errors and their interrelationship, if any; and the overall strength of the evidence. *State v. Holt*, 300 Kan. 985, 1007, 336 P.3d 312 (2014).

Argument

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 State agrees there was one error in the inclusion of knowing and reckless as culpable mental states for the crime of aggravated indecent liberties with a child. However, a single error cannot constitute cumulative error.

State v. Williams, 299 Kan. 509, 566, 324 P.3d 1078 (2014). To the extent that this Court finds additional errors, their cumulative effect still does not require reversal because Purdy's right to a fair trial was not violated. Thus, Purdy is not entitled to relief based on cumulative error.

CONCLUSION

For the above reasons, the State respectfully requests the Kansas Court of Appeals affirm Purdy's convictions.

Respectfully submitted,

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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 Randall L. Hodgkinson, #15279, at adoservice@sbids.org on August 9, 2019, and the original was electronically filed with:

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