NOT DESIGNATED FOR PUBLICATION

No. 124,129

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

BRIAN G. TREASTER,
Appellant.

MEMORANDUM OPINION

Appeal from Reno County District Court; TRISH ROSE, judge. Opinion filed July 21, 2023. Affirmed.

Bryan W. Cox and *Patrick H. Dunn*, of Kansas Appellate Defender Office, for appellant.

Andrew R. Davidson, assistant district attorney, *Thomas R. Stanton*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before CLINE, P.J., ISHERWOOD, J., and PATRICK D. MCANANY, S.J.

PER CURIAM: Brian G. Treaster and his former wife, C.S., weathered a considerably acrimonious dissolution of their relationship which warranted an order from the divorce court that prohibited both parties from interfering with the serenity and well-being of the other. Despite that directive, problems persisted and Treaster was ultimately convicted of stalking, violation of a protective order, criminal threat, and battery. He now appeals and argues that his convictions for stalking and violation of a protective order must be reversed not only because the evidence could not sustain a guilty verdict for either one, but also because his conviction for the latter offense violates principles governing general and specific crimes. Treaster also contends clear error occurred when

the district court neglected to instruct the jury that it must consider whether the restraining order was issued under the proper statutory authority. Finally, he rounds out this appeal with a claim that the district court erred in admitting evidence of his prior bad acts without a corresponding limiting instruction to properly constrain the jury's consideration of that evidence. Following a thorough review of the issues and the record on appeal, we are satisfied that Treaster's convictions are valid, the district court did not err in the manner alleged, and that upholding this case is the appropriate resolution.

FACTUAL AND PROCEDURAL BACKGROUND

C.S. filed for divorce from Treaster after nine years of marriage. The couple shared three children together and also jointly cared for C.S.'s daughter from a prior relationship. The divorce quickly became contentious, prompting C.S. to pursue a restraining order, through their divorce action, to prohibit Treaster from harassing or bothering her at work, home, or any other place she happened to be. In support of her request, C.S. alleged that Treaster harassed her at work several times and took her vehicle without her knowledge, more than once, including from the domestic violence shelter where she sought refuge just after filing for divorce.

The district court ultimately issued a restraining order (the Order) in the divorce action that equally forbade both parties from harassing, bothering, or going about the premises of the other, or where that individual is employed. It also granted C.S. temporary sole possession of the vehicle and required the parties to exchange the children for parenting time in front of the Hutchinson Law Enforcement Center.

A little over a month after the Order was issued, Treaster received a summary of services from his health insurance provider which revealed that C.S. recently underwent testing for sexually transmitted diseases (STDs). Treaster promptly texted C.S. to ask whether he needed to be tested also but received no response. Irritated, he made a trip to

C.S.'s place of work and waited for her to leave. C.S. noticed Treaster's car as she exited the building and attempted to make it to hers without an encounter. Unfortunately, Treaster thwarted her efforts and yelled at her, called her names, and loudly asked if he needed to be tested for STDs within earshot of at least one of her coworkers. Treaster was obviously angry and C.S. felt threatened by him but she managed to get into her vehicle and call her boss for help. Treaster eventually drove away and C.S. discussed the incident with law enforcement officers later that day.

Waters remained relatively calm between the two for a few months until both ended up at the same Dillons store one evening following their scheduled child exchange. Treaster went in to get groceries with the children for their weekend together while C.S. stopped by with her boyfriend to grab salads for dinner. C.S. purportedly did not intend to contact Treaster, and after seeing his car in the parking lot assumed the store was large enough they would not cross paths. Even so, she also brought insurance paperwork inside with her that required Treaster's signature. Treaster became upset upon seeing the couple and ordered C.S. to leave the store. C.S. approached him with the paperwork anyway and he refused to sign it, so she and her boyfriend simply continued on toward the salad bar.

Treaster followed them and in an increasingly louder and angrier tone, accused C.S. of interfering with his visitation time. C.S.'s partner pulled her away from the dispute, and she retreated to be near the children. Treaster continued to argue with the boyfriend and eventually hit him in the ribs with his elbow before exiting the store. Treaster returned moments later and told C.S. it was good she drove her own vehicle "because if [her partner] would have driven his vehicle, I would have destroyed it." Treaster followed the remark with a threat to kill the couple and accompanied it with a slashing gesture across his neck. He then left the store with the children while C.S. reported the incident to law enforcement.

Later that evening, C.S. repeatedly tried to reach her son via phone without success. He eventually called her back, but Treaster quickly took control of the boy's phone. The estranged couple spoke for a few minutes before C.S.'s boyfriend started recording the conversation. During the recorded portion, Treaster admitted that he threatened to kill the couple at Dillons. He also referenced several previous threats he made to them that were of a similar nature.

C.S. took the threats seriously and reported it to law enforcement. Treaster's conduct resulted in charges for a single count each of stalking, violation of a protective order, criminal threat, and battery, alongside two counts each of telephone harassment and disorderly conduct. Following a two-day trial, a jury found Treaster guilty of the first four of those offenses. The court followed the presumption and granted Treaster probation for 12 months with underlying consecutive prison terms of 7 months each for his stalking and criminal threat convictions. A 12-month jail term for his violation of the protective order, and a 6-month jail sentence for battery were also imposed and ordered to run concurrently with his prison sentences.

Treaster brings the matter before this court to resolve challenges he raises concerning the evidentiary validity of his convictions, as well as his claims that the district court committed errors throughout his trial that necessitate reversal of his convictions.

LEGAL ANALYSIS

A review of the evidence in the light most favorable to the State, as required by our governing standard of review, reveals there was sufficient evidence adduced at trial to suggest that Treaster was guilty beyond a reasonable doubt of violating a protective order and stalking after being served.

Treaster opens this appeal with a two-part challenge to the sufficiency of the evidence to support his convictions for violation of a protective order and stalking after being served. To satisfy the sufficiency standard, the State carries the burden to present evidence at trial that fulfills each element of the charged offenses. *State v. Parker*, 309 Kan. 1, 13, 430 P.3d 975 (2018).

> "When the sufficiency of the evidence is challenged in a criminal case, we review the evidence in a light most favorable to the State to determine whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt. An appellate court does not reweigh evidence, resolve conflicts in the evidence, or pass on the credibility of witnesses." *State v. Aguirre*, 313 Kan. 189, 209, 485 P.3d 576 (2021).

The State charged Treaster with violation of a protective order in contravention of K.S.A. 2018 Supp. 21-5924(a)(3) and stalking after being served in violation of K.S.A. 2018 Supp. 21-5427(a)(3). In order to sustain a conviction for those two offenses, the State had the burden to prove that Treaster "knowingly" violated "a restraining order issued pursuant to K.S.A. 2018 Supp. 23-2707." K.S.A. 2018 Supp. 21-5924(a)(3). A valid conviction for the second offense also required the State to prove the following elements beyond a reasonable doubt:

> "(a) Stalking is:
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> . . . .
>
> (3) after being served with, or otherwise provided notice of, any protective order in K.S.A. 21-3843, prior to its repeal or K.S.A. 2018 Supp. 21-5924, and amendments thereto, that prohibits contact with a targeted person, recklessly engaging in at least one act listed in subsection (f)(1) that violates the provisions of the order and would cause a reasonable person to fear for such person's safety, or the safety of a member of such person's immediate family and the targeted person is actually placed in such fear.
>
> . . . .
>
> "(f) As used in this section:

> (1) 'Course of conduct' means two or more acts over a period of time, however short, which evidence a continuity of purpose. A course of conduct shall not include constitutionally protected activity nor conduct that was necessary to accomplish a legitimate purpose independent of making contact with the targeted person. A course of conduct shall include, but not be limited to, any of the following acts or a combination thereof:
> (A) Threatening the safety of the targeted person or a member of such person's immediate family;
> (B) following, approaching or confronting the targeted person or a member of such person's immediate family;
> (C) appearing in close proximity to, or entering the targeted person's residence, place of employment, school or other place where such person can be found, or the residence, place of employment or school of a member of such person's immediate family;
> (D) causing damage to the targeted person's residence or property or that a member of such person's immediate family;
> (E) placing an object on the targeted per son's property or the property of a member of such person's immediate family, either directly or through a third person;
> (F) causing injury to the targeted person's pet or a pet belonging to a member of such person's immediate family;
> (G) any act of communication." K.S.A. 2018 Supp. 21-5427(a)(3), (f)(1).

Treaster challenges the evidence to support his convictions from two separate angles. We will address each in turn.

1. *The State was not required to present evidence to establish the precise numerical statutory provision under which the restraining order was issued.*

Treaster first contends the evidence was not sufficient to sustain his convictions because the State purportedly "introduced no evidence of the underlying authority for the [restraining] Order, therefore making it impossible to determine if the Order was among the types listed in K.S.A. 21-5924(a)." We have conducted a thorough review of the

record and find the contrary to be true. Prosecution for both charged offenses required the State to prove that Treaster violated "a restraining order issued pursuant to K.S.A. 2018 Supp. 23-2707, 38-2243, 38-2244 or 38-2255 and amendments thereto, or 60-1607 prior to its transfer." K.S.A. 2018 Supp. 21-5942(a)(3). K.S.A. 2018 Supp. 23-2707 covers those restraining orders issued during the pendency of a divorce action. K.S.A. 38-2243, 38-2244, and 38-2255 apply to proceedings under the Code for Care of Children, and K.S.A. 60-1607 was transferred to K.S.A. 2011 Supp. 23-2707 in 2011 as part of the recodification of the Family Law Code.

It is without question that the charges here arose as a result of the deterioration in and ultimate dissolution of the relationship C.S. and Treaster shared. The entirety of the State's evidence was in alignment with that theme. Thus, this portion of the evidence was, by the very nature of the case, confined to the restraining order issued as part of their divorce proceedings. To that end, the record reflects testimony from C.S. during which she relayed the encounters she had with Treaster that prompted her to pursue a restraining order through the divorce court and Treaster's agreement to the same. C.S. read the Order's provisions into the record and the State then received permission to admit a physical copy of the Order that was signed and issued by the district court judge who was assigned to their divorce as verification of its existence. At no point did Treaster challenge C.S.'s assertion that she pursued the Order as part of that case, nor did he object to the validity of the Order.

Treaster's position seems to be that the State failed to present evidence of the precise statute number under which the restraining order was issued. But he cites no authority to support the contention that the State bears such a burden and we have found none. Nor was there any confusion of purpose that necessitated such specificity. That is, there was absolutely no indication the couple was also entangled in a child in need of care proceeding, which make up the only other statutory provisions addressed in the subsection alongside K.S.A. 2018 Supp. 23-2707.

To sustain a conviction for the charged offenses the State was required to prove that Treaster violated a restraining order issued through their divorce that prohibited him and C.S. from harassing each other at work or going about the premises of the other's residence or place of employment. A fair, yet thorough, review of the record, in the light most favorable to the State, reflects that is precisely what the State accomplished through the presentation of its case. We are satisfied the evidence was sufficient to enable a reasonable fact-finder to conclude that Treaster violated the particular restraining order to which he was bound.

2. *Restraining orders are encompassed within the protective orders that the stalking statute seeks to insulate from violations.*

Treaster next asserts the State's case against him for the stalking charge fell short because it established that he violated a restraining order, not a protective order as required by K.S.A. 2018 Supp. 21-5427(a)(3). A precursor to a violation of the stalking statute is for the offender to be served with "any protective order included in . . . K.S.A. 21-5924." K.S.A. 2018 Supp. 21-5427(a)(3). Treaster takes the position that the Legislature's use of the term "'protective'" as a descriptor modifying "order" limits the types of orders to only those that formally bear the "protective" designation under K.S.A. 2018 Supp. 21-5924, not merely *any* of the orders listed therein. He contends that if the legislative intent was that a violation of any of the enumerated orders would subject an offender to prosecution then the Legislature would not have included "'protective'" as a descriptor for a portion of those orders.

This argument ignores the plain language of the statutes at issue and our obligation to adhere to the precise words chosen by the Legislature when reviewing claims of this nature. See *State v. Ruiz-Reyes*, 285 Kan. 650, 653, 175 P.3d 849 (2008) (When called on to interpret a statute, the intent of the Legislature expressed through the language in the statute governs.). Our relevant linguistic parameters consist of the following:

> "(a) Stalking is:
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> . . . .
>
> (3) after being served with, or otherwise provided notice of, *any protective order included in K.S.A. 21-3843, prior to its repeal or K.S.A. 2018 Supp. 21-5924*, and amendments thereto, that prohibits contact with a targeted person, recklessly engaging in at least one act listed in subsection (f)(1) that violates the provisions of the order and would cause a reasonable person to fear for such person's safety, or the safety of a member of such person's immediate family and the targeted person is actually placed in such fear." K.S.A. 2018 Supp. 21-5427. (Emphasis added.)

Our next step then is to turn to K.S.A. 2018 Supp. 21-5924(a) to ascertain what protective orders it includes. That provision states:

> "(a) Violation of a protective order is knowingly violating:
>
> (1) A protection from abuse order issued pursuant to K.S.A. 60-3105, 60-3106 or 60-3107, and amendments thereto;
>
> (2) a protective order issued by a court or tribunal of any state or Indian tribe that consistent with the provisions of 18 U.S.C. § 2265, and amendments thereto;
>
> (3) a restraining order issued pursuant to K.S.A. 2018 Supp. 23-2707, 38-2243, 38-2244 or 38-2255, and amendments thereto, or K.S.A. 60-1607, prior to its transfer;
>
> (4) an order issued in this or any other state as a condition of pretrial release, diversion, probation, suspended sentence, postrelease supervision or at any other time during the criminal case that orders the person to refrain from having any direct or indirect contact with another person;
>
> (5) an order issued in this or any other state as a condition of release after conviction or as a condition of a supersedeas bond pending disposition of an appeal, that orders the person to refrain from having any direct or indirect contact with another person; or
>
> (6) a protection from stalking, sexual assault or human trafficking order issued pursuant to K.S.A. 60-31a05 or 60-31a06, and amendments thereto."

It is clear from the language of the statute that the Legislature used the umbrella term "protective order" in (a) with the intent to encompass the six different types of orders it took the initiative to precisely identify under that section. A restraining order issued under K.S.A. 2018 Supp. 23-2707, the type of order to which Treaster was subject, is specifically included among them at subsection (3).

Treaster implores us to parse the statute to exclude half of those six because they are not also independently labeled as protective orders. That is, they lack a dual "'protective order'" designation. Interpreting the statute as Treaster suggests would read three of the subsections out of the law, essentially rendering them mere surplusage. To do so contravenes a canon of construction which recognizes that, when possible, we should refrain from rendering parts of a statute meaningless. See *State v. Van Hoet*, 277 Kan. 815, 826-27, 89 P.3d 606 (2004). The "no-surplusage rule of construction is a secondary one that generally must yield to otherwise obvious legislative intent and purpose." *State v. Bunyard*, No. 115,603, 2018 WL 2748698, at *4 (Kan. App. 2018) (unpublished opinion). Rather, we presume the Legislature does not intend to enact useless or meaningless legislation. See *State v. Sellers*, 301 Kan. 540, 547, 344 P.3d 950 (2015). Moreover, adopting Treaster's analysis would require us to step outside our obligation to simply interpret the statute and into the role of rewriting it; an act which is expressly forbidden. When endeavoring to interpret a statute, ordinary words are to be given their ordinary meaning, and the provision should not be read as to add what is not readily found therein or to read out what as a matter of ordinary English language is in it. *GT, Kansas, L.L.C. v. Riley County Register of Deeds*, 271 Kan. 311, 316, 22 P.3d 600 (2001).

We believe that a reasonable reading of the statute reveals that the Kansas Legislature specifically intended to classify all six orders listed as protective orders and to criminalize any violations of each one. Therefore, Treaster's claim does not undermine the sufficiency of the evidence to support his conviction. Viewing the evidence in a light

most favorable to the State, a rational fact-finder could have found all the elements necessary to determine that Treaster was guilty of stalking.

3. *The invited error doctrine precludes review of Treaster's instructional error claim.*

Treaster argues for the first time on appeal that the district court erred by failing to properly instruct the jury to consider whether the Order was issued under the proper authority enumerated in K.S.A. 2018 Supp. 21-5924(a). The State responds that the jury instructions were not clearly erroneous and that Treaster invited any error given that he requested the exact instruction the court issued.

When analyzing jury instruction issues, reviewing courts follow a three-step process which requires them to (1) determine whether they can or should review the issue, whether there is a lack of appellate jurisdiction or a failure to preserve the issue for appeal, (2) consider the merits of the claim to determine whether error occurred, and (3) assess whether the error requires reversal, whether the error can be considered harmless. *State v. McLinn*, 307 Kan. 307, 317, 409 P.3d 1 (2018). When a party fails to object to or request a jury instruction at trial, K.S.A. 2022 Supp. 22-3414(3) limits appellate review to a determination of whether the instruction was clearly erroneous. In assessing whether an error occurred, an appellate court considers whether the instruction was legally and factually appropriate, applying an unlimited review of the entire record. Under the clearly erroneous standard, we will only reverse a decision of the district court if an error occurred, and we are firmly convinced the jury would have reached a different verdict had the instructional error not occurred. 307 Kan. at 318.

Treaster and the State proposed jury instructions for violating a protective order and stalking in accordance with the pattern instructions for Kansas. See PIK Crim. 4th 59.190 (2019 Supp.); PIK Crim. 4th 54.470 (2019 Supp.). The district court then stated it

intended to follow the PIK instructions and neither party objected. Accordingly, jury instruction No. 7 read:

> "In Count One, Brian Treaster is charged with stalking. Brian Treaster pleads not guilty. To establish this charge, each of the following claims must be proved:
>
> 1. Brian Treaster was given notice of a protective order prohibiting contact with [C.S.].
> 2. Brian Treaster thereafter recklessly followed, approached, or confronted the targeted person.
> 3. That act violates the protective order.
> 4. That act would cause a reasonable person to fear for his safety.
> 5. [C.S.] was placed in such fear.
> 6. This act occurred on the 18th day of April 2019, in Reno County, Kansas."

Instruction No. 8 read:

> "In Count Two, Brian Treaster is charged with Violation of a Protective Order. Brian Treaster pleads not guilty. To establish this charge, each of the following claims must be proved:
>
> 1. Brian Treaster knowingly violated a restraining order issued under Kansas Law.
> 2. This act occurred on the 18th day of April 2019, in Reno County, Kansas."

Treaster contends that both instructions failed to include the statutory requirement that the violated order be one of those specifically enumerated in K.S.A. 2018 Supp. 21-5924(a). He asserts the omission renders the instructions clearly erroneous because the jury could not apply the correct legal standard for an essential element of the crimes which then impacts his right to a fair trial. Therefore, the argument goes, its verdict was potentially based on a finding that the Order was issued in connection with one of the other statutes creating or governing restraining orders.

Treaster requested the exact instructions at trial that he now claims erroneously omitted an essential element of the charged crimes. As noted above, under the circumstances we typically review such claims under the clearly erroneous standard. See *State v. Jones*, 313 Kan. 917, 927, 492 P.3d 433 (2021) ("In the absence of a contemporaneous objection, the failure to include an essential element of the crime in jury instructions is still reviewed for clear error."). The concern is that the failure to properly instruct a jury on the essential elements of the crime charged risks depriving it of the ability to render a proper verdict. But where the appellate record convinces the reviewing court that the jury would have found the omitted element if it had been asked to do so, the failure to formally instruct the jury is harmless error. *State v. Brown*, 298 Kan. 1040, 1045, 1049, 318 P.3d 1005 (2014).

But Treaster's case involves another layer which the State properly identifies with its request for application of the invited error doctrine. Our Supreme Court's recent opinion in *State v. Slusser*, 317 Kan. 174, 179-81, 527 P.3d 565 (2023), is instructive on that issue. In that case, Slusser, like Treaster, proposed the precise instruction he challenged on appeal and also did not object at the time the instruction was issued. The court found that Slusser's instructional claim was precluded by the invited error doctrine because the alleged error was apparent at the time Slusser submitted the proposed instruction and he failed to object to the final instructions before the district court delivered them to the jury. 317 Kan. 181-82 (citing *State v. Fleming*, 308 Kan. 689, 702-03, 423 P.3d 506 [2018]). The court drew additional support for application of the doctrine from the fact that the circumstances, when viewed collectively, demonstrated that Slusser induced commission of the error. The court highlighted the fact that not only did Slusser affirmatively request the instruction, but he also did so alongside the State's proposal of the same instruction. That dual submission, coupled with the absence of an objection from Slusser amounted to an inducement for the district court to issue the instruction. As a result, the court declined to reach the merits of Slusser's instructional challenge. 317 Kan. at 183.

We cannot discern any appreciable difference between Treaster's case and Slusser's. Like Slusser, Treaster and the State requested the same instructions that are the subject of Treaster's claim, and the error he alleges exists in the instructions was readily apparent at the time of his request, yet he never voiced an objection. Under these circumstances we find that Treaster induced the district court to issue the instructions he now alleges warrant reversal of his convictions. We will follow the lead of the *Slusser* court and decline to analyze the merits of Treaster's claim given that he invited the error he now complains of.

4. *Treaster's convictions for violating a protective order and stalking after being served are appropriate and may coexist without offending the prohibition on simultaneous convictions for general and specific crimes.*

Treaster next argues, for the first time on appeal, that K.S.A. 2022 Supp. 21-5109(d) requires us to vacate his conviction for violating a protective order because stalking is the more specific offense which prohibits the same conduct and therefore is the only offense for which he may be sentenced. The State counters that Treaster's convictions for both offenses are legally permissible because the two contemplate different conduct as evidenced by the disparity in their elements. That is, stalking involves a different mens rea, a reasonableness component, and the additional element that the targeted person, C.S., was placed in actual fear.

Generally, this court does not hear issues raised for the first time on appeal. *State v. Green*, 315 Kan. 178, 182, 505 P.3d 377 (2022). Reviewing courts have recognized exceptions to this general rule when: (1) the newly asserted theory involves only a question of law arising on proved or admitted facts and the issue is finally determinative of the case; (2) resolution of the question is necessary to serve the ends of justice or to prevent denial of fundamental rights; or (3) the district court reached the right result for the wrong reason. *State v. Johnson*, 309 Kan. 992, 995, 441 P.3d 1036 (2019). We are persuaded that analysis of the issue is warranted because it involves only a question of

law. Given its purely legal quality, we exercise unlimited review of the merits. *State v. Williams*, 299 Kan. 911, 929-30, 329 P.3d 400 (2014). Resolution of the issue also demands an analysis of K.S.A. 2022 Supp. 21-5109(d) which similarly presents a question of law that receives de novo review. See *State v. Stoll*, 312 Kan. 726, 736, 480 P.3d 158 (2021).

Again, Treaster seeks to vacate his conviction for violating a protective order through the operation of K.S.A. 2022 Supp. 21-5109(d) which states:

> "(d) Unless otherwise provided by law, when crimes differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct, the defendant:
>
> (1) May not be convicted of the two crimes based upon the same conduct; and
>
> (2) shall be sentenced according to the terms of the more specific crime."

"'A statute which relates to persons or things as a class is a general law while a statute which relates to particular persons or things of a class is special.'" S*eltmann v. Board of County Commissioners*, 212 Kan. 805, 810, 512 P.2d 334 (1973). In *State v. Euler*, 314 Kan. 391, 396, 499 P.3d 448 (2021), the Kansas Supreme Court examined the general versus specific issue in the context of the earlier, judicially created, permutation of that principle and noted its "questionable applicability and sketchy origins in our caselaw." The court did not delve into an analysis of the applicability of K.S.A. 2020 Supp. 21-5109(d) because Euler did not raise it as an avenue for relief. *Euler* clarified that the general versus specific rule is not truly a "rule" at all and "was never intended to apply to two statutes with divergent elements." 314 Kan. at 397. This conclusion essentially reiterates the court's previous holding in *State v. Cott*, 288 Kan. 643, Syl. ¶ 2, 206 P.3d 514 (2009), that the general versus specific rule is inapplicable when there is a clear indication that the Legislature did not intend for one statute to provide the sole avenue for punishing prohibited activity. And for its part, *Cott* reinforced the position the court took several years earlier in *State v. Fritz*, 261 Kan. 294, 304-06, 933 P.2d 126

(1997), in which it stated that where two statutes each have a different purpose or prevent different types of behavior, they are not in conflict, and one is not a more specific version of the other.

The *Euler* court went on to explain that the general and specific "rule" is more aptly classified as a previously helpful tool for divining legislative intent, but the degree to which it continued to inform that issue was questionable given the court's current and "more rigorous insistence" on statutory plain language as the lodestar for interpretation questions. 314 Kan. at 397. That is, "when a criminal statute by its plain language unambiguously applies to a given set of facts, there can be no conclusion under our current rules of statutory interpretation other than that the Legislature intended the statute to apply." 314 Kan. at 397. Thus, "the legislative intent exception swallows the 'more specific statute rule' whole." 314 Kan. at 397.

While there is no fundamental difference between the common law version of the "rule" and the codified version set out in K.S.A. 2022 Supp. 21-5109(d) which calls the soundness of the *Euler* court's analysis into question, we do acknowledge that unlike Euler, Treaster relies on the statute for the foundation of his claim and "[a]s a general rule, statutory law supersedes common law." *Stanley v. Sullivan*, 300 Kan. 1015, 1018, 336 P.3d 870 (2014). Thus, while the rule may not be favored and has been deemed "accidental" by the Supreme Court, it is still the manner in which the Legislature chose to draft the statute and we must analyze the issue Treaster raised within the parameters of that provision. See *Euler*, 314 Kan. at 397.

Holding true to our obligation to use the plain language of the provision as the designated starting point for statutory interpretation matters, we look to what the Legislature stated in K.S.A. 2022 Supp. 21-5109(d), what that contemplates, and its applicability here. When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind the clear language, and it should refrain from

reading something into the statute that is not readily found in its words. *State v. Keys*, 315 Kan. 690, 698, 510 P.3d 706 (2022).

As noted above, two conditions must occur in order to trigger the provision - an offender must be convicted of two offenses and those crimes must be based on the same conduct. See also *State v. Stohs*, 63 Kan. App. 2d 500, 505, __ P.3d __, 2023 WL 3668174 (No. 124,314, filed May 26, 2023) (The sentencing rule contained in K.S.A. 2022 Supp. 21-5109[d] only applies when the prosecutor charges the defendant with multiple crimes for the same conduct.). Here, the first component is fulfilled as Treaster was charged with, and ultimately convicted of violation of a protective order and stalking after being served. The second component is where Treaster's request for relief encounters its greatest challenge. The convictions at issue must arise out of the same conduct and our assessment of those offenses makes clear they did not.

The relevant statutory language of K.S.A. 2018 Supp. 21-5924(a)(3) defines the crime of violation of a protective order as *knowingly* violating a restraining order "issued pursuant to K.S.A. 2018 Supp. 23-2707 . . . ." (Emphasis added.) By contrast, the plain language of K.S.A. 2018 Supp. 21-5427(a)(3) explains that the offense of stalking after being served occurs when:

> "(3) after being served with, or otherwise provided notice of, any protective order included in K.S.A. 21-3843, prior to its repeal or K.S.A. 2018 Supp. 21-5924, and amendments thereto, that prohibits contact with a targeted person, *recklessly* engaging in at least one act listed in subsection (f)(1) that violates the provisions of the order and would cause a reasonable person to fear for such person's safety, or the safety of a member of such person's immediate family and the targeted person is actually placed in such fear." (Emphasis added.)

It cannot be said that violation of a protective order and stalking constitute "the same conduct" as required for application of K.S.A. 2018 Supp. 21-5109(d) because the

offenses demand that the State prove an offender acted with different degrees of mental culpability when establishing the two offenses. The former requires that the offender act "knowingly" while a conviction for the latter occurs when an offender undertakes a "reckless" course of conduct. K.S.A. 2018 Supp. 21-5924(a)(3); K.S.A. 2018 Supp. 21-5427(a)(3).

Our conclusion is buttressed by the analysis a panel of this court conducted concerning a similar issue in *State v. Sinzogan*, 53 Kan. App. 2d 324, 388 P.3d 176 (2017). In that case, Sinzogan was also convicted of violation of a protective order and stalking. He pursued a direct appeal and argued the two convictions could not coexist because the protective order violation qualified as a lesser included offense of the stalking charge under K.S.A. 2015 Supp. 21-5109(b). That particular subsection of the provision states that "[u]pon prosecution for a crime, the defendant may be convicted of either the crime charged or a lesser included crime, but not both." K.S.A. 2015 Supp. 21-5109(b). A lesser included crime is defined, as relevant to Sinzogan's claim, as "a crime where all elements of the lesser crime are identical to some of the elements of the crime charged." K.S.A. 2015 Supp. 21-5109(b)(2).

Despite Sinzogan's contentions to the contrary, the panel determined that a central factor to the analysis was the different mental states the State was required to prove in order to establish Sinzogan's commission of the two offenses. The court did not find the authority Sinzogan offered in support of his position persuasive because, in large measure, those examples each presented a situation where the mental state associated with the highlighted lesser included offenses was lower than that assigned to the greater offense. 53 Kan. App. 2d at 328. Thus, proving the greater offense, with its higher culpable mental state, necessarily sufficed to prove all the elements of the lesser offense, including its lower mens rea. But in Sinzogan's case, the offense he sought to have declared as the lesser offense demanded the higher mental state of "knowingly." 53 Kan. App. 2d at 327. As a result, the panel declined to find that violation of a protective order

constituted a lesser included crime of stalking and affirmed his convictions for both offenses. 53 Kan. App. 2d at 329.

Just as the varied mental states undercut Sinzogan's quest for relief, they also raise a hurdle Treaster cannot clear. To prevail on his claim, he was required to show the same conduct occurred. But a person who acts with a full awareness of the nature of their conduct or the reasonableness of its result, is distinctly different from one who acts with a conscious and gross disregard of a substantial and unjustifiable risk that circumstances exist, or a result will follow. See K.S.A. 2022 Supp. 21-5202(i) and (j). We therefore find that K.S.A. 2022 Supp. 21-5109(d) is inapplicable to Treaster's case and does not provide an avenue for vacating his conviction of violating a protective order.

5. *The State did not admit evidence of conduct by Treaster that qualified for a limiting instruction under K.S.A. 60-455.*

In his final claim of error, Treaster asserts that his convictions must be reversed, and his case remanded for a new trial because the district court clearly erred when it failed to issue an instruction limiting the jury's consideration of information about prior, but uncharged, bad acts he committed. Specifically, Treaster contends a limiting instruction was necessary to address that evidence which revealed that C.S. moved to a domestic violence shelter after filing for divorce because it suggested Treaster subjected her to that type of abuse. He also argues that because the State also introduced evidence that he previously stole C.S.'s vehicle and threatened her boyfriend, a limiting instruction was necessary to ensure his right to a fair trial remained protected. The State responds that the issue is not properly preserved and highlights Treaster's failure to object at the time the evidence was admitted at trial.

Treaster concedes he did not request the instruction that he now argues the district court erred in failing to provide, and so he must prove that failure to provide a limiting

instruction was clearly erroneous. The failure to object to the admission of K.S.A. 60-455 evidence does not waive the right to raise on appeal whether the failure to give a limiting instruction was clearly erroneous. See *State v. Breeden*, 297 Kan. 567, 582, 304 P.3d 660 (2013). When a party challenges a district court's failure to give a particular jury instruction, an appellate court follows a three-step process: (1) decide whether failure to preserve the issue for appeal or a lack of appellate jurisdiction precludes the court from reviewing the challenge, (2) evaluate the merits of the claim to determine whether the district court erred by failing to give a legally and factually appropriate instruction, and (3) assess whether the error warrants reversal. *State v. Hilyard*, 316 Kan. 326, 333, 515 P.3d 267 (2022). In those instances when a party fails to object to or request a jury instruction at trial, K.S.A. 2022 Supp. 22-3414(3) limits appellate review to a determination of whether the instruction was clearly erroneous. Under that standard, we will reverse only in the face of error and when we are firmly convinced the jury would have reached a different verdict had the instructional error not occurred. See 316 Kan. at 333.

The statute governing the admissibility of evidence of other crimes or civil wrongs provides:

> "(a) Subject to K.S.A. 60-447, and amendments thereto, evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove such person's disposition to commit crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion.
>
> "(b) Subject to K.S.A. 60-445 and 60-448, and amendments thereto, such evidence is admissible when relevant to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." K.S.A. 2022 Supp. 60-455.

Three requirements must be met before the State can pursue admission of evidence establishing a defendant's prior bad acts. It must be shown that (1) the evidence is

relevant to establish a material fact at issue, (2) the material fact is disputed, and (3) the probative value of the evidence outweighs its prejudicial effect. If such evidence is admitted under K.S.A. 2021 Supp. 60-455, the district court must provide a limiting instruction to inform the jury of the specific purpose for which the evidence was admitted. *State v. Evans*, 313 Kan. 972, 987, 492 P.3d 418 (2021).

Treaster proffers three pieces of evidence introduced by the State that qualified for a limiting instruction. First, that at one point C.S. moved into a shelter for women fleeing domestic violence situations. According to Treaster, this evidence could be misused to find that he committed acts of domestic violence against C.S. before the charges were filed for which he was on trial. Second, Treaster claims that C.S.'s testimony that he stole her vehicle lends itself to the interpretation that he committed a theft, and finally, Treaster argues that evidence regarding prior threats he made to C.S. and her boyfriend could be misinterpreted as prior criminal threats beyond that with which he was charged.

The first step in determining whether the district court erred by omitting a limiting instruction is to ascertain whether the complained of evidence falls within the scope of those types of acts that require such an instruction. See, e.g., *State v. Butler*, 307 Kan. 831, 860, 416 P.3d 116 (2018). The purpose of K.S.A. 60-455 is to forbid introduction of crimes or civil wrongs committed by the defendant in a criminal action or party in a civil action for the purpose of showing disposition to engage in such behavior. *State v. Boyd*, 281 Kan. 70, 95, 127 P.3d 998 (2006).

Historically, Kansas courts allowed evidence of prior acts characterized as marital discord to be admissible independent of K.S.A. 60-455 where the evidence was offered to establish the relationship of the parties, the existence of a continuing course of conduct between the parties, or to corroborate the witness' testimony. See, e.g., *State v. Cheeks*, 258 Kan. 581, 587-88, 908 P.2d 175 (1995); *State v. Green*, 232 Kan. 116, Syl. ¶ 4, 652 P.2d 697 (1982). But *Gunby* strongly disapproved of the "marital discord exception"

when it was not accompanied by the safeguards afforded K.S.A. 60-455 evidence. *State v. Gunby*, 282 Kan. 39, 54-57, 144 P.3d 647 (2006). In *State v. Campbell*, 308 Kan. 763, 773, 423 P.3d 539 (2018), the Kansas Supreme Court clarified that, after *Gunby*, such evidence only implicated K.S.A. 60-455 where it truly qualified as evidence of other crimes or civil wrongs. "Courts must analyze the specific and concrete evidence in each instance to determine whether the evidence truly qualifies as evidence of other crimes or civil wrongs." 308 Kan. at 773. Ultimately, the *Campbell* court affirmed the admission of testimony that the husband was "controlling" because it was not evidence of a crime or civil wrong. 308 Kan. at 773-74.

The evidence that Treaster puts forth does not implicate K.S.A. 2022 Supp. 60-455. C.S. never expressly testified that Treaster physically abused her or explained that she sought refuge at the shelter because of domestic violence. Her testimony that she moved to the residence after filing for divorce was introduced to establish the factual foundation of the case, not to help illustrate Treaster's propensity to commit the alleged crimes. Thus, this is not the type of evidence that qualifies for a limiting instruction.

C.S.'s testimony that Treaster took their vehicle from her without permission is also not concrete evidence of a crime or civil wrong. Although such behavior was certainly less than appropriate, it did not subject Treaster to any criminal or civil liability given that it was still joint marital property at that point. Accordingly, Treaster's claim that the evidence depicted him as a thief rings hollow because he did not misappropriate the property of another. The two simply previously agreed that C.S. would maintain possession of the vehicle so she could get to work and take the children to school. While Treaster violated their oral agreement he did not commit a crime or punishable bad act. In fact, legally restraining Treaster from taking the car and obtaining possession of the same was the sole reason C.S. pursued a restraining order. Thus, this information was admissible independent of K.S.A. 60-455 to establish why C.S. pursued the Order

Treaster was charged with violating. As such, it does not meet the classification of that for which a limiting instruction is required.

Finally, evidence of prior threats Treaster made to C.S. and her new beau was also admissible independent of K.S.A. 60-455 because it related to the acts Treaster committed that surrounded the criminal threat offense the State charged him with. "K.S.A. 60-455 does not prohibit the admission of evidence regarding other crimes and civil wrongs if the evidence relates to acts committed as part of the events surrounding the crimes or civil wrongs at issue in the trial." *State v. King*, 297 Kan. 955, Syl. ¶ 1, 305 P.3d 641 (2013). Treaster claims that evidence of the prior remarks he alluded to during the phone call carried a risk that the jury would confuse those statements as contemporaneous with the threats that formed the basis for the charges against him, and therefore a limiting instruction was required to avoid any confusion.

We are not persuaded. Rather, it is clear to us from the record that the threats Treaster made during the phone conversation were present threats intended to induce fear in C.S. and her boyfriend. During the conversation, Treaster claimed that he knew where Smith worked and where he parked his car and he made multiple remarks concerning his desire to kill the couple, including a plan to place explosives in the boyfriend's car. Although Treaster argues that these are separate and distinct past threats, in actuality he simply reiterated those remarks over the phone to help drive home the seriousness of the threats he made to them at Dillons that evening. Because the past threats related to the criminal threat for which Treaster was on trial, evidence from the phone call was admissible independent of K.S.A. 2022 Supp. 60-455.

The evidence that Treaster outlines in this issue was not subject to the K.S.A. 2022 Supp. 60-455 safeguards. Thus, we cannot find that the district court committed clear error in failing to issue a limiting instruction that it did not need to provide.

CONCLUSION

Brian Treaster properly stands convicted of violation of a protective order and stalking due to acts he perpetrated against C.S. after a restraining order was issued during their divorce. Following a careful review of the record we are satisfied that the evidence adduced at trial was sufficient to enable a rational fact-finder to conclude that Treaster was guilty beyond a reasonable doubt of the charged offenses. We are equally satisfied that, despite Treaster's contentions to the contrary, his convictions are not tainted by any errors associated with general versus specific offenses or the absence of a limiting instruction as neither of those principles is triggered here. Accordingly, Treaster's convictions are affirmed.

Affirmed.