IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 123,190

STATE OF KANSAS,
Appellee,

v.

JERRY W. CAMPBELL,
Appellant.

SYLLABUS BY THE COURT

1.

The harmless error standard of K.S.A. 60-2105 and K.S.A. 2022 Supp. 60-261 applies to determine if erroneous admission of prior drug crime evidence under K.S.A. 2022 Supp. 60-455 prejudicially affected a party's substantial rights, considering the entire record. Where an error implicates a statutory but not a federal constitutional right, the harmless error test is whether there is a reasonable probability that the erroneous admission of prior drug crime evidence affected the outcome of the trial, considering the entire record. The party benefiting from the improper admission of evidence bears the burden to show harmlessness.

2.

At least three types of prejudice can result from the admission of prior bad acts evidence: (1) a jury might exaggerate the value of other crimes as evidence showing that, because a defendant previously committed a crime, it might be properly inferred that he or she committed the currently charged offense; (2) a jury might conclude that a defendant deserves punishment because he or she is a general wrongdoer, even if the prosecution has not otherwise met its burden to establish guilt beyond a reasonable doubt;

and (3) a jury might conclude that because the defendant is a criminal, the evidence he or she presents on his or her own behalf should not be believed.

3.

Although PIK Crim. 4th 57.040 states that a defendant's use of a controlled substance is a factor the jury can consider in a nonexclusive possession case, the pattern instruction fails to adequately summarize the nuances of this court's caselaw relating to K.S.A. 2022 Supp. 60-455 evidence. While a defendant's use of a controlled substance may be admitted—subject to the requirements of K.S.A. 2022 Supp. 60-455—when such evidence is relevant to prove a disputed material fact, the defendant's use of a controlled substance is not a factor that is automatically admissible as an exception to the specific mandates of K.S.A. 2022 Supp. 60-455. To the extent PIK Crim. 4th 57.040 suggests otherwise, the instruction is disapproved. To the extent past appellate cases in this state suggest otherwise, they also are disapproved.

4.

Appellate courts generally treat motions to reconsider as motions to alter or amend. When reviewing the district court's ruling on a motion to alter or amend, we apply an abuse of discretion standard. A judicial action constitutes an abuse of discretion if it is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact.

5.

A magistrate may issue a search warrant authorizing the installation and use of a tracking device to collect data for a specified period of time. Upon a showing of good cause by the State, the magistrate may grant extensions of the search warrant.

6.

Absent a showing of illegality, search warrants and their supporting affidavits are presumed valid. The party challenging the validity of the search warrant bears the burden of establishing its illegality.

7.

No search warrant shall be quashed or evidence suppressed because of technical irregularities not affecting the substantial rights of the accused. In Kansas, the test used to evaluate search warrant technical irregularities is one of practical accuracy rather than one of hyper technicality. The label of "technical irregularity" is generally reserved for clerical mistakes or omissions that do not otherwise affect the substance of the warrant.

Review of the judgment of the Court of Appeals in an unpublished opinion filed July 1, 2022. Appeal from Douglas District Court; AMY J. HANLEY, judge. Oral argument held March 28, 2023. Opinion filed July 14, 2023. Judgment of the Court of Appeals reversing the district court is affirmed. Judgment of the district court is reversed, and the case is remanded with directions.

Kasper Schirer, of Kansas Appellate Defender Office, argued the cause and was on the briefs for appellant.

Brian Deiter, assistant district attorney, argued the cause, and *Suzanne Valdez*, district attorney, and *Derek Schmidt*, attorney general, were with him on the briefs for appellee.

The opinion of the court was delivered by

STANDRIDGE, J.: After law enforcement discovered drugs and items associated with the sale of drugs in a car Jerry W. Campbell was driving on two separate occasions, a jury convicted him of two counts of possessing methamphetamine and four counts of possessing drug paraphernalia with intent to use to distribute. At trial, the district court allowed the State to introduce detailed evidence relating to Campbell's prior convictions

for similar crimes under K.S.A. 2017 Supp. 60-455. Campbell appealed. The Court of Appeals reversed Campbell's convictions, finding the district court erred by allowing the State to introduce the prior crimes evidence. The panel remanded the case for a new trial. Judge Henry Green, concurring in part and dissenting in part, also would have found the prosecutor committed reversible error during voir dire by using an inflammatory hypothetical to explain the presumption of innocence to the prospective jurors.

In its petition for review, the State does not challenge the panel's finding that the district court erroneously allowed introduction of the prior crimes evidence. Instead, the State claims the panel erred in failing to analyze whether this error required reversal. Applying that analysis, the State maintains the error was harmless. We agree that the panel erred in failing to conduct a harmless error analysis but disagree that application of a reversibility analysis results in a finding of harmless error.

Campbell filed a cross-petition for review raising three issues: (1) the panel erred in affirming the district court's reversal of its order suppressing evidence found in Campbell's car, (2) this court should adopt Judge Green's dissent and find the prosecutor committed reversible error during voir dire, and (3) the cumulative effect of the alleged errors violated his constitutional right to a fair trial. Given our holding that introduction of the prior crimes evidence constitutes reversible error, we only reach the merits of Campbell's claim of error relating to his motion to suppress because resolution of this claim will assist the district court on remand. We conclude Campbell has no right to relief on this basis because the district court did not abuse its discretion in reversing its suppression order.

FACTUAL AND PROCEDURAL BACKGROUND

On September 23, 2017, Lawrence Police Officer Matt Roberts saw Campbell driving a blue Lincoln Town Car with a seven-year-old child as a passenger. After learning Campbell had an active warrant for his arrest and a suspended driver's license, Officer Roberts stopped Campbell and arrested him. The officer located several $100 bills in Campbell's pants pockets, along with some $20 bills and other smaller denominations. During a later search of the car, Officer Roberts discovered several items he associated with the sale of drugs, including a zippered case containing an unknown white powdery substance, a digital scale with white residue, a measuring spoon, Ziploc bags containing white residue and what appeared to be marijuana seeds, and 64 unused Ziploc bags. The residue later tested positive for methamphetamine.

In November 2017, law enforcement applied for and received a search warrant to place a GPS tracking device on the Lincoln Town Car. Although Campbell was not the registered owner of the car, law enforcement regularly saw him driving it. In the affidavit supporting the search warrant, law enforcement alleged Campbell was a methamphetamine distributor and listed previous encounters law enforcement had with Campbell. These encounters included three occasions when law enforcement found what appeared to be methamphetamine and drug paraphernalia in cars driven by Campbell in May 2017 (May stop), July 2017 (July stop), and September 2017, which is the incident referenced above (September stop).

Law enforcement attached the GPS tracking device to the Lincoln Town Car and began monitoring its movements. On the evening of December 28, 2017, and into the early morning hours of December 29, 2017, law enforcement used the GPS tracker to physically follow Campbell as he drove to various locations in Kansas City, Missouri,

and back toward Lawrence. Officers saw a female passenger in the car who they later identified as Kayla Stroda.

Around 3:15 a.m., law enforcement stopped Campbell just outside Lawrence and arrested him for driving without a valid license. A drug-sniffing dog alerted law enforcement to the possibility of drugs inside the car. A search revealed a red bag on the passenger floor containing two bags of methamphetamine, a digital scale with white residue, and a large Ziploc bag containing a roll of smaller Ziploc bags. Inside the center console, law enforcement located a small coin purse containing a small bag of methamphetamine, a paper tablet folded up in foil, and a bag of broken pill pieces. Campbell agreed to speak with law enforcement. Campbell admitted he typically drove the car but denied any knowledge of the methamphetamine and said it did not belong to Stroda either. Campbell advised he often gave rides to people and claimed the methamphetamine could belong to one of these passengers.

The State combined the charges relating to the September and December stops into a single complaint. For the September stop, the State charged Campbell with one count of possessing methamphetamine with intent to distribute, two counts of possessing drug paraphernalia with intent to use to distribute, and one count of child endangerment. For the December stop, the State charged Campbell with one count of possessing methamphetamine with intent to distribute, two counts of possessing drug paraphernalia with intent to use to distribute, one count of possessing diazepam with intent to distribute (the bag of pill pieces), and one count of possessing buprenorphine (the paper tablet).

Before trial, Campbell moved to suppress the evidence seized during the December stop, arguing law enforcement lacked probable cause to search the car. At first, the district court granted the motion based on its finding that law enforcement's use of the GPS tracker to search Campbell's car occurred after the GPS search warrant expired. But

after hearing testimony and arguments on the State's motion for reconsideration, the court reversed its ruling and found the evidence seized from Campbell's car during the December stop was admissible because the warrant expired due to a clerical error that did not otherwise affect the substance of the warrant.

In another pretrial ruling, the district court granted the State's motion to introduce detailed evidence of Campbell's prior crimes from the May and July stops under K.S.A. 2017 Supp. 60-455. During the May stop, law enforcement discovered 41.6 grams of methamphetamine and drug paraphernalia associated with the sale of methamphetamine, including a pipe, new and used Ziploc bags, a digital scale with residue, two measuring spoons, and a notepad listing names of people known to possess or distribute methamphetamine next to numbers and dollar amounts, which law enforcement called a "drug ledger." During the July stop, law enforcement located more than 8 grams of methamphetamine separately packaged by common distribution weights. They also found drug paraphernalia associated with the sale of methamphetamine, including a pipe, a plastic Ziploc bag containing smaller unused bags, plastic bags with distinct imprints commonly used for distributing drugs, a black scale with white residue, and $90.

The case proceeded to a jury trial, where the State presented evidence relating to the May, July, September, and December stops. The district court instructed the jury it could consider the May and July stop evidence "solely as evidence of the defendant's intent, and to prove the truth or falsity of the defendant's innocent explanation." In a different instruction, the court told the jury it could consider Campbell's prior participation in the sale or use of controlled substances to determine whether Campbell possessed the controlled substances in the current case.

The jury returned a relatively favorable verdict for Campbell. It declined to find him guilty of possession with intent to distribute. And it acquitted him of the child

endangerment charge and the charges for possessing diazepam and buprenorphine. In total, the jury found Campbell guilty of two counts of the lesser included offense of possession of methamphetamine and four counts of possessing drug paraphernalia with intent to use to distribute. The district court sentenced Campbell to 31 months' imprisonment followed by 12 months' postrelease supervision. The court ordered this sentence to run consecutive to Campbell's sentences for the convictions resulting from the May and July stops.

On appeal, Campbell raised four issues. He argued the district court committed reversible error by allowing the State to introduce the prior crimes evidence and by reversing its order suppressing the December stop evidence. Campbell also alleged the State committed prosecutorial error during voir dire by using an inflammatory hypothetical to explain a defendant's presumption of innocence and the cumulative effect of the alleged errors violated his right to a fair trial.

A Court of Appeals panel reversed Campbell's convictions and remanded the case for a new trial. *State v. Campbell*, No. 123,190, 2022 WL 2392519, at *24 (Kan. App. 2022) (unpublished opinion). The panel agreed the district court erred in allowing the State to introduce evidence of the prior crimes at trial. In reaching this conclusion, the panel stated:

> "Because Campbell has established that the trial court erred by granting the State's motion to admit evidence of his May stop and July stop law enforcement encounters for purposes of establishing his intent and for evaluating the veracity of his innocent explanation, *we consider the prejudicial effect of this error in our cumulative error analysis further below*." (Emphasis added.) 2022 WL 2392519, at *19.

But the panel never analyzed the prejudicial effect of the district court's error in admitting the prior crimes evidence. *Campbell*, 2022 WL 2392519, at *19-24. Instead, it summarily

concluded the district court's erroneous admission of prior crimes evidence denied Campbell his right to a fair trial. After rejecting Campbell's remaining claims of error, the panel reversed and remanded the case for a new trial. 2022 WL 2392519, at *24.

The State moved for rehearing or modification based on the panel's failure to address the prejudicial effect resulting from admission of K.S.A. 60-455 evidence or otherwise address whether the error was harmless. Without explanation, the Court of Appeals summarily denied the State's motion. We granted the State's petition for review and Campbell's cross-petition for review. Jurisdiction is proper. See K.S.A. 20-3018(b) (providing for petitions for review of Court of Appeals decisions); K.S.A. 60-2101(b) (Supreme Court has jurisdiction to review Court of Appeals decisions upon petition for review).

ANALYSIS

The State raises a single issue on review, arguing the Court of Appeals erred in failing to review the district court's erroneous admission of K.S.A. 60-455 evidence for harmlessness. The State maintains any error in the admission of this evidence was harmless. Campbell raises three points of error in a cross-petition for review, alleging: (1) the district court erred in reversing its order suppressing the December stop evidence, (2) the Court of Appeals majority erred in finding improper comments during voir dire did not deny him a fair trial via prosecutorial error, and (3) cumulative error denied him a fair trial.

A. The State's Petition for Review: Harmlessness

The State's issue is narrow. The parties agree the panel correctly determined the district court erred in allowing the State to introduce evidence of Campbell's prior crimes

under K.S.A. 2017 Supp. 60-455. And Campbell does not dispute the State's claim that the panel erred in failing to conduct a harmless error analysis to determine whether the error required reversal. All that remains is whether the erroneous introduction of K.S.A. 60-455 evidence was harmless. The State contends it was.

Given the panel's analytical misstep, we could remand the case to the Court of Appeals to perform the appropriate harmlessness analysis. See *Littlejohn v. State*, 310 Kan. 439, 446, 447 P.3d 375 (2019) (remanding case to Court of Appeals with direction to perform analysis under correct legal standard). Or, in the interest of judicial economy, we may complete the harmless error analysis ourselves. See *State v. Taylor*, 314 Kan. 166, 174, 496 P.3d 526 (2021) ("[W]e believe judicial economy weighs in favor of completing the cumulative error analysis to move the case along for district court disposition."). We choose the latter option.

To decide whether an error in admitting K.S.A. 60-455 evidence is reversible, we apply the harmless error standard of K.S.A. 60-2105 and K.S.A. 2022 Supp. 60-261 to determine if admission of the evidence prejudicially affected a party's substantial rights, considering the entire record. K.S.A. 60-2105 ("[A]ppellate court shall disregard all mere technical errors and irregularities which do not affirmatively appear to have prejudicially affected the substantial rights of the party complaining, where it appears upon the whole record that substantial justice has been done by the judgment."); K.S.A. 2022 Supp. 60-261 ("Unless justice requires otherwise, no error in admitting or excluding evidence . . . is ground for . . . disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."). Where, as here, an error implicates a statutory but not a federal constitutional right, we must determine if there is a "'reasonable probability that error will or did affect the outcome of the trial in light of the entire record.'" *State v. McCullough*, 293 Kan. 970, 981-82, 270 P.3d 1142 (2012) (quoting *State v. Ward*, 292 Kan. 541, 569, 256 P.3d 801

[2011]). As the party who benefits from the improper admission of evidence under the statute, the State bears the burden of proof. *McCullough*, 293 Kan. at 983.

The State claims there is no reasonable probability introduction of K.S.A. 60-455 prior crimes evidence affected the trial's outcome. The State argues that even without the prior crimes evidence, it presented the jury with overwhelming evidence of Campbell's intent to both possess and distribute methamphetamine. In support, the State cites evidence establishing (1) law enforcement discovered drugs and drug paraphernalia typically used for distribution inside the Lincoln Town Car during the September and December stops and (2) Campbell drove the Lincoln Town Car on both occasions and told law enforcement he typically drove the car. Because the jury did not convict Campbell of possession with intent to distribute, the State argues the jury did not improperly rely on the prior crimes evidence.

Campbell disagrees, arguing the State's harmless error argument focuses solely on the *admissible* evidence introduced and disregards in its analysis the *inadmissible* evidence presented to the jury. Campbell points out the State devoted a significant portion of its opening statement to the May and July stops, introduced detailed evidence from these stops and stressed the importance of this evidence during closing argument. Because the jury acquitted him of possessing diazepam and buprenorphine, Campbell suggests the jury relied on his prior methamphetamine convictions to convict him only of the charges involving methamphetamine.

To decide whether the State has met its burden to show there is no reasonable probability the impermissible evidence from the May and July stops affected the outcome of the trial, we must look at the entire record. Given the arguments submitted by the parties, we review the record to assess (1) the prejudicial impact on the outcome of the trial resulting from the impermissible evidence introduced at trial and (2) the prejudicial

impact on the outcome of the trial resulting from the district court's instructions to the jury that it could consider the impermissible evidence.

1. *Prejudicial impact on the outcome of the trial resulting from the introduction of impermissible evidence*

In *State v. Gunby*, 282 Kan. 39, 48, 144 P.3d 647 (2006), we reiterated there were at least three types of prejudice resulting from the admission of prior bad acts evidence:

> "'First a jury might well exaggerate the value of other crimes as evidence proving that, because the defendant has committed a similar crime before, it might properly be inferred that he committed this one. Secondly, the jury might conclude that the defendant deserves punishment because he is a general wrongdoer even if the prosecution has not established guilt beyond a reasonable doubt in the prosecution at hand. Thirdly, the jury might conclude that because the defendant is a criminal, the evidence put in on his behalf should not be believed.' [Citation omitted.]" *Gunby*, 282 Kan. at 48-49 (quoting *State v. Davis*, 213 Kan. 54, 58, 515 P.2d 802 [1973]).

Gunby differs from this case in that it measured prejudicial impact against probative value to determine *admissibility* of the evidence under K.S.A. 60-455. But we recently used *Gunby's* "types of prejudice" rationale as a useful perspective when determining *reversibility* in a harmless error analysis as well. See *Taylor*, 314 Kan. at 174-77 (discussing three types of possible prejudice that could result from wrongfully admitting evidence in context of constitutional harmless error standard to determine whether State established beyond a reasonable doubt that cumulative errors did not affect trial's outcome).

Although this case presents a nonconstitutional harmless error analysis, the *Taylor* rationale is persuasive. Applying it here, we find the wrongful admission of evidence

from the May and July stops prejudiced Campbell and created a reasonable probability the outcome of the trial would have been different had the State not presented the inadmissible evidence to the jury. Our finding is based on the emphasis placed on evidence from the May and July stops by the State in its opening statement, case-in-chief, and closing argument.

Early in the State's opening statement, the prosecutor referenced law enforcement's familiarity with Campbell from the May stop and then described in detail the methamphetamine and other items associated with methamphetamine distribution found in his car during the May stop. The prosecutor then discussed the July stop, again describing in detail the drug evidence found in Campbell's car during that stop. All told, the prosecutor devoted about half of the opening statement to discussing inadmissible prior crimes evidence from the May and July stops.

Then, during the State's case-in-chief, it presented in detail the inadmissible prior crimes evidence from the May and July stops through witness testimony. Based on the transcript, it appears the prosecutor brought out as much detail about inadmissible prior crimes evidence as it did about admissible evidence from the September and December stops.

And during closing argument, the prosecutor linked the prior crimes to the present charges, repeatedly telling the jury to consider Campbell's prior crimes as evidence of his intent and again detailing the specific amounts of methamphetamine and the items of drug paraphernalia recovered during the May and July stops. The prosecutor also told the jury it could consider the prior crimes evidence to determine whether Campbell possessed the alleged drug paraphernalia for use or sale and to determine whether an object constitutes drug paraphernalia.

Finally, during rebuttal, the prosecutor emphasized the similarities between Campbell's prior crimes and the present charges:

> "Go back. Look at the photos. Look how things are packaged. Look how they're contained. Look if they're similar. And you will see that there's white residue on the scales. 8-ball seems to be a very consistent amount that the defendant liked to sell.
>
> "There were two 8-balls in his hat. July 18th, I think there were seven 8-balls. Yep. On May 21st and on December 29th, there were two 8-balls. And, remember, that's a presumption distribution amount. You heard all the witnesses that testified about distribution amounts say that that is a common distribution amount.
>
> "How do we know his intent? We can't crawl in his head. But [defense counsel] says, 'Well, if an 8-ball is a common distribution amount, then how do we know he wasn't just possessing it for his own personal use? How do we know, on December 29th, that he intended to sell it? How can we be sure?[']
>
> "Well, first of all, there were unused baggies and digital scales in the same bag. That's consistent with May 21st, July 18th, and September 23rd. If you are just intending to use it, why do you need unused baggies? You don't. Why do you need scales? You don't.
>
> . . . .
>
> "Go back and look at the photographs, look at the similarities between the items, and I'm sure that you will be convinced, beyond a reasonable doubt, that the defendant possessed the methamphetamine . . . and the drug paraphernalia intending to distribute methamphetamine.
>
> . . . .

> "Did the defendant possess the paraphernalia to distribute? Again, go back and look at the pictures. Look at [the] May 21st pictures, July 28th, December 29th. What do you have? The scales with residue, measuring spoons, unused baggies. It's all consistent, ladies and gentlemen."

The emphasis placed on the inadmissible evidence throughout the trial as described above increases the likelihood that the jury relied on the inadmissible evidence to conclude that, because Campbell committed a similar crime before, (1) he committed the crimes charged here and (2) he deserves to be punished because he is a general wrongdoer even if the prosecution failed to establish guilt beyond a reasonable doubt. See *Gunby*, 282 Kan. at 48-49.

2. *Prejudicial impact on the outcome of the trial resulting from the district court's instructions to the jury that it could consider the impermissible evidence*

The district court provided two instructions to the jury regarding its ability to consider prior crimes evidence. The first instruction told the jury it could consider prior crimes as non-propensity evidence for the limited purpose of evaluating the veracity of Campbell's innocent explanation to decide whether the State proved Campbell's intent to commit the crimes charged. The second instruction told the jury it could consider the prior crimes as propensity evidence to prove that, because Campbell committed similar crimes before, he committed the current crimes.

Non-propensity

In non-sex offense cases, evidence of prior crimes is inadmissible to prove a criminal defendant's propensity to commit the charged crime, but it can be "admissible when relevant to prove some other material fact." K.S.A. 2022 Supp. 60-455(b). Here,

the court instructed the jury it could consider prior crimes only to decide "the defendant's intent, and to prove the truth or falsity of the defendant's innocent explanation."

Although the panel did not analyze whether the district court erred in giving this jury instruction, it did hold evidence of a prior drug crime was inadmissible to prove intent or the veracity of an innocent explanation when, as here, the defendant denied having possessed the drugs. *Campbell*, 2022 WL 2392519, at *16 (citing *State v. Boggs*, 287 Kan. 298, 314, 197 P.3d 441 (2008). The panel noted Campbell's theory of defense at trial "'was to present no evidence, to take advantage of his right not to testify, and to hold the State to its burden of proof.'" 2022 WL 2392519, at *12. Given this theory of defense, the panel determined the State's unilateral introduction of evidence about intent and innocent explanation failed to create a dispute of material fact on those issues. Absent a legitimate dispute about intent or an innocent explanation, the panel concluded the K.S.A. 60-455 exception allowing prior crimes to prove some other material fact did not apply and evidence from the May and July stops was inadmissible. 2022 WL 2392519, at *14-16.

As noted above, the State does not challenge the panel's finding that evidence from the May and July stops was inadmissible to prove intent or innocent explanation, so that issue is not before us. But given the panel's holding that the prior crimes evidence was inadmissible, we find the district court erred by instructing the jury it could consider the inadmissible prior crimes evidence. And given the emphasis placed on the inadmissible evidence in the State's opening statement, case-in-chief, and closing argument, this erroneous instruction increases the likelihood that the jury relied on the inadmissible evidence to conclude that, because Campbell committed a similar crime before, (1) he committed the crimes charged here and (2) he deserves to be punished because he is a general wrongdoer even if the prosecution failed to establish guilt beyond a reasonable doubt.

Propensity

After the "limited purpose" non-propensity instruction, the court instructed the jury that, when a defendant is in nonexclusive possession of drugs, it could consider prior crimes as propensity evidence to prove the defendant knowingly possessed methamphetamine under the current charges:

> "'Possession' means having joint or exclusive control over an item with knowledge of and the intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.
>
> "When a defendant is in nonexclusive possession of an automobile in which a controlled substance is found, it cannot be inferred that the defendant knowingly possessed the controlled substance unless there are other circumstances linking the defendant to the controlled substance.
>
> "You may consider all factors supported by the evidence in determining whether the defendant knowingly possessed a controlled substance, including the following:
>
> 1. whether the defendant previously participated in the sale of a controlled substance;
> 2. whether the defendant used controlled substances;
> 3. whether the defendant was near the area where the controlled substance was found;
> 4. whether the controlled substance was found in plain view;
> 5. whether the defendant made any incriminating statements;
> 6. whether the defendant's behavior was suspicious;
> 7. whether the defendant's personal belongings were near the controlled substance."

Although this instruction mirrors PIK Crim. 4th 57.040, we find it troubling because the first and second factors in the third paragraph conflict with K.S.A. 2022 Supp. 60-455(a), which prohibits introduction of prior crimes evidence if its only purpose is to establish a propensity to commit the current crime. The Notes on Use explain the factors in the third paragraph originally were based on historical caselaw. PIK Crim. 4th 57.040, Notes on Use. But a review of that caselaw reflects we have disapproved of the unqualified use of these factors because doing so fails to adhere to the prior crime limitations in K.S.A. 60-455. See *Boggs*, 287 Kan. at 318.

In *State v. Faulkner*, 220 Kan. 153, 551 P.2d 1247 (1976), law enforcement discovered illicit drugs and paraphernalia on the passenger floorboard and in the glove box of a car where Faulkner was a passenger. At trial, the State introduced evidence that Faulkner had a prior conviction for possession of a controlled substance. On appeal, Faulkner argued the prior conviction was inadmissible under K.S.A. 60-455 and, without that evidence, his mere presence in the vehicle could not prove he possessed the drugs and paraphernalia. We agreed with Faulkner that "when illicit drugs are found in an automobile containing more than one person, the defendant's mere presence in the vehicle, without more, would not sustain his conviction for possession." 220 Kan. at 160. But we discussed other circumstances that could be introduced to show a person possessed drugs in a nonexclusive possession case:

> "Other circumstances which have been held sufficiently incriminating to link a defendant with illicit drugs in a vehicle are his previous participation in the sale of drugs, his use of narcotics, his proximity to the area where drugs are found and the fact the drugs were found in plain view." *Faulkner*, 220 Kan. at 160.

Significantly, however, we held introduction of prior drug crimes in this context was subject to the rule from K.S.A. 60-455 prohibiting consideration of prior crime

evidence as propensity evidence and allowing it only when relevant to prove some other material fact in dispute. We ultimately held the prior crime evidence admissible because the State did not introduce it for propensity reasons but to prove a fact substantially in dispute—Faulkner's intent to possess the drugs and paraphernalia. *Faulkner*, 220 Kan. at 157.

In *State v. Bullocks*, 2 Kan. App. 2d 48, 574 P.2d 243 (1978), the Court of Appeals expanded the *Faulkner* discussion to conclude that evidence of prior drug use is a factor that always can be considered in nonexclusive possession cases. The *Bullocks* court explained:

> "'Possession' of marijuana is having control over the marijuana with knowledge of, and intent to have, such control. Possession and intent, like any element of a crime, may be proved by circumstantial evidence. [Citation omitted.] Possession may be immediate and exclusive, jointly held with another, or constructive as where the drug is kept by the accused in a place to which he has some measure of access and right of control. [Citation omitted.]
>
> "When a defendant is in nonexclusive possession of premises on which drugs are found, the better view is that it cannot be inferred that the defendant knowingly possessed the drugs unless there are other incriminating circumstances linking the defendant to the drugs. [Citation omitted.] Such parallels the rule in Kansas as to a defendant charged with possession of drugs in an automobile of which he was not the sole occupant. [Citation omitted.] Incriminating factors noted in *Faulkner* are a defendant's previous participation in the sale of drugs, his use of narcotics, his proximity to the area where the drugs are found, and the fact that the drugs are found in plain view. Other factors noted in cases involving nonexclusive possession include incriminating statements of the defendant, suspicious behavior, and proximity of defendant's possessions to the drugs." *Bullocks*, 2 Kan. App. 2d at 49-50.

The *Bullocks* court did not cite to or consider K.S.A. 60-455 in its analysis.

Over the years, our appellate courts consistently relied on the *Bullocks* incriminating factors and circumstances to support an inference that a defendant is in possession of drugs. See, e.g., *State v. Cruz*, 15 Kan. App. 2d 476, 489, 809 P.2d 1233 (1991) (applying factors in *Faulkner* and *Bullocks*).

In 2001, citing *Cruz* and *Faulkner*, the PIK committee recommended courts give a new instruction in nonexclusive possession cases. See PIK Crim. 3d 67.13-D. This instruction provided the jury with the *Bullocks* factors to consider in deciding whether a defendant was the individual who possessed illicit drugs in a nonexclusive possession case. The PIK instruction failed, however, to provide language explaining—as we did in *Faulkner*—that introducing prior drug crimes as an incriminating factor for the jury to consider is subject to the limitations in K.S.A. 60-455.

In 2008, we addressed the tension between K.S.A. 60-455 and PIK Crim. 3d 67.13-D in *Boggs*. There, we reaffirmed *Faulkner*'s holding that introduction of prior drug crimes as a factor for the jury to consider in nonexclusive possession cases was subject to the rule in K.S.A. 60-455. We held prior crime evidence in nonexclusive possession cases is prohibited unless relevant to prove a disputed material fact. In so holding, we disapproved *Bullocks* and any other case holding prior drug use is always a factor juries can consider in nonexclusive possession cases. *Boggs*, 287 Kan. at 317-18.

In 2009, the Legislature codified the common law definition of possession. The Legislature did not include the *Faulkner/Bullocks/Cruz* factors in the definition. And the PIK committee did not include the PIK Crim. 3d 67.13-D *Faulkner/Bullocks/Cruz* factors in the fourth edition of its pattern instructions, published in 2012. See Notes on Use, PIK Crim. 4th 57.040 (2018 Supp.) (concluding "that [the new statutory definition] was meant

to supplant the much expanded definition of possession previously found in PIK Crim. 3d 67.13-D").

But in 2019, the PIK committee chose to reinsert the *Faulkner/Bullocks/Cruz* list of nonexclusive possession factors into PIK Crim. 4th 57.040, when appropriate. See PIK Crim. 4th 57.040 [2018 Supp.]. The committee did not explain what it meant by appropriate, but it did cite to "[r]ecent opinions of the Kansas appellate courts [indicating] . . . that the previous list of nonexclusive possession factors survives the legislative change." Notes on Use, PIK Crim. 4th 57.040 (citing *State v. Keel*, 302 Kan. 560, Syl. ¶ 2, 357 P.3d 251 [2015], and *State v. Rosa*, 304 Kan. 429, 434, 371 P.3d 915 [2016]).

In *Keel*, the defendant appealed his convictions for possession of methamphetamine and drug paraphernalia, arguing the State failed to present sufficient evidence to show he had constructive possession of the drugs and paraphernalia found in the residence he shared with his girlfriend. Consistent with our precedent, we held that when "a defendant does not have exclusive control of the premises upon which drugs are found, 'more than mere presence or access to the drugs [is] required to sustain a conviction.'" 302 Kan. at 567. In such cases, we held the State may prove possession by presenting other evidence of incriminating circumstances linking the defendant to the drugs, including "(1) the defendant's previous sale or use of narcotics; (2) the defendant's proximity to the area in which the drugs were found; (3) the fact that the drugs were found in plain view; and (4) the defendant's incriminating statements or suspicious behavior. [Citation omitted.]" 302 Kan. at 567-68. We found Keel's proximity to the drugs, the plain view of the drugs, and Keel's suspicious behavior sufficiently linked him to the contraband and concluded he possessed the contraband. 302 Kan. at 568. Presumably because there was no evidence Keel previously sold or used narcotics, we did

not discuss *Boggs*' holding that introduction of prior drug crimes as a factor in nonexclusive possession cases was subject to the rule in K.S.A. 60-455.

In *Rosa*, the State charged Rosa with possession of methamphetamine after discovering a meth lab in the bedroom of a long-term resident living in Rosa's house. Rosa conceded he owned the house and the drugs were found in the house but denied any knowledge the drugs were there. To prove he knew about the drugs, the State introduced witness testimony to show Rosa was in close proximity to the room where the meth lab was discovered, had actual knowledge of its existence, and knew about methamphetamine in general because he used it in the past.

Rosa claimed on appeal that the district court erroneously permitted the jury to consider evidence of his past drug use. Citing *Boggs* and *State v. Preston*, 294 Kan. 27, 34, 272 P.3d 1275 (2012), we reiterated K.S.A. 60-455 prohibits consideration of prior crimes evidence for propensity purposes but allows it when relevant to prove some other material fact in dispute. Rosa claimed he did not know the people living in his house were keeping or making methamphetamine in the house. Thus, we held the district court properly allowed the roommates to testify about Rosa's prior acquaintance with methamphetamine under K.S.A. 60-455(b) because it was relevant to prove some other material fact—Rosa's knowledge. *Rosa*, 304 Kan. at 436-37.

Keel and *Rosa* adhere to *Boggs*, and we reaffirm that holding here: evidence of prior drug crimes as a factor to consider in nonexclusive drug possession cases is admissible only when the evidence is relevant to prove some other disputed material fact as authorized under K.S.A. 2022 Supp. 60-455(b). See *Boggs*, 287 Kan. at 318. To the extent PIK Crim. 4th 57.040 conflicts with the legislative mandate in K.S.A. 2022 Supp. 60-455 limiting admissibility, we disapprove of its use.

Contrary to *Boggs*, the PIK Crim. 4th 57.040 instruction given here erroneously informed the jury it could consider Campbell's prior drug crimes for any reason, including propensity. Given the emphasis placed on the inadmissible evidence in the State's opening statement, case-in-chief, and closing argument, this erroneous instruction substantially increases the likelihood that the jury relied on the inadmissible evidence to conclude that, because Campbell committed a similar crime before, (1) he committed the crimes charged here and (2) he deserves to be punished because he is a general wrongdoer even if the prosecution failed to establish guilt beyond a reasonable doubt.

3. *Conclusion*

In conclusion, we find a reasonable probability the erroneous admission of prior drug crime evidence affected the outcome of the trial, considering the entire record. For this reason, we hold the district court's error in admitting the prior crimes evidence was not harmless. Our holding is based on the sheer amount of evidence and argument focused on the inadmissible evidence throughout trial, as well as the court's erroneous instructions to the jury that it could consider Campbell's prior drug crimes as propensity evidence. Accordingly, we reverse Campbell's convictions and remand the case to the district court for a new trial. Because we reverse Campbell's convictions on this basis, we need not address all the claims raised in his cross-petition for review. Because it will provide guidance for the district court on remand, however, we will address Campbell's claim of error relating to his motion to suppress the December stop evidence.

B. Campbell's Cross-Petition for Review: Motion to Suppress

Campbell objects to the district court's reversal of its order suppressing the evidence from the December stop. He alleges the Court of Appeals erred in affirming the district court's decision to grant the State's motion for reconsideration.

Appellate courts generally treat motions to reconsider as motions to alter or amend. When reviewing the district court's ruling on a motion to alter or amend, we apply an abuse of discretion standard. See *Exploration Place, Inc. v. Midwest Drywall Co.*, 277 Kan. 898, 900, 89 P.3d 536 (2004). A judicial action constitutes an abuse of discretion if it is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. *State v. Levy*, 313 Kan. 232, 237, 485 P.3d 605 (2021).

Before trial, Campbell moved to suppress all evidence seized during the December stop, arguing law enforcement lacked probable cause to search the Lincoln Town Car. At a hearing on Campbell's motion, the district court held law enforcement had probable cause to search the car. But the court questioned whether the search warrant was valid at the time of the December 29, 2017, stop.

The search warrant provided law enforcement with authorization to monitor the tracking device installed on the Lincoln Town Car "for a period of 30 days from the date the tracking device is installed." Law enforcement installed the tracking device on November 28, 2017, but removed the device two days later because it was not working properly. Then, the Lincoln Town Car was not operational and remained parked in front of Campbell's residence, so law enforcement did not reinstall the tracking device until December 19, 2017. On December 27, 2017, Lawrence Police Officer Kristen Kennedy filed an affidavit requesting a 30-day extension of the warrant. Noting the GPS tracking device had been usable for only 8 out of the 30 days allowed for in the original warrant, law enforcement requested "a 30 day extension of the current search warrant, which is set to expire on Thursday, November 28, 2017." The designation of November 28 instead of December 28 as the date the search warrant expired appears to be a typographical error. The district court granted the request on December 27, 2017, but apparently did not catch the typographical error because it authorized extension of the search warrant "for an

extended period of 30 days from the expiration date on the previous search warrant, November 28, 2017."

After reviewing the relevant exhibits and hearing argument from the parties, the district court suppressed the December stop and the evidence seized from Campbell's car on December 29, 2017. Although the court agreed Officer Kennedy and the district court judge who signed the warrant extension mistakenly listed November 28—rather than December 28—as the date the original search warrant was set to expire, the court still granted Campbell's motion to suppress because "[t]hat's a mistake they made."

The State moved for reconsideration, arguing the search warrant extension should be read to expire 30 days after December 28, 2017. The State claimed the district court's interpretation of the search warrant extension conflicted with its plain language and produced an absurd result, which authorized extension of the search warrant for a single day. In support of its motion, the State presented testimony from Officer Kennedy. She testified the affidavit requested a 30-day extension from the December 28, 2017, expiration date of the original warrant. As a result, she believed the new expiration date would be sometime around January 28, 2018. Officer Kennedy pointed out interpreting the search warrant to extend for 30 days from November 28, 2017, would not actually result in an extension because it would cover the same timeframe as the original search warrant.

After hearing Officer Kennedy's testimony, the district court reversed its prior ruling granting Campbell's motion to suppress:

> "And I think when you read everything together to avoid unreasonable results, but mainly when reading everything all together that the November 28th modifies the date of the previous search warrant when the tracking device was installed and she wanted—what she wanted was 30 days

> extension, and it's clear when you look at her reference to Thursday that she did not mean November 28th. She meant December 28th. So I do reconsider and reverse my prior ruling."

On appeal, Campbell argued the district court erred in granting the State's motion for reconsideration because the court's original interpretation of the 30-day extension to the search warrant aligned with the plain language of the warrant extension. The Court of Appeals rejected Campbell's argument, holding it created an unreasonable result and was contrary to K.S.A. 22-2511, which states "[n]o search warrant shall be quashed or evidence suppressed because of technical irregularities not affecting the substantial rights of the accused." *Campbell*, 2022 WL 2392519, at *23-24. The panel concluded:

> "Because no evidence should be set aside based on technical irregularities under K.S.A. 22-2511, it necessarily follows that the trial court did not abuse its discretion by granting the State's reconsideration motion. This was something that the trial court needed to do to correct its previous mistaken decision to grant Campbell's suppression motion based on an unreasonable interpretation of the trial court's order extending the GPS search warrant for 30 days." 2022 WL 2392519, at *24.

Campbell argues the panel erred in affirming the district court's reconsideration ruling based on a mistake of law. First, he asserts the incorrect expiration date listed on the search warrant extension constituted a substantive error rather than a technical irregularity under K.S.A. 22-2511. Second, Campbell claims the panel erred in failing to reach his alternative argument that the original suppression order was proper because law enforcement placed the GPS tracking device on his car outside the statutory timeframe set forth in K.S.A. 2022 Supp. 22-2506(b)(2).

1. *K.S.A. 22-2511*

A magistrate may issue a search warrant authorizing the installation and use of a tracking device. K.S.A. 2022 Supp. 22-2502(a)(2). The tracking device may be used to track and collect certain data "for a specified period of time, not to exceed 30 days from the date of the installation of the device." K.S.A. 2022 Supp. 22-2502(b)(1). Upon a showing of good cause by the State, the magistrate may grant one or more 30-day extensions of the search warrant. K.S.A. 2022 Supp. 22-2502(b)(3). A plain reading of the search warrant at issue establishes the 30-day extension expired on December 28, 2017, the day before law enforcement stopped Campbell's car.

As discussed, K.S.A. 22-2511 states "[n]o search warrant shall be quashed or evidence suppressed because of technical irregularities not affecting the substantial rights of the accused." In Kansas, the test used to evaluate search warrant technical irregularities is one of practical accuracy rather than one of hyper technicality:

> "[C]ourts prefer searches conducted under the authority of warrants to those conducted without benefit thereof. Therefore, warrants and their supporting affidavits are interpreted in a common sense, rather than a hypertechnical, fashion. To do otherwise would tend to discourage police officers from submitting their evidence to a judicial officer before acting." *State v. LeFort*, 248 Kan. 332, 335-36, 806 P.2d 986 (1991).

Absent a showing of illegality, search warrants and their supporting affidavits are presumed valid. Campbell, as the party challenging the validity of the search warrant, bears the burden of establishing its illegality. See 248 Kan. at 336.

The label of "technical irregularity" is reserved for clerical mistakes or omissions that do not otherwise affect the substance of the warrant. See, e.g., *State v. Francis*, 282 Kan. 120, 127-29, 145 P.3d 48 (2006) (mere technical irregularity where affidavit

identifies one affiant in its text but is signed by different affiant); *LeFort*, 248 Kan. at 337 (failure of warrant to specify exact address of residence to be searched mere technical irregularity where affidavit contained correct description and executing officer familiar with location); *State v. Holloman*, 240 Kan. 589, 595-96, 731 P.2d 294 (1987) (mere technical irregularity when duplicate of warrant and inventory of items to be seized given to defendant's mother rather than defendant); *State v. Spaulding*, 239 Kan. 439, 441-42, 720 P.2d 1047 (1986) (judge's failure to sign warrant mere technicality where probable cause finding made); *State v. Jackson*, 226 Kan. 302, 304, 597 P.2d 255 (1979) (mere technical irregularities found where affidavit failed to specifically allege similarity between circumstances of prior conviction and present crime and also provided inaccurate description of plea to prior conviction); *State v. Ames*, 222 Kan. 88, 92-95, 563 P.2d 1034 (1977) (mere technical irregularities found where warrant return was unsigned, listed incorrect date, failed to list a seized item, and was not served on defendant); *State v. Tryon*, 36 Kan. App. 2d 349, 352, 138 P.3d 1259 (2006) (finding improper date on warrant return a mere technicality insufficient to overturn search); *State v. Forsyth*, 2 Kan. App. 2d 44, 47, 574 P.2d 241 (1978) (absence of return receipt on search warrant mere technical irregularity). Compare *State v. Journey*, 1 Kan. App. 2d 150, 151-52, 562 P.2d 138 (1977) (lack of jurat signature on search warrant mere technical irregularity), with *State v. Belt*, 285 Kan. 949, 950-54, 960-62, 179 P.3d 443 (2008) (no mere technicality where John Doe search warrants contained insufficient identifying information by failing to particularly describe perpetrator's unique DNA profile).

Campbell argues the incorrect date listed in the search warrant extension is a substantive error, distinct from the technical irregularities contemplated by K.S.A. 22-2511. He reasons law enforcement got exactly what it asked for—a warrant expiring on December 28, 2017—even if it meant to ask for something else. But Campbell's attempt to distinguish the present circumstances from those cases in which our courts have found technical irregularities under K.S.A. 22-2511 is unpersuasive. Campbell does not allege

any of the allegations within the body of the affidavit are false or otherwise challenge the sufficiency of the probable cause to support issuance of the search warrant. A review of the evidence presented at the reconsideration hearing confirms the discrepancy in the dates was simply a clerical error. This error did not affect the substance of the warrant and thus constitutes a mere technical irregularity under K.S.A. 22-2511. See *Blackburn v. State*, No. 105,697, 2012 WL 603284, at *1, 3 (Kan. App. 2012) (unpublished opinion) (upholding validity of search warrant signed and executed in February 2006 where law enforcement's probable cause affidavit mistakenly said events occurred in February 2005; had counsel moved to suppress, discrepancy in dates likely would have been found a mere technical irregularity under K.S.A. 22-2511).

2. *K.S.A. 2022 Supp. 22-2506(b)(2)*

Under K.S.A. 2022 Supp. 22-2506(b)(2), law enforcement must install a tracking device within 15 days from the date the search warrant is issued. Here, the search warrant issued on November 20, 2017. Law enforcement placed a tracking device on Campbell's car on November 28, 2017, but removed the device two days later because it was defective. Law enforcement then placed a new tracking device on Campbell's car on December 19, 2017, once the car appeared drivable.

Campbell argues the search warrant was invalid because the second tracking device was not placed on his car within the 15-day window allowed by statute. This argument is as unpersuasive as Campbell's first argument and fails for the same reason. Law enforcement initially installed the tracking device in compliance with K.S.A. 2022 Supp. 22-2506(b)(2). Because of circumstances outside their control, law enforcement had to remove the tracking device but later reinstalled it as soon as practicable. Law enforcement's failure to strictly comply with the statutory timeframe when installing the second tracking device constitutes a technical irregularity under K.S.A. 22-2511 that does

not affect the validity of the search warrant. See *LeFort*, 248 Kan. at 335-36 ("[W]arrants and their supporting affidavits are interpreted in a common sense, rather than a hypertechnical, fashion.").

We find any discrepancy in the dates of the search warrant or the timing in placing the tracking device are technical irregularities that did not affect the validity of the search warrant. See K.S.A. 22-2511 ("No search warrant shall be quashed or evidence suppressed because of technical irregularities not affecting the substantial rights of the accused.") As a result, the district court did not abuse its discretion in granting the State's motion to reconsider its erroneous suppression ruling.

Judgment of the Court of Appeals reversing the district court is affirmed. Judgment of the district court is reversed, and the case is remanded for a new trial.