NOT DESIGNATED FOR PUBLICATION

No. 119,815

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
*Appellee*,

v.

ENRIQUE C. PERALES,
*Appellant.*

MEMORANDUM OPINION

Appeal from Sedgwick District Court; FAITH A.J. MAUGHAN, judge. Opinion filed October 11, 2019. Affirmed.

*Sam Schirer*, of Kansas Appellate Defender Office, for appellant.

*Lance J. Gillett*, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before STANDRIDGE, P.J., PIERRON and ATCHESON, JJ.

PER CURIAM: The State charged Enrique C. Perales with one count of aggravated battery and two counts of aggravated criminal sodomy after he physically and sexually assaulted A.C., a woman he was dating. Perales waived his right to counsel and represented himself at trial. The jury convicted him of aggravated battery and one count of aggravated sodomy but acquitted him of the second aggravated criminal sodomy charge. Perales appeals, arguing (1) the district court erred in allowing him to appear before the jury in an orange jumpsuit and shackles; (2) his aggravated criminal sodomy conviction is unsupported by sufficient evidence; (3) the district court erred in failing to give a limiting instruction; (4) cumulative error; and (5) the district court erred in combining a Wichita municipal battery conviction with two other misdemeanor

convictions to be scored as the equivalent of a person felony in calculating his criminal history. We find no basis for reversing the convictions or the resulting sentences and, therefore, affirm.

## FACTS

A.C. began dating Perales in September 2016. A few months later, she broke up with him after "he basically all but held [her] hostage in [her] apartment for a night." She then left for California. Perales began sending A.C. cryptic, intimidating Facebook messages. One message said:

> "Gasoline on your skin is nothing like you ever felt a burn. Fire hurts for five minutes before the nerves go numb. Five minutes feels like an eternity. You feel me now. GPS is awesome. Having cops as friends is awesome. . . . What would you do if I showed up all of the sudden where you were at?"

Perales then began sending her conciliatory messages, saying he loved her and would never hurt her. A.C. believed him and returned to Wichita in early January 2017.

On the morning of January 4, 2017, Perales returned to A.C.'s apartment after going to the liquor store. After drinking for a while, Perales started calling and texting some of his old friends. A.C. did not think Perales should be associating with them, and she told him to be careful. The two began arguing. Perales backed her into her room where he repeatedly punched her in the head. He then choked her. When she began to black out, he stopped choking her and resumed hitting her. Perales choked her to the point that she almost passed out at least four times. He bit her on the nose and neck. He wrote 666 in blood on her forehead and told A.C. she should be afraid of him because he was the devil. A.C. thought she was going to die.

The assault lasted about 20 to 30 minutes. After it ended, Perales told A.C. she could go clean up. He then ordered her back into the room. A.C. went back in because she did not know what else to do. Perales ordered her to fellate him. He threatened to break her neck if she did not, so she complied. He also tried to videotape her using her phone and threatened to put the video on Facebook for all her friends and family to see. A.C. did not physically resist because she feared Perales would resume hitting or choking her and might kill her. After about 10 minutes, Perales told A.C. to lick his anus. Still fearing for her life, she complied.

After the assault, A.C. deleted the pictures from her phone. She also deleted what she thought was the video. At trial, she explained she deleted them so Perales could not post them on Facebook.

Later that afternoon, A.C.'s father called her. She had called him earlier that morning to borrow some money. He had tried to contact her shortly after the assault, but Perales would not let her answer. When A.C. was finally able to talk to her father, she told him she did not need the money anymore and he should not come over. She said this because Perales had threatened to break her father's knee caps if he came over and he had threatened her children.

Perales' friend then picked up A.C. and Perales to give them a ride to Perales' brother's house. During the ride, A.C. covered her head with a hood and kept her head down. A.C. did not ask that individual for help because she thought Perales would hurt her more and she doubted he would help because he was Perales' friend. When they got to Perales' brother's house, A.C. put on makeup to cover her facial injuries.

During the day, A.C. surreptitiously sent a message to her ex-boyfriend who lived in Mexico. She reached out to him because she thought he would be safe from any possible retaliation from Perales. One message said: "If I die I'm at 742 South Fountain, Wichita, Kansas. He will be here. I don't know what to do. I have to go. I love you. I'm

sorry." She also took a picture of her injuries and sent it to him. She was not sure what her ex-boyfriend would do, but she "wanted it to be documented as to what [Perales'] did."

A.C.'s ex-boyfriend sent A.C.'s messages to a friend of his who was a deputy with the Ness County Sheriff's Office. After receiving the messages, the deputy called the Wichita Police Department. He told them about the messages and asked them to do a welfare check.

When officers arrived at 742 South Fountain, A.C. was home alone because Perales had gone to the liquor store. They saw A.C. had significant facial injuries and bite marks on her nose and neck. A.C. told officers Perales had injured her. When Perales returned from the liquor store, he did not appear concerned that officers and EMTs were at the house. Officers arrested Perales and took A.C. to the hospital.

A.C. underwent a sexual assault exam at the hospital. She described what Perales had done to her, except for the forced oral-anal contact. A.C.'s description of the events was otherwise generally consistent with her trial testimony. She also told the nurse she had vomited during the sexual abuse. As part of the exam, the nurse noted injuries consistent with the physical assault A.C. described, including forced oral sex, strangulation, and a beating to the head.

Officers also took Perales to the hospital for an exam. The nurse conducting that exam noted several abrasions on his penis. According to the nurse, when she asked Perales why he was there, he responded:

> "'I'm here to get one swab of my penis and one picture of my penis to get her DNA off of my junk. I have a laceration on my penis from a sharp tooth she has. She's a freak. She likes to have sex all the time, six to seven times a day.'"

During the investigation, a forensic examiner unsuccessfully tried to recover the videos or pictures of the nonconsensual sex acts from A.C.'s phone. He did recover two "thumbnail" photos of Perales' genitals dated January 4, 2017, but someone had deleted the accompanying files. The examiner could not tell if the thumbnails came from a video or a photo.

The State charged Perales with one count of aggravated battery under K.S.A. 2015 Supp. 21-5413(b)(1)(B) and two counts of aggravated criminal sodomy under K.S.A. 2015 Supp. 21-5504(b)(3). All three charges were felonies and designated as domestic violence offenses.

After having a public defender appointed as his lawyer, Perales moved to represent himself. At a motions hearing, the district court conducted a thorough waiver colloquy. The court explained Perales' right to counsel and right to self-representation. Perales informed the court he was already aware of these rights and "clearly aware" of what he was getting himself into.

The district court warned Perales of the dangers and disadvantages of self-representation, including: (1) the judge would not act on his behalf by making objections or motions; (2) the rules of law were highly technical and would not be set aside because he was not an attorney; and (3) he might unknowingly waive his constitutional, statutory, or common-law rights. Perales told the court he understood and had already reviewed this information a few times. He told the court he still wished to represent himself. The court found Perales knowingly and intelligently waived his right to counsel and invoked his right to self-representation.

At Perales' three-day jury trial in May 2017, the State called A.C., her father, Perales' friend, the nurses, the forensic examiner, and two responding officers as witnesses. Several witnesses identified Perales in court as wearing orange or an orange

jumpsuit. Before beginning his cross-examination of A.C., Perales also said, "It's kind of hard to do this with handcuffs."

The jury convicted Perales of aggravated battery and one count of aggravated criminal sodomy. The jury acquitted Perales of the second count of aggravated criminal sodomy. Fifteen days after the jury convicted Perales, he filed his own motion for a new trial. In his motion, he alleged the district court abused its discretion by allowing him to appear before the jury in an orange jumpsuit and shackles. He also requested appointment of counsel.

The district court eventually reappointed counsel for Perales who filed supplemental briefs in support of the motion for a new trial. The court ultimately denied the motion as untimely. The court sentenced Perales to 253 months' imprisonment for the aggravated criminal sodomy, to run concurrent with 12 months' imprisonment for the aggravated battery. Perales appeals.

## ANALYSIS

### *Did the District Court Err by Allowing Perales to Stand Trial Wearing an Orange Jumpsuit?*

Perales argues the district court erred by allowing him to stand trial in jail clothing. He claims this denied him a fair trial, and we should reverse his convictions. The State responds that Perales waived any right to appear in civilian clothing because he did not object, and any alleged error was harmless.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution and § 10 of the Kansas Constitution Bill of Rights both guarantee criminal defendants the right to a fair trial, which includes the presumption of innocence. See

*Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); *State v. Hall*, 220 Kan. 712, 714-15, 556 P.2d 413 (1976). Compelling a defendant to wear jail clothing may result in an unfair trial and deny that defendant the presumption of innocence. *Williams*, 425 U.S. at 504; *Hall*, 220 Kan. at 714-15. But "if a prisoner voluntarily chooses to be tried in prison garb or fails to object at the trial, his voluntary action or lack of action may constitute an effective waiver of his right to appear at the trial in civilian clothing." *Hall*, 220 Kan. at 715; see *Williams*, 425 U.S. at 512-13. We review constitutional claims de novo. *State v. Bowen*, 299 Kan. 339, 354, 323 P.3d 853 (2014).

Perales admits he effectively raises this issue for the first time on appeal because he did not object to wearing jail clothing at trial and his motion for a new trial was untimely. Constitutional grounds for reversal asserted for the first time on appeal typically are not properly before us for review. *State v. Daniel*, 307 Kan. 428, 430, 410 P.3d 877 (2018). There are several exceptions to this general rule, including: (1) The newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) consideration of the theory is necessary to serve the ends of justice or to prevent denial of fundamental rights; and (3) the judgment of the trial court may be upheld on appeal despite its reliance on the wrong ground or having assigned a wrong reason for its decision. *State v. Brown*, 309 Kan. 369, 375, 435 P.3d 546 (2019). Perales argues his claim is reviewable under the first and second exception.

The State argues we should not review the merits of Perales' claim because he failed to preserve any claim of a right to appear in civilian clothing when he did not object. Both *Williams* and *Hall* establish a defendant's constitutional rights are not violated when a defendant chooses to appear before the jury in prison garb. As a result, the *Williams* Court required an objection, holding "the failure to make an objection to the court as to being tried in such clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation." 425 U.S. at

512-13. Thus, the State's argument appears to have merit in the sense that had Perales objected, the district court could have afforded him relief.

Despite Perales' failure to object, he argues we should find constitutional error for two reasons. First, he contends that in at least some circumstances a lawyer might make a reasoned strategic decision that his or her client could realize a benefit from appearing in front of the jury in jail clothing. Accordingly, his appellate lawyer submits, "[t]here is no reason for this Court to assume that Mr. Perales—a non-attorney—had the slightest idea, at the time of his trial, that he had a constitutional right to present his case in civilian clothing" and, thus, made no strategic choice. But the legal ignorance upon which the argument is premised represents precisely the sort of pitfall that weighs against self-representation in the first place. Moreover, nothing suggests Perales was compelled to appear for trial in jail clothes or that the district court would have ignored his objection to doing so. See *Williams*, 425 U.S. at 512-13 (holding presence of compulsion necessary to establish constitutional violation).

Perales also argues the Kansas Supreme Court has placed an affirmative duty on district courts to explain on the record why a defendant has appeared in front of a jury in jail clothing. He relies on *State v. Ward*, 292 Kan. 541, 576, 256 P.3d 801 (2011). But the fit between *Ward* and the rule Perales fashions from it is not nearly as tight as he suggests. During the trial in that case, the prosecutor engineered having a witness identify associates of the defendant who were brought into the courtroom and seated in the gallery while wearing orange jail jumpsuits—plainly, though silently, signaling to the jurors they were in custody. Defense counsel objected and unsuccessfully moved for a mistrial. On appeal, the court recognized that the district court erred in failing to police the prosecutor's improper tactic. The court explained:

> "[G]iven the consensus in the case law that jail clothing taints a trial, a trial court almost always abuses its discretion to control the courtroom when it allows a defendant, witness, or nonwitness to be brought before a jury in jail clothing without an articulated

> justification explaining why it is necessary for the person to wear jail clothing and does not consider giving an admonition or instruction to the jury that it should not consider the clothing or the person's incarceration. (In some cases, an admonition may not be advisable, but the pros and cons should be weighed.) As we have noted, discretion is abused when a trial court does not take into account the legal principles that control its decision. In this situation, the case law, including decisions of the United States Supreme Court, indicate the trial court should avoid the taint of jail clothing on a trial. Ignoring this case law is an abuse of discretion." 292 Kan. at 576.

Thus, *Ward* addresses a situation in which a defendant, a witness, or someone closely associated with the defendant appears in front of jurors in jail clothes without giving the defendant the opportunity to press for alternative arrangements or despite a defendant's previously granted request for such arrangements. And, of course, government agents control the movement and appearance of persons in custody as they go to and from jury trials. Here, as we have said, Perales certainly had the opportunity to request that he wear civilian clothing during the jury trial. He never exercised that opportunity. Conversely, the defendant in *Ward* had no similar opportunity and objected to the prosecutor's tactic shortly after it became apparent, an objection the district court turned aside with nothing more than an unexplained finding of no prejudice. 292 Kan. at 547-48. So it is less than clear that *Ward* governs here, where Perales failed to object to his attire, even though that failure may have been the product of his own ignorance. But see *State v. Gleason*, 299 Kan. 1127, 1180-81, 329 P.3d 1102 (2014) (holding the district court abused its discretion by letting witnesses take the stand in orange prison jumpsuits, even though the defendant did not raise the issue), *reversed and remanded on other grounds by Kansas v. Carr*, 577 U.S. __, 136 S. Ct. 633, 193 L. Ed. 2d 535 (2016).

Even if the district court erred in allowing Perales to appear before the jury in jail clothing, that error may be excused if it is harmless. See *Hall*, 220 Kan. at 715. When an error infringes upon a defendant's federal constitutional right, a court will declare the error harmless only when the State, as the party benefiting from the error, persuades the court "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., proves there is no reasonable possibility that the error affected the verdict." *Ward*, 292 Kan. at 569 (citing *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705, *reh. denied* 386 U.S. 987 [1967]).

The evidence against Perales was strong. A.C. testified and described the physical and sexual abuse Perales inflicted on her. She also made consistent statements outlining most of that abuse shortly after the events. And she had documented injuries consistent with her account. Identity was never an issue, since A.C. and Perales had a close relationship. Perales did not testify at trial, so the jurors never heard a detailed alternative version from him. Likewise, he did not develop any sort of coherent theory of defense in his opening statement and closing argument to the jurors—another common pitfall for those without legal training who choose to represent themselves.

The district court instructed the jurors on the presumption of innocence and that their verdicts should be based on the evidence admitted during the trial. We presume jurors follow the instructions they are given. *State v. Becker*, 290 Kan. 842, 856, 235 P.3d 424 (2010); *State v. Franco*, 49 Kan. App. 2d 924, 939, 319 P.3d 551 (2014). Nothing in this case suggests the jurors did otherwise. The jury acquitted Perales of one of the three charges against him. In this situation, a split verdict suggests the jurors were not disposed to convict because of some impertinent external consideration, such as Perales' appearance in jail clothes during the trial.

Perales has established no error in his appearance in jail clothes during the jury trial because the district court did not compel him to dress that way and he never asked to wear something else. Even if the district court erred, the error would have been harmless under the *Ward* standard for a constitutional violation in light of the compelling evidence of Perales' guilt.

*Did the District Court Abuse its Discretion in Allowing Perales to be Shackled Throughout the Trial?*

Next, Perales claims the district court erred by deferring to a deputy's wishes when deciding whether to shackle Perales during the trial. On appeal, Perales points to an exchange he and the district court had during the trial. During the lunch recess following the State's case-in-chief, this colloquy took place:

> "THE DEFENDANT: I just have one question for you.
> "THE COURT: Yes, sir.
> "THE DEFENDANT: I don't have any good reasons, but I'm handcuffed all day long. I was wondering if I could get permission to just go back to my pod and take a quick nap before.
> "THE COURT: That's up to the deputy, sir.
> "THE DEFENDANT: If not, I'm going to be sitting in that cell handcuffed for two hours.
> "THE COURT: I don't control movement. Just like in here, I don't control security. Deputies are in charged [sic] of security, that's why I let them, you know, handcuffs removed, handcuffs on. It's whatever they need for security.
> "THE DEFENDANT: All right. So you don't have any objections to that. I would just like to go.
> "THE COURT: I don't put any request in for movements. I just want to make sure your [sic] here. What they do with you in between that time, that's up to them."

Perales claims those statements constituted an order Perales be shackled during the trial. He argues the district court abused its discretion by deferring the decision to the deputies. The State responds Perales misconstrues the record because the district court simply dealt with Perales' movement and restraint during a lengthy trial recess. The State has the better of that jousting.

"Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process." *Deck v. Missouri*, 544 U.S. 622, 630, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005). But shackling a defendant does not always result in

constitutional error because security concerns may necessitate such an action. 544 U.S. at 632. We review the district court's order that the defendant be shackled during trial for an abuse of discretion. *State v. Anderson*, 40 Kan. App. 2d 403, 406, 192 P.3d 673 (2008). The *Anderson* court held that a district court errs when it delegates the decision on whether a defendant must be shackled in the presence of the jurors during trial to a jailer precisely because the district court fails to exercise any discretion at all in doing so. *Anderson*, 40 Kan. App. 2d at 407-08.

Perales acknowledges he did not object in the district court to wearing shackles, but he argues we can review the issue as a question of law. The factual record, however, is less than clearly or fully developed. Although the trial transcript contains several references by Perales to being handcuffed, we have no comprehensive description of how and when during the trial he was physically restrained. For purposes of resolving the issue, we assume that Perales' hands were cuffed in front of him in some manner during the trial and those restraints would have been obvious to the jurors.

Perales frames his appellate issue around his exchange with the district court that we have already outlined. There, he was asking the district court to order the sheriff's officers to take him back to the jail (where he presumably would not be handcuffed) or to leave him unhandcuffed in a holding cell off of the courtroom. The district court declined to do so and did defer to the sheriff's department on where Perales would be held during the recess and how he would be restrained during that time. We presume that deference on the general handling of a pretrial detainee being moved to and from court proceedings to be appropriate. More to the point, Perales' request had nothing to do with how he appeared in front of the jurors during the trial. And, in turn, the district court's response to the request had no impact on the fairness of the trial itself.

On appeal, Perales notes that district courts have the discretion to order defendants physically restrained during trial based on legitimate safety concerns. But those concerns have to be balanced against the potential prejudice. As Parales points out, visible physical

restraints inferentially suggest the person restrained is otherwise unwilling to behave appropriately and poses a significant danger to those in his or her immediate vicinity. Those inferences tend to intrude on the presumption of innocence jurors are required to extend to criminal defendants. But, as we have indicated, Perales neither objected to appearing in handcuffs in front of the jurors nor asked the district court to allow him to participate in the trial without restraints or with some less obtrusive restraints. In light of that record and how the issue has been cast on appeal, we find no reversible error and really no error at all.

*Was the Evidence Sufficient to Support Perales' Aggravated Criminal Sodomy Conviction?*

Perales next challenges the sufficiency of the evidence supporting the jury's verdict convicting him of aggravated criminal sodomy. The argument turns on how the district court outlined the elements of the crime in the jury instructions and how that language should be considered in light of the statutory definition of the offense. As we explain, jury instructions ought to be construed by giving the words used their common and ordinary meanings unless an instruction expressly provides a different definition. See *State v. McLinn*, 307 Kan. 307, 342-43, 409 P.3d 1 (2018) (jurors expected to "apply a common understanding of the words" used in jury instructions); *State v. Armstrong*, 299 Kan. 405, 440, 324 P.3d 1052 (2014); *State v. Krahl*, No. 115,024, 2017 WL 3203331, at *8 (Kan. App. 2017) (unpublished opinion) (no need to define "lewd" as used in jury instruction, since jurors would properly rely on "the ordinary meaning of the commonly understood term"). Given that rule, Perales has failed to persuade us the jury instruction was erroneous or the evidence was insufficient to support his conviction.

Pertinent here, the district court's jury instruction on aggravated criminal sodomy stated:

> "To establish this charge, each of the following claims must be proved:
>
> "1. The defendant caused [A.C.] to engage in sodomy with a person.

"2. [A.C.] did not consent to the sodomy.

"3. The sodomy occurred under circumstances when [A.C.] was overcome by force and/or fear.

"4. The defendant acted intentionally."

The instruction also identified the date of the crime and that it happened in Sedgwick County as the final element. The instruction defined sodomy as "oral contact of the male genitalia." And it explained when a defendant is considered to have acted intentionally.

In assessing the sufficiency of the evidence, an appellate court looks at the evidence in a light most favorable to the prevailing party, here the State, and in support of the jury's verdict. An appellate court will neither reweigh the evidence generally nor make credibility determinations specifically. *State v. Jenkins*, 308 Kan. 545, Syl. ¶ 1, 422 P.3d 72 (2018); *State v. Butler*, 307 Kan. 831, 844-45, 416 P.3d 116 (2018); *State v. Pham*, 281 Kan. 1227, 1252, 136 P.3d 919 (2006). The issue for review is simply whether rational jurors could have found the defendant guilty beyond a reasonable doubt. *Butler*, 307 Kan. at 844-45; *State v. McBroom*, 299 Kan. 731, 754, 325 P.3d 1174 (2014).

Perales' point on appeal focuses on the first element in the instruction and rests on the idea the evidence failed to show that he caused A.C. to have engaged in sodomy with a person. On its face, the argument seems nonsensical. A.C. testified that Perales forced her to fellate him—that is sodomy—and Perales is indisputably a person. So considering the plain meaning of those words, as we expect and want jurors to, there seems to be plenty of evidence establishing that element of the crime.

But Parales shifts his argument to the statutory language criminalizing sodomy and the Kansas Supreme Court's interpretation of that language. The pivot, however, creates a false premise for the argument by interposing the unusual meaning the court has fashioned for the statutory phrase "any person." The jurors had no reason to know of or apply that unusual meaning in reaching their verdict finding Perales guilty.

Pertinent here, aggravated criminal sodomy is described in K.S.A. 2018 Supp. 21-5504(b) as:

> "(3) sodomy with a victim who does not consent to the sodomy or causing a victim, without the victim's consent, to engage in sodomy with any person or an animal under any of the following circumstances:
>
> (A) When the victim is overcome by force or fear."

The statute, thus, outlines dual scenarios in which the defendant either engages in nonconsensual sodomy with the victim or compels the victim to engage in sodomy "with any person." Considering the plain meaning of the statutory language, the first scenario would appear to be nothing more than a subset of the second. Legally identical language in K.S.A. 2018 Supp. 21-5504(a) and K.S.A. 2018 Supp. 21-5504(b)(1) and (2) applies to the respective crimes of sodomy and a form of aggravated criminal sodomy when the victim is less than 14 years old.

To avoid rendering the first scenario entirely redundant of the second, the Kansas Supreme Court has narrowed the second scenario by giving the phrase "any person" an odd meaning. In *State v. Dickson*, 275 Kan. 683, 693, 69 P.3d 549 (2003), the Kansas Supreme Court held that "any person," as used in an earlier version of the criminal sodomy statute, must mean "a person other than the defendant," thereby preserving an independent function for the statutory language separately criminalizing a defendant's conduct in engaging in sodomy with the victim. The *Dickson* court's interpretation of the statutory language remains controlling because the 2011 recodification of the criminal code retained that phrasing. See *State v. Fitzgerald*, 308 Kan. 659, 664, 423 P.3d 497 (2018).

So for purposes of the statutory language, "any person" actually means "any person in the world other than the named defendant" or something on the order of 7.7 billion individuals less one particular individual. The holding in *Dickson* may be explained as a rigid adherence to the canon of construction that no statutory

language should be rendered legislative surplus or vestigial. See *State v. Van Hoet*, 277 Kan. 815, 826-27, 89 P.3d 606 (2004) ("The court should avoid interpreting a statute in such a way that part of it becomes surplusage."). But the no-surplusage rule of construction is hardly ironclad and should yield to otherwise plain legislative intent and purpose. Scalia & Garner, Reading Law: The Interpretation of Legal Texts 176 (2012) (canon "must be applied with judgment and discretion," and if "[p]ut to a choice . . . a court may well prefer ordinary meaning to an unusual meaning that will avoid surplusage"). Here, a more realistic judicial reading of the statute would recognize a degree of superfluousness in its phrasing resulting from haphazard drafting through multiple amendments, especially given the legislative history described in *Dickson*, 275 Kan. at 689-92.

The quirky construction of the statute has occasionally led to outcomes testing what might be thought of as intrinsically fair. In some cases, the State has charged a defendant with causing the victim to engage in sodomy with any person but proved at trial that the defendant sodomized the victim. The appellate courts have voided those convictions because the crime set out in the charging instrument did not match the evidence presented during the trial and, thus, the crime actually prosecuted. *Fitzgerald*, 308 Kan. at 666; *Dickson*, 275 Kan. at 694-95; see also *State v. Laborde*, 303 Kan. 1, 2, 360 P.3d 1080 (2015) (conviction for theft reversed for insufficient evidence where defendant charged with one statutorily defined form of theft and trial evidence established different form of theft). But there was no such problem here, and Perales does not claim otherwise. The charging instrument alleged both scenarios: that Perales engaged in sodomy with A.C. and that he caused her to engage in sodomy with any person. In that respect, *Fitzgerald* and *Dickson* are inapposite. The charging document encompassed the form of sodomy the State proved at trial.

The question here is whether the elements instruction adequately informed the jurors of the law required to convict Perales of engaging in aggravated

criminal sodomy with A.C. See *State v. Dias*, 263 Kan. 331, 336, 949 P.2d 1093 (1997) (instructions proper if they "sufficiently inform the jury of the law" and jurors "could not have been reasonably be misled"); *State v. Shockey*, No. 116,375, 2017 WL 3113220, at *5 (Kan. App. 2017) (unpublished opinion). We answer by returning to where we started with the plain meaning of the language used in the jury instruction. Guided by that meaning, the jurors were sufficiently apprised of what the State had to prove to convict Perales of forcing A.C. to engage in sodomy with him. By any common understanding, Perales fit within the meaning of the phrase "a person" as used in the instruction. In turn, the evidence viewed in the State's favor supported the jurors' guilty verdict.

The peculiar meaning the Kansas Supreme Court has given the statutory language has no bearing on the jurors' application of the elements instruction, since they were not informed of that definition and had no reason to even imagine it in their deliberations. Why would they? See *State v. Bradford*, No. 115,008, 2016 WL 7429318, at *2 (Kan. App. 2016) (unpublished opinion) (This court rejected the defendant's challenge to a jury verdict convicting him of aggravated battery premised on the statutory definition of the crime being impermissibly vague because "[t]he jurors necessarily relied on the relevant instructions rather than the statute in arriving at their guilty verdicts.").

In context, the elements instruction may have lacked a degree of precision by broadly identifying the participant Perales caused to in engage in the act of sodomy with A.C. as "a person." Given the evidence, the instruction could have been tailored to refer specifically to Perales. But that imprecision did not render the instruction erroneous or the jury's guilty verdict legally or factually suspect. See *State v. Trotter*, No. 114,743, 2017 WL 3668908, at *5 (Kan. App. 2017) (unpublished opinion) ("A given instruction is not erroneous simply because a superior one might be crafted."); see also *State v. Herbel*, 296 Kan. 1101, 1124, 299 P.3d 292 (2013) (jury instruction, though "not the preferred" one, still

considered "legally appropriate"). The jurors appropriately would have considered Perales to be a person within the scope of the instruction and, thus, would have deliberated as to whether the State had proved he caused A.C. to engage in sodomy with him. And that is the correct issue. In short, the instruction was not erroneous, and Perales' argument premised on instructional error necessarily fails.

To button up this point, we mention that another panel considered the same issue earlier this year in *State v. Valentine*, No. 119,164, 2019 WL 2306626 (Kan. App. 2019) (unpublished opinion), *petition for rev. filed* June 21, 2019, a decision the State has called to our attention in a Supreme Court Rule 6.09 (2019 Kan. S. Ct. R. 39) letter. The *Valentine* case involved the same district court and the same instruction on aggravated criminal sodomy as we have here. There, Valentine forced the victim to engage in sodomy with him, but the instruction referred to him causing the victim to engage in sodomy with "a person." The panel concluded the instruction was factually inappropriate and, therefore, erroneous. 2019 WL 2306626, at *6. It superimposed the Kansas Supreme Court's unusual statutory definition of "another person" on the plain meaning of the phrase "a person" used in the instruction. We, of course, disagree with that assessment of the issue.

Having found the instruction to be erroneous, the *Valentine* panel then considered how the evidence stacked up against what would have been the "correct" instruction—the alternative form in PIK Crim. 4th 55.070—casting the element as whether "'[t]he defendant engaged in sodomy with [the victim].'" 2019 WL 2306626, at *6. (That more precisely tailored form is the one the district court ideally should have used in this case.) The panel concluded the evidence clearly supported a conviction under that instruction, so any error must have been harmless. 2019 WL 2306626, at *6.

We find that resolution of the issue troubling because the panel replaced what it viewed as a factually erroneous element of the crime as stated in the instruction with an element it viewed as materially different and then presumed to

conclude what verdict the jurors would have reached based on the substituted element. The method of analysis and resulting conclusion stand perilously close to directing a verdict in a criminal case. See *State v. Hargrove*, 48 Kan. 522, 530, 293 P.3d 787 (2013); *State v. Brown*, No. 115,817, 2017 WL 5016171, at *4 (Kan. App. 2017) (unpublished opinion) (A district court's decision to "reform" a jury verdict finding the defendant guilty of attempted involuntary manslaughter, the lesser included offense identified on the verdict form, to a verdict of guilty for attempted voluntary manslaughter, the crime identified in the instructions, constituted reversible error that "move[d] perilously toward the entry of a directed verdict of guilty."), *rev. granted* 307 Kan. 989 (2018). Directing a guilty verdict no matter how overwhelming the government's evidence violates the defendant's Sixth Amendment right to jury trial. *Sullivan v. Louisiana*, 508 U.S. 275, 277, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) (citing *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73, 97 S. Ct. 1349, 51 L. Ed. 2d 642 [1977]; *Sparf v. United States*, 156 U.S. 51, 105-06, 15 S. Ct. 273, 39 L. Ed. 343 [1895]); *State v. Sisson*, 302 Kan. 123, 129-30, 351 P.3d 1235 (2015). That rule extends to individual elements of particular crimes. *Neder v. United States*, 527 U.S. 1, 12, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); *Sisson*, 302 Kan. at 129-30. Accordingly, we prefer our more antiseptic resolution of this issue to the constitutionally fraught one deployed in *Valentine*.

*Did the District Court Err By Failing to Give a Limiting Instruction?*

Perales argues the district court erred by failing to give a limiting instruction regarding evidence attributing other criminal acts to him. For example, during direct examination, the State asked A.C. why she left for California, and she responded, "[W]e have had domestic violence issues before, but he basically all but held me hostage in my apartment for a night." A.C.'s father testified Perales had assaulted A.C. several times and had threatened to kill her family. A.C.'s father recounted a particular incident in which the police had responded to a disturbance call because Perales "had her by the throat on

the floor, and said he would kill her if she said anything." The nurse also repeated statements A.C. made to her about domestic violence.

Perales elicited information about his own criminal conduct. During his cross-examination of A.C., he asked her, "What old friends did I contact?" She responded, "The ones you said you were supposedly in a gang with. That you used to sell drugs with, and go rob people, and do things like that with." Perales asked A.C.'s father if he ever witnessed any physical abuse of A.C. Her father responded, "No, I wasn't around you that long. But I have seen her afterwards where both of her eyes were swollen shut after you—after she says you beat the hell out of her." And Perales asked a responding police officer if he had voluntarily disclosed that he an outstanding warrant for a misdemeanor stalking charge. She agreed that he did.

Under K.S.A. 60-455, a defendant's other criminal acts or civil wrongs are generally inadmissible to prove his or her criminal propensity but may be admissible to prove some other relevant, disputed fact. When a district court admits prior crimes evidence, it typically must give a limiting instruction. *State v. Gunby*, 282 Kan. 39, 48, 144 P.3d 647 (2006). Neither party argues the other crimes evidence fell outside the purview of K.S.A. 60-455. As a result, the district court should have given a limiting instruction and erred by not doing so.

The State argues Perales cannot now claim error because he either elicited the other crimes evidence in the first place or cross-examined witnesses about the evidence. To the extent that Perales introduced some of the other crimes evidence during his cross-examination and failed to request a limiting instruction, the invited error doctrine precludes him demanding relief on appeal. *State v. Anthony*, 282 Kan. 201, 215, 145 P.3d 1 (2006). But the invited error doctrine would not prevent Perales from complaining about the admission of evidence elicited by the State in direct examination without a limiting instruction.

Although Perales neither objected to the admission of other crimes evidence at trial nor requested a limiting instruction, he may raise this issue on appeal. But he must show the district court's failure was clearly erroneous to succeed. *State v. Breeden*, 297 Kan. 567, Syl. ¶ 4, 304 P.3d 660 (2013). To meet this burden, he must firmly convince us that a real possibility exists the jury would have rendered a different verdict if the district court had given the instruction. See *State v. Murrin*, 309 Kan. 385, 392, 435 P.3d 1126 (2019).

Perales cannot show a real possibility exists that the jury would have rendered a different verdict if the district court had given a limiting instruction. The jury acquitted Perales on one charge, so it is unlikely the jury convicted him on the other two based on a belief he had a general criminal disposition or that he ought to be punished in this case for that bad conduct. Again, the evidence against Perales was strong. Thus, any error in failing to give a limiting instruction was insufficient to warrant relief.

*Did Cumulative Errors Deprive Perales' of a Fair Trial?*

Perales argues cumulative errors deprived him of a fair trial. In a cumulative error analysis, we consider all errors collectively, even if those errors would individually be harmless, to determine if their combined effect denied the defendant a fair trial. In conducting this analysis, we examine the errors in the context of the entire record, considering how the district court dealt with the errors as they arose, the nature and number of errors, their interrelationship, and the strength of the evidence. *State v. Williams*, 308 Kan. 1439, 1462, 430 P.3d 448 (2018). "'No prejudicial error may be found under the cumulative error doctrine if the evidence against the defendant is overwhelming.'" *State v. Anderson*, 308 Kan. 1251, 1267, 427 P.3d 847 (2018). And the cumulative error rule does not apply in the absence of multiple errors. That is, a single error cannot be cumulated. *State v. Williams*, 299 Kan. 509, 566, 324 P.3d 1078 (2014).

Here, the district court made only one identified error in failing to give a limiting instruction as to some of the other crimes evidence. Accordingly, Perales cannot show *cumulative* error requiring reversal of his convictions.

*Did the District Court Err by Scoring Perales' In-State Municipal Misdemeanor as a Person Misdemeanor Resulting in Conversion of Three Person Misdemeanors into a Person Feloney?*

For his last point, Perales argues the district court erred in scoring his Wichita municipal battery conviction as a person misdemeanor and converting it, along with two other person misdemeanors, to a person felony. Perales acknowledges he did not object to his criminal history score at sentencing. But a sentence based on an incorrect criminal history amounts to an illegal sentence. *State v. Dickey*, 301 Kan. 1018, Syl. ¶ 3, 350 P.3d 1054 (2015). And a court may correct an illegal sentence at any time. K.S.A. 2018 Supp. 22-3504(1); see *Dickey*, 301 Kan. 1018, Syl. ¶ 3. The legality of a sentence is a question of law subject to unlimited review. Similarly, classification of prior offenses for criminal history purposes requires interpretation of the revised Kansas Sentencing Guidelines Act (KSGA), K.S.A. 2018 Supp. 21-6801 *et seq.*, and statutory interpretation is also a question of law subject to unlimited review. *State v. Russ*, 309 Kan. 1240, 1242, 443 P.3d 1060 (2019).

Under the KSGA, a defendant's sentence is based on the current crime's severity level and the defendant's criminal history score. See K.S.A. 2018 Supp. 21-6804; K.S.A. 2018 Supp. 21-6805. Generally, a district court calculates the defendant's criminal history score by listing his or her prior convictions or adjudications and then classifying those convictions or adjudications as either misdemeanors or felonies and as person or nonperson offenses. Based on the number and type of convictions, the court gives the defendant a criminal history score ranging from I, the least serious category, to A, the most serious category. See K.S.A. 2018 Supp. 21-6809; K.S.A. 2018 Supp. 21-6810; K.S.A. 2018 Supp. 21-6811.

If a defendant has three prior convictions or adjudications of class A or class B person misdemeanors, the district court converts those convictions to one person felony for criminal history purposes. K.S.A. 2018 Supp. 21-6811(a). Perales had two prior convictions for stalking, see K.S.A. 2018 Supp. 21-5427(a)(1), a class A person misdemeanor. He also had a Wichita municipal conviction for battery. The district court classified his municipal battery conviction as a person misdemeanor and converted the three person misdemeanors into one person felony. That elevated Perales' criminal history score from category H to category D.

Perales agrees the Kansas Supreme Court has held that municipal convictions count as misdemeanors within the meaning of K.S.A. 21-4711(a), now codified as K.S.A. 2018 Supp. 21-6811(a). See *State v. Vega-Fuentes*, 264 Kan. 10, 14-16, 955 P.2d 1235 (1998). Nonetheless, he argues the statute provides no way to determine whether an in-state municipal conviction is a class A or class B misdemeanor. He notes that K.S.A. 2016 Supp. 21-6811(e) provides a way to classify out-of-state convictions as class A, B, or C misdemeanors, but he argues the statute's language expressly limits its application to out-of-state convictions.

The State responds that K.S.A. 2016 Supp. 21-6811(a) must be read in conjunction with K.S.A. 2016 Supp. 21-6810. That statute provides the district court must consider and score prior "convictions and adjudications for violations of municipal ordinances . . . which are comparable to any crime classified under the state law of Kansas as a person misdemeanor, select nonperson class B misdemeanor or nonperson class A misdemeanor." K.S.A. 2016 Supp. 21-6810(a); see also K.S.A. 2016 Supp. 21-6810(d)(5) ("All person misdemeanors, class A nonperson misdemeanors and class B select nonperson misdemeanors, and all municipal ordinance county resolution violations comparable to such misdemeanors, shall be considered and scored."). Based on this language, the State argues the district court correctly classified Perales' Wichita

municipal conviction as a class B person misdemeanor based on the comparable offense in the Kansas Criminal Code—battery under K.S.A. 2016 Supp. 21-5413(a)(2), (g)(1).

In *Russ*, 309 Kan. at 1243-44, the Kansas Supreme Court held the district court had correctly classified the defendant's Wichita municipal convictions for domestic battery as person misdemeanors in calculating his criminal history score. Russ had several prior Wichita municipal convictions that were scored as person misdemeanors, and three of those convictions had been converted into a person felony. On appeal, he argued the district court erred in classifying his Wichita municipal domestic battery convictions as person misdemeanors because the Wichita domestic battery statute was broader than the Kansas domestic battery statute.

In conducting its analysis, the *Russ* court noted that K.S.A. 2018 Supp. 21-6810(a) requires the district court to consider and score municipal convictions comparable to Kansas person misdemeanors. 309 Kan. at 1242-43. Relying on *State v. Wetrich*, 307 Kan. 552, 561-62, 412 P.3d 984 (2018), the court held a municipal conviction is comparable to a Kansas person misdemeanor if the municipal offense's elements are identical to or narrower than the Kansas offense. The court held the elements of Wichita's domestic battery offense were narrower than Kansas' simple battery statute, so a Wichita municipal domestic battery conviction should be classified as a person misdemeanor. *Russ*, 309 Kan. at 1243-44.

Russ did not specifically argue that the KSGA did not provide a way to classify in-state municipal convictions as class A or class B misdemeanors. Nonetheless, *Russ* supports the State's argument that K.S.A. 2016 Supp. 21-6810(a) provides that mechanism by requiring district courts to consider and score municipal convictions having person misdemeanor counterparts in the Kansas Criminal Code.

The municipal ordinance in effect at the time of Perales' 1996 battery conviction could not be found online and is not in the record on appeal. The State relies on Wichita

Mun. Code § 5.10.020, which states: "Any person who, within the corporate limits of the city, (1) knowingly or recklessly causes bodily harm to another person or (2) knowingly causes physical contact with another person when done in a rude, insulting or angry manner, is guilty of a misdemeanor." As the State correctly notes, this language is legally indistinguishable from K.S.A. 2016 Supp. 21-5413(a), which states: "Battery is (1) Knowingly or recklessly causing bodily harm to another person; or (2) knowingly causing physical contact with another person when done in a rude, insulting or angry manner." The two crimes are comparable for criminal history purposes, and the state crime is a class B person misdemeanor. K.S.A. 2016 Supp. 21-5413(g)(1). Thus, Perales' municipal conviction was correctly scored, and his sentence is not illegal.

Affirmed.

ATCHESON, J., concurring: I join in the majority's thorough opinion and find nothing that supports reversing either Defendant Enrique Perales' convictions or the resulting sentences. But I write separately specifically to repeat my view on limiting instructions for other crimes evidence admitted under K.S.A. 60-455. See *State v. Massengale*, No. 109,351, 2014 WL 349612, at *10-12 (Kan. App. 2014) (unpublished opinion) (Atcheson, J., concurring). In short, a district court should not give a limiting instruction unless the party adversely affected by the admitted evidence affirmatively requests one. Often, good trial strategy suggests forgoing a limiting instruction that necessarily calls attention to the evidence in preference for the camouflage of silence. And I certainly do not believe a district court *must* give a limiting instruction, especially over an objection from the party against whom the evidence has been admitted. 2014 WL 349612, at *11; see *State v. Jilka*, No. 115,274, 2017 WL 1367052, at *7-8 (Kan. App. 2d 2017) (unpublished opinion) (Atcheson, J., concurring).

Here, Perales did not request a limiting instruction, so the district court committed no error in failing to give one. I doubt Perales acted on any studied

strategic considerations and probably just forged ahead in ignorance, as he apparently did in many other aspects of the trial. But the majority has reached the right outcome in denying the point, and I concur in that result.