No. 124,303

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

JOHN R. CANTU,
Appellant.

SYLLABUS BY THE COURT

1.

The right to testify on one's own behalf at a criminal trial is a right essential to due process of law in an adversary process.

2.

A defendant may waive or forfeit the right to testify in a criminal case either intentionally or by conduct.

3.

Although warning a disruptive witness that their testimony may be stricken is not mandatory in Kansas, it is a factor that should be considered as part of the totality of the circumstances.

4.

Denial of the right to testify is not a structural error requiring reversal. Instead, courts apply a harmless error analysis to determine whether the denial affected the outcome of the trial beyond a reasonable doubt.

Appeal from Reno District Court; TRISH ROSE, judge. Opinion filed March 31, 2023. Affirmed in part and reversed in part.

Randall L. Hodgkinson, of Kansas Appellate Defender Office, for appellant.

Kimberly A. Rodebaugh, senior assistant district attorney, *Thomas R. Stanton*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before ARNOLD-BURGER, C.J., GARDNER and CLINE, JJ.

ARNOLD-BURGER, C.J.: John R. Cantu was charged and convicted of two counts of felony stalking, two counts of violation of a protection from stalking order, one count of criminal damage to property, and one count of felony criminal threat. His case was tried before a jury, and he testified in his own defense. During the State's cross-examination of Cantu, Cantu asked the district court questions and ignored some admonishments from the district judge. The district judge removed Cantu from the witness stand and struck his testimony from the record.

Cantu argues on appeal that there was insufficient evidence to show that he was served or provided notice of the protective orders. Thus, he argues, he could not be convicted of knowingly violating a protection from stalking order as required by K.S.A. 2020 Supp. 21-5924(a)(6); nor could he be convicted of felony stalking under K.S.A. 2020 Supp. 21-5427(a)(3) because it also requires that he be served the orders or that he received notice of the orders through some other means. We agree, and for the reasons set forth herein we reverse his convictions for those charges.

Cantu next argues that the district court committed reversible error when it denied him his right to testify and struck his testimony. We find that the district court erroneously denied Cantu's constitutional right to testify by striking his direct testimony.

But based on a review of the evidence as a whole, we find beyond a reasonable doubt that even if the jury disregarded Cantu's testimony, it did not affect the outcome of the trial.

Affirmed in part and reversed in part.

FACTUAL AND PROCEDURAL HISTORY

In June 2020, D.H. requested protection from stalking orders against Cantu for herself and her daughter, F.H. Her request was granted on July 7, 2020.

On September 27, 2020, D.H. was at her home with her two children and getting ready to go to sleep. She heard a loud knocking on her back door and, after looking at her video camera monitor, saw that Cantu was on her back porch knocking on the door. The camera was not saving its recordings at the time. D.H. heard Cantu saying something but could not make out what he was saying. D.H. called the police.

D.H.'s oldest child entered the room around the same time and asked who was at the door. D.H. instructed her to call a relative, A.H., who lived next door.

D.H. stayed on the phone with police while her daughter stayed on the phone with A.H. A short time later, the knocking on the door stopped. Soon after, D.H. heard glass breaking. She and her children screamed and were telling the police and A.H. to hurry. D.H. and her children waited in her bedroom until dispatch told her that the police were outside and knocking on her door. She went to the door and let an officer in to search the house.

After searching the house and finding no one, the officer determined that the sound of breaking glass was caused by a cinder block going through the window.

While the officer was searching the house and talking to D.H., A.H. was outside speaking with another officer. After talking with the police, A.H. boarded up the broken window. The police left the area without finding Cantu. A.H. stayed in the area and after a while went to an alley connected to the house to look around. While searching the alley, A.H. found Cantu hiding behind a large utility pole.

Cantu began moving quickly towards A.H., screaming, cursing, and trying to take off his belt. Cantu would then walk away for a bit before returning and continuing to yell. According to A.H., this happened for a few minutes. Eventually Cantu left and the police arrested him a few blocks away.

Cantu was eventually charged with two counts of felony stalking, two counts of violation of a protection from stalking order, one count of criminal damage to property, one count of criminal trespass in defiance of a restraining order, and one count of felony criminal threat.

A jury trial was held where D.H. and A.H. testified about their experience that night. During D.H.'s testimony, the district court admitted the previously granted protection from stalking orders that D.H. requested against Cantu. Cantu did not object to their admission. Nor did he request a limiting instruction. No limiting instruction was given.

Before their testimony, during jury selection, the district court brought Cantu and counsel to chambers and admonished Cantu for inappropriate conduct during jury selection.

> "THE COURT: . . . Mr. Cantu, I noticed when a question was asked, would you be willing to vote not guilty, you raised your hand. That's not appropriate. Ms.

Rodebaugh was not speaking to you. So you just need to remember not to make any gestures. Alright? Do you understand?

"MS. CRANE: Do you understand what she's saying?

"[THE DEFENDANT]: I didn't mean to be inappropriate.

"THE COURT: I'm sure you didn't but that's why I'm telling you outside of the jury.

"[THE DEFENDANT]: I was doing that at the end that specific gesture.

"THE COURT: Any gesture by you is not appropriate.

"[THE DEFENDANT]: Like can you explain? Like would that be one? What about like—

"THE COURT: I'm not going to go through all the probable things you can do.

"MS. CRANE: I believe what she's trying to tell you, John, is she wants you to sit there and not make a lot of gestures whether you're approving to something or disapproving to something.

"THE DEFENDANT: I told her I did not do so in a forceful manner. I thought it was neutral.

"MS. CRANE: She's telling you that's not appropriate.

"THE DEFENDANT: Like that?

"MS. CRANE: No gestures whatsoever.

"THE DEFENDANT: Can we object then?

"THE COURT: Mr. Cantu.

"THE DEFENDANT: Not to say I'm going to.

"THE COURT: Just listen to me.

"THE DEFENDANT: But just for—

"THE COURT: Will you listen to me please.

"THE DEFENDANT: For purposes of appeal. Apparently you won't listen. Like I proved my point. Thank you.

"THE COURT: Well, if you think you're going to prove points here today, we're going to have problems. You need to listen to me.

"THE DEFENDANT: Is this all taken down? Thank you.

"THE COURT: Do you understand that?

"THE DEFENDANT: Yes, ma'am.

"THE COURT: You are not to make any gestures in action to anything anyone says in the courtroom. If you do, I will have you removed from your own trial. Do you understand that?

"THE DEFENDANT: Not in the way you term it but I will not—you see what I'm saying? I feel like you're being very forceful and I would like to be on the record.

"THE COURT: Let's go back in the courtroom.

"THE DEFENDANT: Thank you."

After the State rested its case, Cantu testified in his own defense. Cantu's testimony was largely a general denial of the allegations. According to Cantu, he was not at D.H.'s residence, he did not throw a brick through her window, and was not present in the alley near the house.

On cross-examination, the State first asked whether Cantu "agree[d] that there was a protection from stalking that was filed" against him. Cantu disagreed. The State then tried to ask another question, which Cantu interrupted. The following exchange then happened between the district court and Cantu:

"[THE DEFENDANT]: For the record, for the record—

"THE COURT: You need to wait for a question.

"[THE DEFENDANT]: I didn't finish.

"THE COURT: You need to wait for a question.

"[THE DEFENDANT]: I didn't finish answering the first one.

"THE COURT: I said it two times now. You need to wait for a question.

"[THE DEFENDANT]: She asked if I agreed.

"THE COURT: Sit back and wait for a question.

"[THE DEFENDANT]: May I be allowed to explain? Do I have to say yes or no?

"Q: Mr. Cantu?

"THE COURT: Mr. Cantu, if you don't cooperate I'm going to ask you to go back to the table.

"[THE DEFENDANT]: May I ask a question?

"THE COURT: You need to listen to the questions.

"[THE DEFENDANT]: Am I supposed to respond yes or no?

"THE COURT: Go sit at the table right now. Absolutely right now.

"[THE DEFENDANT]: I don't understand. Can I object to this?

"THE COURT: Sit at your table.

"[THE DEFENDANT]: I mean, she asked me a question.

"THE COURT: Officers, would you remove Mr. Cantu from the courtroom?

"[THE DEFENDANT]: Is this going to be on the record? [D.H.]—my water. You—

. . . .

"MS. CRANE: Is that sufficient, Your Honor?

"THE COURT: If Mr. Cantu will remain compliant it is. Otherwise I will require his removal. He's indicating by his posture and returning to his seat that he will remain compliant. Do you have any other evidence?

"MS. RODEBAUGH: Your Honor, are we striking everything from the record, if I don't have an opportunity to cross-examine.

"THE COURT: Is that what you are requesting?

"MS. RODEBAUGH: If I don't have an opportunity to cross-examine, yes, I would ask for everything he testified to be struck from the record.

"THE COURT: Ms. Crane, any response to that request?

"MS. CRANE: It's an unusual situation, Your Honor. The questions I asked were pretty general. It's a general denial. He's already issued a general denial by pleading not guilty. So I don't think his testimony needs to be stricken at this point.

"THE COURT: Mr. Cantu would not cooperate when I told him to only answer questions on cross-exam. I believe the State's request is valid. His testimony is stricken."

The defense then rested their case. Before the district court had an opportunity to read the jury instructions to the jury, Cantu interrupted to state that his attorney was "refusing to communicate" with him and that he wanted to claim ineffective assistance of counsel. The district court asked Cantu to be quiet and then read the jury instructions to the jury.

The jury found Cantu guilty on every count except criminal trespass. Cantu timely appealed.

ANALYSIS

Cantu raises five issues on appeal. First, Cantu argues that there was insufficient evidence to convict him of felony stalking or knowingly violating a protection from stalking order. Second, Cantu argues that the jury instructions for felony stalking did not include a required culpable mental state. Third, Cantu argues that the district court erred by failing to give a limiting instruction relating to the use of prior bad acts evidence. Fourth, Cantu argues that the district court erred when it determined that Cantu forfeited the right to testify in his own defense. Finally, Cantu argues that cumulative error deprived him of a fair trial. We will address each claim in turn.

I. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT CANTU OF FELONY STALKING OR OF KNOWINGLY VIOLATING A PROTECTION FROM STALKING ORDER

Cantu argues that there was insufficient evidence to convict him of felony stalking or knowingly violating a protection from stalking order.

We review the evidence in the light most favorable to the State.

> "'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.' [Citations omitted.]" *State v. Aguirre*, 313 Kan. 189, 209, 485 P.3d 576 (2021).

There was insufficient evidence to find that Cantu was served with, or otherwise provided notice of, any protective order.

Cantu was charged with two counts of felony stalking under K.S.A. 2020 Supp. 21-5427(a)(3) which required the State to prove that Cantu recklessly engaged in prohibited conduct "after being served with, or otherwise provided notice of, any protective order." Cantu was also charged with two counts of violating a protection from stalking order under K.S.A. 2020 Supp. 21-5924(a)(6) which required the State to prove that Cantu "knowingly violat[ed] . . . a protection from stalking . . . order."

On appeal, Cantu argues that there was insufficient evidence to show that he was served or provided notice of the protective orders. Thus, he argues, he could not be convicted of knowingly violating a protection from stalking order as required by K.S.A. 2020 Supp. 21-5924(a)(6); nor could he be convicted of felony stalking under K.S.A. 2020 Supp. 21-5427(a)(3) because it also requires that he be served the orders or that he received notice of the orders through some other means.

Based on the record before this court, Cantu's argument is persuasive. Both of the final orders of protection from stalking were filed in July 2020 and would be effective until July 2021. There is a stamp saying that the orders were received by the sheriff's office in July 2020, but nothing to show that the orders were served on Cantu. Nor was Cantu present at the hearing where the orders were given. Nothing in the record shows that Cantu knew that the final orders had been issued.

Perhaps realizing this, the State points to the text on the final orders that states that "Plaintiff filed a written verified petition on 22 June, 2020 requesting an Order of Protection . . . . Prior to [the final] hearing, Defendant was given reasonable notice of the date set for the hearing, together with a copy of the petition and *any ex parte order of protection from stalking* . . . on 25 June, 2020." (Emphasis added.) The State argues

because Cantu was given a copy of the petition and "any" ex parte order then he necessarily knew that a protection from stalking order was in place, and he then violated it. But there is no evidence that an ex parte order was ever put in place. The district court was not required to enter ex parte orders upon the filing of the petition. See K.S.A. 2020 Supp. 60-31a05(b) (court may enter ex parte temporary order on presentation of a verified petition).

With no evidence that an ex parte temporary order was entered, we cannot presume that Cantu was provided notice of any order of protection from stalking. Without evidence showing that Cantu was served or provided notice of a temporary order or the final order, he could not be convicted under K.S.A. 2020 Supp. 21-5427(a)(3) (requiring Cantu to be "served with, or otherwise provided notice of, any protective order" that prohibited his contact with the targeted person).

The same considerations apply to Cantu's conviction under K.S.A. 2020 Supp. 21-5924(a)(6) which required the State to prove that Cantu "knowingly" violated a protection from stalking order. Because Cantu was not present at the hearing when the final order was put in place and because there is no evidence that a temporary order was granted, a jury could not find that Cantu knowingly violated a protection from stalking order.

For these reasons, Cantu's stalking and violation of a protective order convictions must be reversed. We therefore do not need to reach Cantu's objection to the felony stalking instruction that was provided to the jury. Nor do we need to address his claim that an unrequested limiting instruction as it relates to the admission of prior bad acts to establish his propensity to violate protection orders requires reversal of those same convictions.

We are then left to examine Cantu's claims of error as they relate to the remaining charges of misdemeanor criminal damage to property based on damage to the window and felony criminal threat based on threats made to A.H.

II. THE DISTRICT COURT ERRED BY DETERMINING THAT CANTU FORFEITED HIS RIGHT TO TESTIFY BY HIS CONDUCT, BUT THE ERROR WAS HARMLESS

While acknowledging that an accused may forfeit the right to testify through their conduct, Cantu argues that his behavior did not warrant such a finding by the district judge. As a result, he asserts that his remaining convictions must be reversed because his fundamental right to testify under the United States Constitution Fourteenth Amendment Due Process Clause and the Compulsory Process Clause of the Sixth Amendment was violated. See *Rock v. Arkansas*, 483 U.S. 44, 50-52, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987).

The facts prompting Cantu's removal from the witness stand are not in dispute. When Cantu asked the district court some questions during the State's cross-examination, the court ordered him to leave the witness stand and ordered his direct testimony stricken. Cantu's direct testimony was brief. It consisted of an absolute denial that he had been at D.H.'s residence at any time that evening, he did not damage her window, and he had no contact with A.H.

We review an allegation of a constitutional volitation de novo.

We review de novo whether a trial court's ruling violated a criminal defendant's right to due process. *State v. Robinson*, 293 Kan. 1002, 1030, 270 P.3d 1183 (2012).

We examine the constitutional right to testify in general.

The United States Supreme Court has long recognized that the "right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution" and is "one of the rights that 'are essential to due process of law in a fair adversary process.'" *Rock*, 483 U.S. at 51. But the right to present testimony is not without limitation. "The right 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.'" 483 U.S. at 55. For example, "[w]hatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying *falsely*." *Nix v. Whiteside*, 475 U.S. 157, 173, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986).

And a defendant may waive the right either intentionally or by their conduct. *United States v. Panza*, 612 F.2d 432, 438 (9th Cir. 1979). Like the right to testify, the right to be present at trial can be lost if, "after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." *Illinois v. Allen*, 397 U.S. 337, 343, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970). If a defendant can lose their right to be present at trial, it follows that they may also lose their right to testify. See *Rock*, 483 U.S. at 55-56.

While Kansas courts have not addressed whether a defendant can be barred from testifying, other jurisdictions have. For example, in *State v. Anthony*, 361 Wis. 2d 116, 147, 860 N.W.2d 10 (2015), the Wisconsin Supreme Court held that a defendant could forfeit their right to testify if the defendant displayed "stubborn and defiant conduct that presented a serious threat to both the fairness and reliability of the criminal trial process as well as the preservation of dignity, order, and decorum in the courtroom." In *Anthony*, the district court observed, on the record, that the defendant was "'quite animated,'"

'"speaking very forcefully' with 'a good deal of anger in his voice,'" and seemed close to his '"breaking point'" while trying to testify to irrelevant matters. 361 Wis. 2d at 151. Before barring his testimony, the district court in *Anthony* warned him—many times—that he would not be allowed to testify if he continued to disobey orders and misbehave. The defendant made it clear that his conduct would continue, even after being warned multiple times, and the district court determined that he would not be allowed to testify and had him removed from the courtroom. As the Wisconsin Supreme Court put it, the district court "was not required to put Anthony on the stand and wait for the fireworks. The criminal trial process deserves better." 361 Wis. 2d at 155.

The law related to striking a defendant's testimony is cautionary.

Striking the testimony of a witness is a drastic remedy not lightly invoked. *United States v. McKneely*, 69 F.3d 1067, 1076 (10th Cir. 1995). When possible, courts should only strike portions of the testimony. *United States v. Esparsen*, 930 F.2d 1461, 1470 (10th Cir. 1991). Judges often have several options in the situation of a disruptive defendant, the selection of which is subject to an abuse of discretion analysis. *United States v. Rosario Fuentez*, 231 F.3d 700, 704-05 (10th Cir. 2000) (holding that appellate courts review the district court's decision to strike testimony for abuse of discretion); see *State v. Wilkins*, 220 Kan. 735, 741, 556 P.2d 424 (1976) (recognizing that a trial court exercises discretion in ruling on a motion to strike).

> "Whether to strike a witness' testimony or resort to some other procedure (for instance, a contempt proceeding) must be determined in part by the extent to which each alternative would disrupt the trial. The trial judge is uniquely well-suited to make this determination, and we see no good reason to require that a particular process be followed in making it. Excusing a jury in order to make special findings regarding the propriety of various procedures may be disruptive in itself. Were we to require the interruption of a trial each time a defendant refuses to answer a proper question, we have little doubt that this would become a familiar tactic. Such a procedure would certainly be open to abuse.

> "Not only would actions of contumacious defendants be able to severely limit the government's right of cross-examination, but the orderly conduct of trials would be seriously impaired. We cannot impose on a trial court a rule which could so significantly disrupt the administration of justice.
>
> "We also reject the suggestion that striking testimony is necessarily a last resort, to be used only when all other sanctions appear ineffective. Other measures may be appropriate. But we leave this determination to the trial judge in the exercise of a reasoned discretion. Whether it is better to excuse the jury to conduct a contempt proceeding or to continue with an uninterrupted trial by striking testimony is for the trial judge to decide. Here the defendant was permitted to give his direct testimony to the jury. We can only speculate as to the effect on the jury of the striking of the testimony." *Panza*, 612 F.2d at 439.

Several jurisdictions have upheld the district court's decision to strike a defendant's testimony and many of those decisions note that the trial court warned the defendant that continued misbehavior would result in their testimony being stricken. See *Williams v. Borg*, 139 F.3d 737, 740, 743 (9th Cir. 1998) (district court did not err by striking defendant's testimony after defendant was warned or admonished on at least three separate occasions that his failure to answer cross-examination questions would result in his testimony being stricken); *Panza*, 612 F.2d at 439 (holding district court did not abuse its discretion by striking defendant's testimony after defendant was expressly warned that the testimony would be stricken if he refused to answer questions on cross-examination); *Wright v. State*, 278 So.3d 805, 812 (Fla. Dist. App. 2019) (affirming decision to strike defendant's testimony after warning defendant that his testimony would be stricken, and lesser sanctions, did not correct the misbehavior); *People v. Figueroa*, 308 Ill. App. 3d 93, 101, 719 N.E.2d 108 (1999) ("trial court also warned defendant several times that his testimony would be stricken"); *State v. Clausen*, 307 Neb. 968, 985, 951 N.W.2d 764 (2020) (finding no plain error in striking defendant's testimony after trial court warned defendant that his testimony would be stricken "if he had another outburst").

In addition, although it relates to the right to be present, Federal Rule of Criminal Procedure 43(c)(1)(C) states that a defendant waives the right to be present "when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom." Kansas does not have a similar rule.

Here, although Cantu was threatened with removal from the witness stand, he was not advised that his behavior would result in his testimony being stricken. And although we do not find that such a warning is mandatory in Kansas, it is a factor that should be considered as part of the totality of the circumstances.

Cantu's behavior was not so disruptive as to warrant striking his testimony.

In this case, Cantu was not being egregiously disruptive in his back-and-forth with the district judge. The State asks this court to look at the entire record to get a more complete picture of Cantu's conduct, but Cantu behaved appropriately for most of the trial. The one major issue—prior to his conduct during cross-examination—was during voir dire where Cantu raised his hand when the jury was asked if anyone would be willing to vote not guilty. While that was clearly inappropriate behavior, the district court warned Cantu—in chambers—that it was not acceptable. It appears Cantu took the warning to heart because there was no other mention of similar inappropriate behavior.

The next incident occurred after the State rested and Cantu's counsel advised the court that Cantu wanted to testify "against Counsel's advice." The district court then advised Cantu that he had the right to not testify and asked if he had enough time to talk to his attorney about testifying. In response, Cantu said that he had

> "spoken with Mrs. Crane in effect that I wouldn't have any issue going forward with any negotiations to herself but I have also been told that I need to say this on the record that as part of my testimony it is within our trace and action that we—"

He continued by saying that he "just wanted to make sure we get that. That it's called an arbitration action right."

The district court expressed confusion over what Cantu was trying to say and asked if he had any questions. Cantu did not respond to her question and instead talked about his belief that he had a "corporate arbitration action." The court adjourned for the day.

The next day was Cantu's direct testimony and interaction with the district court during cross-examination. The only warning given during that exchange was when the district court said to Cantu "if you don't cooperate I'm going to ask you to go back to the table." Cantu then asked if he could ask a question and if he was supposed to respond "yes or no" to the State's questions. The court then ordered Cantu to return to the table. A short time later, Cantu's direct testimony was stricken from the record.

We find the district court's decision to strike Cantu's testimony was error. Cantu's behavior was not so "stubborn and defiant . . . that [it] presented a serious threat to both the fairness and reliability of the criminal trial process as well as the preservation of dignity, order, and decorum in the courtroom." See *Anthony*, 361 Wis. 2d at 147.

Nothing in the record shows whether Cantu seemed sincere in his questions, if he was angry or shouting, or if his behavior went beyond the questions asked. This court has nothing beyond the cold record to judge his conduct. Although we recognize that we should view the record through a deferential lens—recognizing that the veteran trial judge was in a better position to assess whether the defendant's courtroom demeanor was

an unusual circumstance that needed to be addressed—judges and litigants must be ever conscious of noting on the record behavior that is not otherwise discernable from a review of the transcript. See *State v. Williams*, 299 Kan. 1039, 1044, 329 P.3d 420 (2014). This is particularly true when the action taken in response impacts a fundamental right, like the right to testify.

Here, even reviewing the conduct through a deferential lens, Cantu was not overly disruptive in the context of the entire trial. Based on our review of the record, it was a short exchange, and the judge lost her temper after dealing with a, presumably, frustrating defendant. Moreover, Cantu was put on notice that he may have to return to his table, but he was never placed on notice that his testimony may be stricken if he did not cooperate. So we find the district judge did abuse her discretion by unreasonably ordering Cantu's direct testimony stricken—thus violating his constitutional right to testify.

We turn next to the remedy.

Denial of the right to testify is not a structural error requiring reversal.

The next question is whether the denial of Cantu's right to testify warrants reversal of his convictions or must we first apply a harmless error analysis to the facts. Cantu argues that his denial of a right to testify in his own defense should be considered a structural error. "A structural error is one that is so pervasive it defies 'analysis by "harmless-error" standards.'" *State v. Johnson*, 310 Kan. 909, 913, 453 P.3d 281 (2019) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309, 111 S. Ct. 1246, 113 L. Ed 2d 302 [1991]).

Courts are split as to whether the denial of the fundamental right to testify qualifies as a structural error. Our Supreme Court has noted that a "majority of courts that have considered the issue have applied a constitutional harmless error standard to denial of a defendant's right to testify." *State v. Carr*, 300 Kan. 1, 211, 331 P.3d 544 (2014), *rev'd and remanded on other grounds*, 577 U.S. 108, 136 S. Ct. 633, 193 L. Ed. 2d 535 (2016). And that remains the case today.

Anthony, which Cantu cites heavily, held that it is not a structural error and is therefore subject to a harmless error analysis. *Anthony*, 361 Wis. 2d at 156. The court reasoned that the denial of the right to testify is more like a trial error, which occurs during the presentation of the case to the jury and can be assessed in the context of the trial as a whole to determine whether the error was harmless. "The fact that a defendant's testimony may be significant to the issues in the case does not mean that its absence is incapable of assessment." 361 Wis. 2d at 158. When determining whether the denial of a right to testify is harmless, Wisconsin instructs reviewing courts to consider:

> "'(1) [T]he importance of the defendant's testimony to the defense case; (2) the cumulative nature of the testimony; (3) the presence or absence of evidence corroborating or contradicting the defendant on material points; and (4) the overall strength of the prosecution's case.'" 361 Wis. 2d at 159.

See also *United States v. Books*, 914 F.3d 574, 580 (7th Cir. 2019) (applied harmless error analysis to denial of the right to testify case without discussing whether it was structural error); *Palmer v. Hendricks*, 592 F.3d 386, 394, 399 (3d. Cir. 2010) (noting that defendant's proffered testimony "can be evaluated in the context of the remainder of the evidence in order to assess the impact of the constitutional violation"); *State v. Nelson*, 355 Wis. 2d 722, 738 (2014) (distinguishing structural as errors that permeate the entire process like the denial of the right to counsel, a biased judge, or denial of self-representation to errors like denial of a defendant's right to testify which occurs at a

discrete point much like trial errors); *United States v. Smith*, 433 Fed. Appx. 847, 851 (11th Cir. 2011) (unpublished opinion) (holding that the denial of a defendant's right to testify was not structural error because "[i]t is not impossible, or all that difficult, to assess the effect of the claimed error on the outcome of the trial"); *Soloman v. Curtis*, 21 Fed. Appx. 360, 362-63 (6th Cir. 2001) (unpublished opinion) (holding that there is a strong presumption that harmless error analysis is appropriate if the defendant has counsel and was tried by an impartial adjudicator).

In contrast, other courts have held that the denial of a defendant's right to testify in their own defense is a structural error. See *State v. Hampton*, 818 So. 2d 720, 729 (La. 2002) (holding that "whenever a defendant is prevented from testifying, after unequivocally expressing his desire to do so, the defendant has been denied a fundamental right and suffers detrimental prejudice"); *State v. Rivera*, 402 S.C. 225, 249-50, 741 S.E.2d 694 (2013) (finding that the right to testify is no different from the right to self-representation—which is structural error and not subject to harmless error analysis).

We choose to follow the majority rule our Supreme Court highlighted in *Carr*—the denial of the right to testify is not structural error and is subject to a harmless error analysis.

The striking of Cantu's testimony by the district court was harmless error.

When an error infringes on a party's federal constitutional right, a court will declare a constitutional error harmless only when the party benefiting from the error persuades the court "beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, proves there is no reasonable possibility that the error affected the verdict." *State v. Ward*, 292 Kan. 541, 569, 256 P.3d 801 (2011), *cert. denied* 565 U.S. 1221 (2012) (citing *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705, *reh. denied* 386 U.S. 987

[1967]). Kansas statutes also address the importance of finding that the court must disregard all errors and defects that do not affect any party's substantial rights. K.S.A. 60-261.

The State argues that because Cantu pleaded not guilty, his testimony that generally denied the charges against him was unnecessary and that the removal of his testimony had no impact on the verdict. We agree.

The State presented several witnesses who placed Cantu at D.H.'s residence. D.H. had a relationship with Cantu in the past. Protection from stalking orders on file related to Cantu and D.H. were admitted into evidence without objection. D.H. saw Cantu through her security camera knocking at her door. She recognized him and she recognized his voice as he spoke loudly in an aggressive manner and paced outside. While she was on the phone with the police reporting that Cantu was trying to get in, she heard glass breaking. The jury heard that D.H. and Cantu had a volatile history with dispatch relaying to the two officers that there were two protection from stalking orders on file related to Cantu.

A.H. arrived at the residence after receiving a call from his niece. She was screaming and she said Cantu was at the house. A.H. testified he knew Cantu. After the police left D.H.'s house, A.H. remained and saw Cantu hiding near the house after the police left. Cantu had a confrontation with him. Cantu was angry and aggressive and shouting what he planned to do to D.H. and A.H. Someone reported to the police that Cantu had returned. Police went to Cantu's residence, but he was not there. When Cantu was located a few blocks away from his home, he was angry, shouting racial insults and repeating D.H.'s name.

Cantu testified that he was not there that evening and that D.H. and A.H. were lying. He said he was jogging around his home and then went home to shower and watch

NASCAR. He did not speculate as to why they would lie. After answering the first question put to him in the negative, he asked to explain his response. A discussion with the judge began that led him to be removed from the witness chair, but not the courtroom. There was no other testimony after that from Cantu. When the district court ordered Cantu's testimony stricken, the conversation took place in front of the jury. We pause to note that it is preferable that such conversations occur outside the presence of the jury. Although the judge made the finding that Cantu's testimony would be stricken, she did not explain what that meant to the jury. She did not admonish it not to consider Cantu's direct testimony. And the State did not ask her to. In addition, there was no instruction given to the jury or requested by the State advising it to disregard Cantu's testimony. Accordingly, since it was never instructed not to consider Cantu's direct testimony, we cannot conclude beyond a reasonable doubt that the jury did not consider it. It is equally as likely that the jurors did consider it, since they were not told otherwise.

Next, the judge read the instructions to the jury. She advised the jury that it must presume Cantu to be not guilty and that he pleaded not guilty to each alleged crime.

Finally, in closing, defense counsel was able to relay Cantu's theory of the case to the jury—it was not him. Counsel pointed out the lack of evidence that it was Cantu at D.H.'s house. She told them that he maintained his innocence. Counsel pointed out that police had seen Cantu earlier in the day wearing a red hoodie and when he was picked up later that evening by police, he was wearing a red hoodie. But D.H.'s daughter described the person at the back of her house as dressed all in white, no red hoodie. Counsel argued that D.H. may have believed it was Cantu at the door due to their history, but she was mistaken. She did not see who broke the window, she only heard it break. She did not know if more than one person was present. So here, if we treat Cantu's stricken testimony as a proffer and review it in the context of the evidence as a whole, we are convinced beyond a reasonable doubt that striking Cantu's testimony did not affect the outcome of the trial.

Cantu's convictions for stalking and violation of a protective order are reversed. His remaining convictions of misdemeanor criminal damage to property and criminal threat are affirmed.

Affirmed in part and reversed in part.