

MODIFIED OPINION¹

NOT DESIGNATED FOR PUBLICATION

No. 124,610

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

RILEY D. MOORE,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; BRUCE C. BROWN, judge. Original opinion filed May 5, 2023. Modified opinion filed June 16, 2023. Affirmed in part, reversed in part, and remanded with directions.

Kasper Schirer, of Kansas Appellate Defender Office, for appellant.

Matt J. Maloney, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before MALONE, P.J., HURST and COBLE, JJ.

¹**REPORTER'S NOTE:** Opinion No. 124,610 was modified by the Court of Appeals on June 16, 2023, in response to appellant's motion for modification. The modified language was added to slip op. at 9-13.

PER CURIAM: A jury convicted Riley D. Moore of aggravated kidnapping, criminal threat, and domestic violence stemming from his actions during an incident in January 2021. Moore appeals his conviction on multiple grounds, and while the majority of Moore's claims are without merit, the aggravated kidnapping jury instructions contained at least two errors. The cumulative effect of these errors—even if neither separately created clear error requiring reversal—denied Moore a right to a fair trial. Therefore, Moore's conviction for aggravated kidnapping must be reversed. However, neither of these errors—nor any of the others Moore asserted—impacted his convictions for criminal threat and domestic violence. Affirmed in part, reversed in part, and remanded with directions.

FACTUAL AND PROCEDURAL BACKGROUND

During the January 2021 incident the victim secretly called 911, and that call was recorded and admitted into evidence at Moore's trial. The Axon body camera recording of the responding police officer's interview of the victim at the scene was also admitted into evidence at Moore's trial. As sometimes occurs, the victim's contemporaneous statements at the scene of the incident differed from her testimony at Moore's trial, and each are detailed below.

The Victim's Secret 911 Call and Initial Police Interview

At the scene, the victim told the responding officer that Moore came to her house to retrieve some of his belongings after their recent breakup. During the encounter, Moore became upset that the victim would not talk to him. Wanting to avoid the argument, the victim left and drove around the block for a few minutes and only returned when she saw that Moore's car was gone. However, Moore returned about 15-20 minutes later and entered her home using a key. The victim explained that Moore was "getting

really heated" and "talking crazy" about "how he would burn the house down with both of us in it," and that "he was going to die regardless tonight but I will too."

The victim said that she went outside to get away from Moore, but he followed her and she explained that Moore "grabbed me by my jacket, and so I was fighting back to try to get away from him." While trying to get loose, the victim fell on the ground, and told the officer that Moore then "dragged me into the garage door, into the garage." Once inside the garage, the victim said that Moore closed the garage door and she pushed the button to open the garage door, but Moore closed it again. The victim said that she thought Moore then pulled the automatic garage door open/close button from the wall and damaged it.

While inside the garage, the victim secretly dialed 911 which resulted in a six minute and fourteen second 911 recording of Moore's statements. In the recording, Moore can be heard yelling while the victim cries. Among other things, Moore made the following statements while inside the garage:

"You're gonna die tonight. You ready?"

....

"If you don't talk to me, we're both gonna die.

....

"Fuck you. I'm burning this whole house down tonight.

....

"Either you talk to me and you die and I die, or it's just me dying.

....

"Stop! Please! This is what I don't want! Don't do this! Please . . . just want you to talk to me! Please! You can walk away from me right now and just know that I'm going to be here dead. Ok, this will be the last time you talk to me."

The 911 dispatcher used a program called Rapid Deploy to ping the victim's phone and identify its approximate location in order to dispatch officers to the scene.

While talking to the responding police officer, the victim said that she did not feel free to leave the garage because she thought Moore could get to the door faster than her. She explained that the door to the backyard from the garage was blocked by a piece of wood they typically used as a locking device. Rather than running for the back door, the victim told Moore that she needed some air and asked if she could open the back door. Moore agreed and said that "[y]ou can leave if you want. I'll let you." The victim said that she then went out the back door and started walking toward the gate. She explained that Moore then stood in front of her and asked if she was really going to leave.

The victim then said that she asked Moore the time because she needed to get to work, and when he went to get his phone, she tiptoed around the side of the house to sneak away. She explained, "I kinda ran to my car and that's when I got into my car. He came running up to the side and I didn't get to lock it in time." She said that when Moore tried to get into her car, she got out and ran through the bushes toward the street, but Moore "kind of pulled me back through." She said that Moore yanked on her jacket to prevent her from making it through the bushes. The victim eventually escaped Moore's grasp and saw a passerby who turned out to be an off-duty police officer slowing his car to intervene.

The victim told the responding officer that she had scrapes on her back from "getting pulled into the garage" by Moore and he had also damaged her coat and shoes at that time. The officer asked the victim to demonstrate "approximately the distance you were dragged to the garage and which door you were dragged into." The victim showed the officer that Moore "dragged [her] all over" the driveway while she fought back as he was pulling her, and she fell several times. The victim also said that she was scared when Moore was threatening to burn the house down with them both in it. She explained that at

times during their relationship Moore had threatened to kill himself, but this was the first time he had made statements about also taking her life.

The off-duty officer who was coincidentally in the area driving to work testified that he approached the scene about 30 seconds after seeing the incident between Moore and the victim, and Moore was already gone. The off-duty officer testified that he saw Moore hit the victim while she was on the ground, and then attempt to shove her towards the street. He also testified that the victim was upset, crying, and shaking. He followed the victim back to her house where he briefed the officers who were dispatched in response to the victim's surreptitious 911 call.

The State charged Moore with aggravated kidnapping, criminal threat, and domestic battery. During an interview after his arrest, Moore described the incident differently than the victim's recitation at the scene. He explained that while at the victim's house to pick up his belongings, which was prearranged, the victim refused to talk to him and Moore started an argument with her. Moore said he stood behind the victim's car so she could not leave and he grabbed her jacket hood to get her attention during their argument, "but that was all there was for physical contact." Moore denied dragging the victim into the garage.

Preliminary Hearings

At a hearing in March 2021, the district court reminded Moore that he was prohibited from contacting the victim by order of the court and that meant "no contact in person, in writing, electronically, through social media, through the Internet, or through third parties, none." Further, the court explained that "[n]o one can modify it or change it one millimeter, including the victim in this case."

Just a few days after the district court had reminded Moore of the no contact order, in April 2021, the State filed a motion to revoke Moore's bond for violating the order. At the hearing on the State's motion, Moore confirmed that he had asked his mother to contact the victim to talk about dropping the charges against him, suggested his mother go to the victim's house, and even suggested that his mother call the victim's employer to try to get her fired if she testified against him. The court found Moore violated the no contact order and revoked his bond.

At a hearing in May 2021, when the victim entered the courtroom, Moore "made attempts to visually signal her and then wave." The district court admonished him and reiterated that "as has been done over and over in this case and has been a repeated problem in this case, you're to have no contact whatsoever with [the victim], period. . . . [W]hat I interpret that as is attempts to influence testimony, okay." The victim then testified about the January 2021 incident, and her testimony was similar to her prior statements to the responding officer at the scene. She testified that after their argument, Moore left, returned to her house, and tried to pull her when she went outside. After she dropped to the ground, he dragged her about 8 feet. However, slightly contrary to her prior statements, she initially testified that she walked or ran into the garage, but later admitted that Moore pulled her toward the garage resulting in scrapes on her side, tears in her coat, and damage to her shoes.

The victim explained that once inside of the garage, Moore closed the overhead door, she tried to open it, but Moore closed the door again. Unlike her initial statements, the victim testified that the back door from the garage to the backyard was open the entire time they were in the garage, and she did not remember telling law enforcement that it was blocked with a board. She did explain that although the back door was open, she did not try to exit in that direction because Moore was standing near it. She denied that Moore was physically blocking her, but simply conceded that "I wasn't gonna try to go out that door, I was gonna stay where I was at." When asked if she felt free to leave the

garage, the victim testified "[y]es and no" because she felt he would have followed her if she left the garage and so she "chose to just not try to leave."

At the preliminary hearing, the victim testified that she left the garage by convincing Moore that they should go outside to get some air, and she exited through the back door to the yard and thought that Moore exited through the garage door. The victim explained that she then got inside her car, but Moore also got into the car before she could lock the doors. She then exited her car and ran toward the side of the street to try to stop a car, but Moore pulled her backward by her arms and body.

The Victim's Trial Testimony

The victim reluctantly appeared at trial and testified that she did not want to be there and did not want the case to go forward against Moore. Her trial testimony then deviated from her statements to the responding officer and her testimony at the preliminary hearing.

At trial, the victim testified that she and Moore argued the day of the incident and when she tried to walk away toward the street, Moore followed her and grabbed the back of her coat to pull her backward. She testified that at the time, she felt Moore was restraining her from leaving. However, contrary to her statements the day of the incident, the victim testified at trial that Moore pulled her backward for only a short time, stopped suddenly, and then they both walked toward the garage. Rather than being dragged into the garage as she stated on the day of the incident, at trial she testified that she walked into the garage and Moore followed her. Once inside of the garage, the victim testified that she called 911 because Moore had "just pulled me back," and was yelling. She did confirm her prior testimony that she had scrapes on her side from Moore dragging her, as well as a tear in her coat and on her new shoes.

The victim testified about what occurred inside the garage fairly consistent with her prior statements. She explained that Moore closed the garage door and she tried to open it, but he closed it again. She explained that she called 911 and put the phone in her pocket believing that the emergency system could track her location. She testified at trial that "[i]t just felt logical at the time" to call 911 without Moore knowing. She denied the prosecutor's suggestions that she did not talk to the 911 dispatcher because of Moore's threats to burn the house down with her inside, but speculated that she might have remained silent "because he dragged me, pulled me earlier." She testified that she "[k]inda" felt free to leave the garage, but "chose not to, to let him kinda calm down." Similar to the preliminary hearing, the victim testified that she left the garage through the back door after asking Moore if she could leave and "[h]e said yes." Then after Moore got into her car with her, she exited and ran toward the street and then he grabbed her "like a tackle." At trial, the victim testified that Moore did not block her egress from the garage, the back door of the garage was not barred, and the door from the garage into the house was unlocked.

The victim further testified that before trial, she called one of the investigating detectives and told him she wanted to drop the charges against Moore because she thought the charges were too severe. She also confirmed that she had spoken to Moore's mother before she called the detective, but denied Moore's mother asked her to call the prosecutor's office to ask about dropping the charges. She then explained that she believed Moore was a good person at heart and admitted that she still loved him.

The jury found Moore guilty of aggravated kidnapping, criminal threat, and domestic battery, and found that each crime committed was an act of domestic violence. The trial judge granted Moore's motion for a downward durational departure from the sentencing guideline and sentenced him to 6 months in jail to run concurrent with his sentence of 123 months in prison.

Moore appeals.

DISCUSSION

Moore appeals his conviction alleging eight different errors, four of which relate to the aggravated kidnapping charge. Moore appeals his conviction for aggravated kidnapping alleging the district court erred because:

- (1) there was insufficient evidence of "bodily harm," to sustain his conviction;
- (2) it provided an incorrect definition of "taking or confinement" in the jury instructions;
- (3) it failed to provide a definition of "bodily harm" in the jury instructions; and
- (4) it omitted an essential element in the jury instruction.

Additionally, he alleges the district court erred when it:

- (5) admitted testimony regarding the victim's responses to the lethality assessment and Moore's jailhouse phone calls;
- (6) denied Moore's request to admit evidence of his father's recent suicide; and
- (7) denied Moore's request for a trial continuance.

Finally, he alleges

- (8) cumulative error denied him a fair trial.

I. THE STATE PRESENTED SUFFICIENT EVIDENCE OF BODILY HARM TO SUSTAIN MOORE'S CONVICTIONS FOR AGGRAVATED KIDNAPPING

Moore first argues that the State failed to present sufficient evidence that the victim suffered "bodily harm," and thus there was insufficient evidence upon which a rational fact-finder could rely to find him guilty of aggravated kidnapping beyond a reasonable doubt. Although this court reverses on other grounds, it is necessary to resolve

Moore's sufficiency of the evidence argument because "if the evidence during the first trial was insufficient to support the convictions, a second trial on the same charges would violate [the defendant's] right to be free from double jeopardy." *State v. Chandler*, 307 Kan. 657, 668, 414 P.3d 713 (2018) (reversing for prosecutorial error but also addressing the defendant's sufficiency of the evidence argument to avoid double jeopardy on remand).

In determining whether there was sufficient evidence to support a conviction, this court reviews the evidence in a light more favorable to the State to determine "whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt." *State v. Aguirre*, 313 Kan. 189, 209, 485 P.3d 576 (2021). In doing so, the appellate court should not "reweigh evidence, resolve conflicts in the evidence, or pass on the credibility of witnesses." 313 Kan. at 209. This is a high burden for the defendant to overcome, and this court will find evidence is insufficient to support a conviction only when "the testimony is so incredible that no reasonable fact-finder could find guilt beyond a reasonable doubt" See *State v. Meggerson*, 312 Kan. 238, 247, 474 P.3d 761 (2020).

In response to Moore's challenge, the State argues that Moore's actions of dragging the victim into the garage and tackling her by the street constituted sufficient evidence of bodily harm to support Moore's conviction for aggravated kidnapping. Moore counters that the State is prohibited from relying on the street-side altercation because it did not rely on that theory at trial, and alternatively that the street-side altercation was a separate encounter.

Moore relies on *Burcham v. Unison Bancorp, Inc.*, 276 Kan. 393, 409, 77 P.3d 130 (2003), where the court explained that "[o]n appeal, a party cannot be permitted to change its theory or present new issues which were not raised before the trial court," for the proposition that the State may not rely on the street-side altercation as evidence of bodily harm. In *Burcham*, the plaintiffs alleged the defendant breached a contract by

failing to exercise their right to purchase. On appeal, the plaintiffs added a theory of liability that the defendants had threatened them, thereby violating the covenant of good faith and fair dealing and thus breached the contract. Unlike this case, the *Burcham* plaintiffs asserted an entirely new legal theory on appeal which had not been presented at trial. The State's argument that the street-side altercation constituted "bodily harm" is not a new legal theory. Here, the State presented evidence of two physical interactions that could have constituted bodily harm, and the jury was free to rely on all or part of the evidence to determine whether the victim suffered bodily harm. See *Chandler*, 307 Kan. at 670 ("In assessing the evidence's sufficiency, we consider all the evidence at the jury's disposal.").

Moore next argues that the State cannot rely on the street-side altercation because the alleged kidnapping was completed inside of the garage and ended when the victim left the garage. Although Moore's legal theory is not entirely clear, this court finds no justification for the assertion that the street-side altercation was a separate act from the act which began with Moore taking the victim into the garage. See, e.g., *State v. Kesselring*, 279 Kan. 671, 682, 112 P.3d 175 (2005). In *Kesselring*, the defendant was convicted of aggravated kidnapping after forcing the victim from his home and into a vehicle at gunpoint. As the defendant was driving, he slowed for a yield sign and the victim jumped out of the car, ran away, and hid before being retrieved by the defendant's companion. The Kansas Supreme Court found that although the victim was momentarily free, his attempted escape was not sufficient to interrupt the sequence of events to say that a new criminal impulse or new act of kidnapping had occurred when the defendant's companion brought the victim back to the car. 279 Kan. at 682-83.

Here, like in *Kesselring*, the victim momentarily freed herself from Moore's immediate grasp, but as she attempted to flee toward the street Moore physically engaged her. Moore asserts that after the victim left the garage she was no longer detained, and thus the initial kidnapping had ended. When the evidence here is viewed in the light

favorable to the State, the victim's actions when she left the garage did not result in her freedom and start a new or separate encounter with Moore. Rather, her actions in leaving and his actions in trying to stop her were all still motivated by Moore's initial actions of taking her to the garage. "Incidents are factually separate when independent criminal acts have occurred at different times or when a late criminal act is motivated by "a fresh impulse." " *Kesselring*, 279 Kan. at 683. The facts viewed favorably to the State show that Moore took the victim to the garage and a short time later, with no meaningful passage of time or fresh impulse by Moore, then grabbed her when she was near the street. These two acts—taking the victim to the garage and trying to stop her from leaving—occurred close in time, close in location, and were both motivated by Moore's desire to talk to the victim about their relationship. Moore acted with the same impulse when he took the victim to the garage as when he tried to stop her by the street after she left the garage—and those were not separate criminal acts. Although the State argued at trial that Moore's act of dragging the victim into the garage constituted the bodily harm necessary to support the aggravated kidnapping charge, the street-side tackle was part of that same kidnapping act and there was sufficient evidence presented for the jury to find bodily harm from the street-side altercation.

Bodily harm sufficient to support a conviction for aggravated kidnapping is defined as "any touching of the victim against the victim's will, with physical force, in an intentional, hostile and aggravated manner, or the projecting of such force against the victim by the kidnapper." *State v. Royal*, 234 Kan. 218, Syl. ¶ 6, 670 P.2d 1337 (1983). However, "[o]nly unnecessary acts of violence upon the victim and those occurring after the initial abduction constitute 'bodily harm.'" 234 Kan. at 222. Contrary to Moore's argument, the victim need not sustain physical injury to have suffered the bodily harm necessary to support an aggravated kidnapping conviction. See K.S.A. 2022 Supp. 21-5408(a)(3), (b); see also *State v. Taylor*, 217 Kan. 706, 714-15, 538 P.2d 1375 (1975) (finding the defendant caused the aggravated kidnapping victim bodily harm despite the victim not having any physical injuries). In relevant part, the statutory language

demonstrates that aggravated kidnapping can occur when someone takes or confines a person by force, threat, or deception with the intent to "inflict bodily injury" *or*—as charged here—with the intent "to terrorize the victim or another" and when "bodily harm is inflicted upon the person." K.S.A. 2022 Supp. 21-5408(a)(3), (b). When the State attempts to prove the existence of "bodily harm" through physical injury to the victim, "trivial" injuries are insufficient. See *State v. Daniels*, 278 Kan. 53, 57, 91 P.3d 1147 (2004). But the State is not required to show physical injuries to the victim to demonstrate "bodily harm."

The State admitted and played video of the victim's initial statement to police where she said that Moore "kind of pulled me back through" the bushes by her jacket and "that's why my arm looks like that because he was like yanking on it." The responding officer testified that the victim said Moore was "grabbing her by the coats and her arms and she describes it as ripping her coats off of her, with her arms backwards" and that the victim "sustained some pain." The off-duty officer who happened to drive by testified that he saw the defendant standing over the victim and hitting her. The State also elicited testimony directly from the victim that Moore "tackled me more out in the grass, at the end, on the side of the street" When the evidence is viewed in the light favorable to the State, the State presented sufficient evidence upon which a reasonable fact-finder could find that Moore grabbing, pulling, and tackling the victim by the street constituted "bodily harm" sufficient to sustain a conviction for aggravated kidnapping. See *Royal*, 234 Kan. at 222; *Taylor*, 217 at 714-15.

II. CUMULATIVE ERROR REQUIRES REVERSAL OF MOORE'S CONVICTION FOR AGGRAVATED KIDNAPPING

Although Moore alleges multiple errors related to the jury instruction for aggravated kidnapping, this court need only address two. First, he alleges that the district court erred by failing to provide the definition of "bodily harm," and second, by omitting an essential element. This court follows a three-step process when evaluating claims of

jury instruction errors: first, determine whether there is appellate jurisdiction to review the issue; second, determine whether error occurred; and third, determine whether any identified errors require reversal. After the court establishes its jurisdiction, it then applies a de novo standard of review and determines whether the jury instruction was legally and factually appropriate. Finally, whether this court determines at step one that Moore preserved the jury instruction issue impacts this court's reversibility inquiry at step three. *State v. Holley*, 313 Kan. 249, 253-54, 485 P.3d 614 (2021).

When a party fails to object to a jury instruction to the district court, an appellate court reviews the instruction given to determine if it was clearly erroneous. K.S.A. 2022 Supp. 22-3414(3) ("No party may assign as error the giving or failure to give an instruction . . . unless the party objects thereto before the jury retires to consider its verdict . . . unless the instruction or the failure to give an instruction is clearly erroneous."). A jury instruction is clearly erroneous if it is legally or factually inappropriate and the appellate court is firmly convinced the jury would have reached a different verdict if the erroneous instruction had not been given. The party claiming clear error has the burden to show both error and prejudice. *State v. Crosby*, 312 Kan. 630, 639, 479 P.3d 167 (2021). But, in the event Moore preserved the alleged jury instruction error by objecting to the district court before the case was given to the jury, this court applies one of two harmless error tests depending on the type of error. *Holley*, 313 Kan. at 256-57.

A. *Step One: Moore failed to object to the aggravated kidnapping jury instruction related to either of the errors asserted on appeal.*

Moore failed to object to the aggravated kidnapping jury instruction at the district court. He did not request that the district court include the definition of bodily harm in the aggravated kidnapping jury instruction and did not object to the court's failure to include all of the essential elements of aggravated kidnapping in the jury instructions. Because

Moore failed to object to these alleged jury instruction errors at trial, if this court finds these omissions were an error, then it may only vacate Moore's conviction based on either error if it is firmly convinced the jury would have reached a different verdict if either error had not occurred. *Crosby*, 312 Kan. at 639. However, in the event this court finds more than one error it must also determine if cumulative error deprived Moore of a fair trial.

B. *Step Two: Factually and Legally Appropriate*

At the next step, this court must determine whether Moore's asserted jury instructions were legally and factually appropriate. A jury instruction is legally appropriate if it fairly and accurately states the applicable law. *State v. Kleypas*, 305 Kan. 224, 302, 382 P.3d 373 (2016). The jury instruction is factually appropriate if it is "supported by the particular facts of the case at bar." *State v. Plummer*, 295 Kan. 156, 207, 283 P.3d 202 (2012). In evaluating whether an instruction is factually appropriate, courts must determine whether there was sufficient evidence, viewed in the light more favorable to the defendant than the State, to support the instruction. *Holley*, 313 Kan. at 255.

The district court provided the following jury instruction for aggravated kidnapping:

"INSTRUCTION 4

"The defendant is charged with aggravated kidnapping. The defendant pleads not guilty. To establish this charge, each of the following claims must be proved:

- "1. The defendant took or confined [the victim] by force;
- "2. The defendant did so with the intent to terrorize [the victim];
- "3. Bodily harm was inflicted on [the victim];

"4. The act occurred on or about the 22nd day of January, 2021, in Sedgwick County, Kansas."

This instruction does not follow the aggravated kidnapping jury instruction found in PIK Crim. 4th 54.220 (2019 Supp.), which states:

"The defendant is charged with aggravated kidnapping. The defendant pleads not guilty.

"To establish this charge, each of the following claims must be proved:

"1. The defendant (took) (confined) [insert name of victim] by (force) (threat) (deception).

"2. The defendant did so with the intent *to hold* [insert name of victim] insert one of the following:

- for ransom or as a shield or hostage.
or
- to facilitate flight or the commission of any crime.
or
- to inflict bodily injury on or to terrorize [insert name of victim], or another.
or
- to interfere with the performance of any governmental or political function.

"3. Bodily harm was inflicted on [insert name of victim].

"4. This act occurred on or about the __day of ____, ____, in ____ County, Kansas."

(Emphasis added.)

When a pattern jury instruction is included in the PIK, the Kansas Supreme Court "strongly recommend[s] the use of PIK instructions, which knowledgeable committees develop to bring accuracy, clarity, and uniformity to instructions." *State v. Butler*, 307 Kan. 831, 847, 416 P.3d 116 (2018). The aggravated kidnapping instruction given at trial did not include the term "to hold" as included in the PIK and omitted the definition of bodily harm.

The district court erred by not including the definition of bodily harm in the jury instruction for aggravated kidnapping.

A simple kidnapping is elevated to an aggravated kidnapping when the victim suffers "bodily harm." See K.S.A. 2022 Supp. 21-5408(b). Bodily harm in the context of aggravated kidnapping is "any touching of the victim against the victim's will, with physical force, in an intentional, hostile and aggravated manner, or the projecting of such force against the victim by the kidnapper." *State v. Royal*, 234 Kan. 218, Syl. ¶ 6, 670 P.2d 1337 (1983). The comment to the PIK instruction further says that "if there is an issue of fact as to whether bodily harm occurred, the jury instruction should include the definition of bodily harm." PIK Crim. 4th 54.220 (citing *State v. Peltier*, 249 Kan. 415, 424, 819 P.2d 628 [1991]). Thus, it would have been legally appropriate for the district court to include the definition of bodily harm if there was a dispute of fact as to whether the victim suffered "bodily harm."

When, as here, the State alleges the defendant committed aggravated kidnapping with the intent to terrorize, this court does not contend the State was required to show the victim suffered actual physical injury. But the State must still show the victim suffered "bodily harm." To the extent the State relies on physical injury to the victim to demonstrate that the victim suffered "bodily harm," then those physical injuries must be more than "trivial injuries" that could result from any forcible kidnapping. See *Royal*, 234 Kan. 218, Syl. ¶ 7. Rather, "only unnecessary acts" inflicted upon the victim that occur "after the initial abduction" are sufficient to constitute bodily harm. *State v. Taylor*, 217 Kan. 706, 714, 538 P.2d 1375 (1975); see also *State v. Daniels*, 278 Kan. 53, 57, 91 P.3d 1147 (2004) ("Trivial or insignificant bruises or impressions resulting from the act itself are not considered to be bodily harm, but unnecessary acts of violence, including those occurring after the initial abduction of the victim, do constitute bodily harm.").

Moore disputed whether he caused the victim to suffer "bodily harm." The State argued that the victim suffered "bodily harm" when Moore dragged her into the garage. But there was conflicting testimony regarding whether Moore dragged the victim, and if he did, then for how long or how far. The responding officer's body camera contains audio of the victim describing how Moore dragged her multiple feet into the garage. But at the preliminary hearing and again at trial, the victim testified that she walked into the garage. Additionally, the defendant denied dragging the victim and testified that she walked into the garage. The victim testified that she sustained scrapes during the incident, but as Moore correctly argues, whether those scrapes constitute "bodily harm" depends on whether the jury would consider them "'trivial injuries,' likely to result from any forcible kidnapping by the very nature of the act." See *Royal*, 234 Kan. at 222 (explaining that the definition of "bodily harm" in the context of aggravated kidnapping does not include trivial injuries). Whether the victim suffered "bodily harm" was a factual dispute at trial. Therefore, it was legally and factually appropriate to include the definition in the jury instruction and thus, the court erred by not including it.

The district court erred by not including the essential element of "to hold" in the aggravated kidnapping jury instruction.

The district court, apparently inadvertently, omitted the element "to hold" from the second line of the aggravated kidnapping jury instruction. The instruction said the State was required to prove that Moore "took or confined [the victim] by force . . . with the intent to terrorize [the victim]." But if the district court had followed the PIK instruction, it should have said the State was required to prove that Moore "took or confined [the victim] by force . . . with the intent *to hold* [the victim] to terrorize [the victim]." (Emphasis added.) PIK Crim. 4th 54.220. These two instructions are foundationally different.

"The trial court has the duty to inform the jury of every essential element of the crime that is charged." *State v. Richardson*, 290 Kan. 176, 181, 224 P.3d 553 (2010). The district court must accurately define the charged offense in the jury instruction "either in the language of the statute or in appropriate and accurate language of the court." 290 Kan. at 181. The statute defining aggravated kidnapping begins with the definition of "kidnapping," which is "the taking or confining of any person, accomplished by force, threat or deception, *with the intent to hold such person.*" (Emphasis added.) K.S.A. 2022 Supp. 21-5408 (a), (b). The element "to hold" is included in the statutory definition of aggravated kidnapping and is clearly an essential element of the offense. The State nearly concedes that the term "to hold" is an essential element but attempts to argue its omission is harmless error. The district court's failure to include the essential element "to hold" in the aggravated kidnapping jury instruction was an error. See *State v. Jones*, 313 Kan. 917, 927, 492 P.3d 433 (2021) (quoting *State v. Brown*, 298 Kan. 1040, 1045, 318 P.3d 1005 [2014]).

C. *Step Three: The two aggravated kidnapping jury instruction errors create cumulative error requiring reversal.*

Before this court will reverse a conviction based on these jury instruction errors, Moore must demonstrate clear error, which is a heightened standard of prejudice. Essentially, because he failed to object to the aggravated kidnapping jury instructions and thus the district court was not afforded the opportunity to avoid these errors, Moore is not entitled to reversal unless he can show that clear error resulted from either error. "No party may assign as error the giving or failure to give an instruction . . . unless the party objects thereto before the jury retires to consider its verdict . . . unless the instruction or the failure to give an instruction is clearly erroneous." K.S.A. 2022 Supp. 22-3414(3). This court will find clear error only when it is firmly convinced the jury would have reached a different verdict absent the erroneous instruction. *Crosby*, 312 Kan. at 639. However, when the court finds multiple errors that cumulatively affect the trial—even

when none of the errors alone constitute clear error—the standard for reversal changes. In the case of multiple, cumulative errors, this court must determine "whether the totality of the circumstances substantially prejudiced the defendant and denied that defendant a fair trial." See *Taylor*, 314 Kan. at 173 (finding cumulative error where five errors were identified, requiring reversal).

Here, the two errors both relate to the aggravated kidnapping jury instruction, and thus the same convicted charge. When evaluating multiple errors, this court "considers how the district court dealt with them, reviews the nature and number of errors and whether they are connected, and then weighs the strength of the evidence." *Taylor*, 314 Kan. at 173. The two errors are clearly connected as they both relate to the definition of aggravated kidnapping, and they accumulate to increase the potential harm of the erroneous jury instruction. Additionally, the omitted language from both errors relates to disputed issues at trial.

Here, there was conflicting evidence from both the victim and Moore that Moore intended *to hold* the victim in the garage. The victim's testimony evolved over time, and even her contemporaneous description could undermine the State's argument that Moore intended to hold her. Additionally, there was conflicting evidence of Moore's physical contact with the victim and the images of her scratches did not provide overwhelming evidence of nontrivial injury. These two errors are so related and entwined as to create substantial prejudice to Moore and deny him a fair trial. As such, Moore's conviction for aggravated kidnapping must be reversed, and there is no need to address Moore's other arguments regarding this conviction. However, these two jury instruction errors do not affect Moore's other convictions. See, e.g., *State v. Ortega*, 300 Kan. 761, 786-87, 335 P.3d 93 (2014) (refusing to reverse convictions unaffected by the cumulative error found that required reversal of one of defendant's multiple convictions).

III. MOORE FAILED TO DEMONSTRATE ERROR FROM THE DISTRICT COURT'S ADMISSION OF THE VICTIM'S RESPONSES TO THE LETHALITY ASSESSMENT OR AUDIO RECORDINGS OF MOORE'S JAILHOUSE PHONE CALLS

In addition to Moore's claims related to his aggravated kidnapping charge, he claims that the district court erred by admitting evidence of the victim's responses to a lethality assessment and recordings of Moore's telephone calls from jail. As a preliminary matter, the State argues that Moore failed to contemporaneously object to the admission of this evidence. While Moore clearly objected to both types of evidence at the district court, the State is correct that Moore attempts to expand the basis for these objections on appeal. This court will not address Moore's expanded claims of error.

Moore failed to show that the district court erred by admitting evidence of the victim's responses to a lethality assessment.

The district court permitted the State, over the defense's objection, to admit evidence of the victim's responses to questions from a "lethality assessment" given to the victim on the day of the incident. The State sought to introduce the evidence to impeach the victim's trial testimony, and also argued that the evidence could be used to demonstrate the existence of the relationship between Moore and the victim pursuant to K.S.A. 60-455(b). The district court ultimately agreed that the responding police officer could testify to the victim's responses in the "lethality assessment." The district court included a limiting instruction pursuant to K.S.A. 60-455(b), did not permit anyone to refer to the document as the "lethality assessment," did not permit the document to be presented to the jury, and required the State to identify the specific questions it would ask the witness for the purpose of impeaching the victim's prior testimony.

Although the State called the victim as its witness, she clearly became a hostile or adversarial witness at trial. At trial, the victim testified that she wanted to get the charges against Moore dismissed and she still loved him. In response, the prosecutor asked the

victim if she wanted to make a statement to the jury, and the victim explained, "that night isn't—isn't [Moore]," and that Moore had "never done anything like this before." She said that Moore was often a person to help strangers and stop fights. The State argued that the victim's statement that Moore had "never done anything like this before" contradicted her responses to the "lethality assessment" administered at the scene when she answered "yes" to questions about whether Moore had previously threatened her with a weapon, threatened to kill her, was jealous and controlling, had threatened to kill himself, had destroyed her property, and had been physically violent with her before. Specifically, the prosecutor explained that:

"I'm asking the court at this point in time to allow the State to introduce select answers of the victim's questions to the lethality assessment . . . based on her testimony that the defendant is a good person, he has a big heart, but more specifically, that he's never done anything like this before.

. . . .

"I'm now asking the Court to admit that evidence as it has become relevant. I'm fine with the Court running it through a 60-455 analysis. I don't know that we have to, because I'm asking to admit it to impeach the victim. But if you run it through a 60-455 analysis it's certainly relevant to the relationship of the parties, but it's also—I'm primarily asking for it to be admitted for impeachment purposes."

Thereafter, Moore's counsel objected to the introduction of the victim's responses to the lethality assessment questions and argued it was "going to prejudice Mr. Moore's case" and that "all of these things are prejudicial to Mr. Moore . . . and they were probably entered into in the anger of the moment by the victim." Defense counsel concluded with "[s]o it's just not fair and its prejudicial [*sic*] far outweighs its probative value and the State is springing it on us on the second day of trial." Finally, defense counsel said, "[e]ssentially, Judge, this is a police report and, of course, allowing it would be allowing in a police report for no other reason than to prejudice Mr. Moore's case." It

is unclear from any of these statements if counsel intended to make a specific, evidentiary objection to the evidence based on its relevance, that it was inadmissible hearsay, or that it could not be used to impeach the victim.

After a short break, the parties returned and the court asked for any further discussion on the admission of the lethality assessment responses. The prosecutor said that she provided an email to the court explaining her position that the evidence may be used to impeach the victim, and then proffered that the State was surprised by the victim's testimony. In response, Moore's counsel stated that "these statements are very prejudicial" and that he did not believe the statements were relevant. The prosecutor described the victim as a "turncoat witness" and said "I can impeach her by extrinsic evidence . . . and that's what I am asking the Court to allow me to do in this case." The court then explained that the evidence "is admissible as impeachment," went on to determine the method of introducing the evidence, and then asked Moore's counsel if he wanted the court to give a limiting instruction consistent with those occurring when K.S.A. 60-455 evidence is admitted. Although not required, it appears the court offered the limiting instruction to address Moore's concern about the prejudicial nature of the impeachment evidence.

At trial, Moore's counsel objected that the prejudicial effect of the victim's responses to the lethality assessment outweighed the probative value, and the district court agreed to provide a limiting instruction to mitigate any prejudice. Moore's counsel also objected generally to the relevance. These objections occurred at trial, during a break just before the introduction of the evidence, but Moore's counsel failed to object again after the court ruled it was admissible and when the State actually introduced the evidence at trial. But he did contemporaneously request that the district court make the limiting instruction consistent with his prior objection. Here, the district court had the opportunity to address Moore's general objection to the introduction of the evidence. However, this court will not allow Moore to expand on the basis for objection at trial and

will merely address whether the evidence was properly admitted as impeachment evidence to which Moore objected at trial.

When "a party is genuinely surprised by adverse testimony from his own witness, the trial court may, in its discretion, allow the party calling the witness to cross-examine and to interrogate him as to prior contradictory statements. A party may impeach his own witness to such an extent." *State v. Potts*, 205 Kan. 47, 51, 468 P.2d 78 (1970). Rather than merely failing to testify as expected, the witness' testimony "must be affirmative, contradictory and adverse to the party calling him" to allow impeachment by cross-examination. 205 Kan. at 51-52. It is well settled that the State may impeach its own witness when the State is surprised by its witness' testimony, and that testimony is adverse to the State and affirmatively contradictory to prior statements. 205 Kan. at 51-52.

Here, the victim's statements were contrary to her prior statements, adverse to the State, and surprised the State. Contrary to the defendant's allegation, the victim had not testified to this issue at the preliminary hearing, so the trial testimony contradicting her responses to the lethality assessment surprised the State. Moore objected generally, but did not object on a specific basis such as hearsay, and thus this court does not address that issue. Moore objected to the prejudicial effect, and the district court—although not required—included a limiting instruction and took numerous steps such as not admitting the document, not letting it be referred to as a "lethality assessment," and limiting the questions to those directly contradicting the witness' testimony that Moore had "never done anything like this before." Based on Moore's objections at trial, the district court did not err in permitting the responding officer to testify as to the victim's responses to the questions in the lethality assessment for the purpose of impeaching her trial testimony.

Moore failed to show that the district court erred by admitting his phone calls from jail.

The State alleged that while in jail awaiting trial, Moore spoke with his mother several times on recorded phone calls about efforts to get the victim to recant her statement to law enforcement. The following are some of the statements Moore made to his mother during those telephone calls:

"a. . . . You need to get ahold of her and let her know what the fuck is happening. I doubt she even knows . . . if she doesn't answer her phone go the fuck over there. She needs to get ahold of them and get this shit dropped. This is not okay. This is big boy shit. And no, she does not need to do that to me. Uh uh.

. . . .

"e. Like I said, go over there and talk to her. Don't just fucking call her. Let her fucking know she's going to ruin my whole entire life. Because that's 6 months minimum.

"f. If she doesn't want to do that, fucking call QT and tell them to give her a UA. Get her fired. But don't threaten her.

. . . .

"i. You've got to get ahold of [the victim]. She can't show up or I'm fucked. Or else she's going to have to testify for me. If she testifies I'm doing up to 15 years. It's a level one person felony. I'm going to have to talk to her."

The State sought to admit these statements as well as "any statement the defendant has made in jail calls along these same lines where he's attempting to achieve the victim's recantation, either directly to her or through his mother." Moore sought to prevent admission of the telephone calls by arguing the statements were more prejudicial than probative because some of the statements indicated that Moore thought he would be found guilty if the victim testified. The State argued that "[t]he way in which [Moore] attempts to acquire a recantation by the victim is inconsistent with his denial," and that the jail calls "establish the relationship of the parties, the existence of a course of conduct between the parties and provides a context to which the acts of January 22, 2021, occurred."

The district court granted the State's request to admit the identified jail calls but explained it would have to separately determine the admissibility of each call at issue. The court explained its relevance finding as follows:

"And I do find that this would tend to be relevant and probative on intent, motive, definitely the relationship of the parties, that's not one of them specifically listed, but I think definitely in domestic violence type cases, relevant. I also think it is relevant towards the knowledge, identity, absence of mistake or accident, relevant on those."

After finding the identified calls relevant, the district court then found that the probative value of the phone calls outweighed their prejudicial effect and ordered the parties to agree on redactions to the calls prior to their presentation.

Thereafter, the State continued to subpoena Moore's calls from jail but was repeatedly notified that Moore had not made any additional calls. However, the day before trial began, a detective determined that Moore had been using a different inmate's telephone account to make his calls. At approximately 5 p.m. the day before trial, the detective provided the State with a summary of Moore's jail phone calls between April and August 2021 using the other inmate's account, and the State promptly notified Moore's attorney.

At a preliminary hearing before jury selection, the State notified the court of the new calls and described their contents as additional attempts to get his mother to convince the victim to recant her statement to police and telling his mother that the victim needed to sign an affidavit of nonprosecution. The State argued that although the victim had not directly recanted her statement, she had stopped answering phone calls from the police or prosecutor prior to trial. The prosecutor sought admission of the new jail calls pursuant to K.S.A. 60-455 as relevant to the disputed material facts of intent, motive, and

relationship of the parties. The trial court agreed the newly identified phone calls were relevant as to intent, motive, lack of mistake, and relationship pursuant to K.S.A. 60-455.

On appeal, Moore challenges the district court's admission of his jailhouse phone calls to his mother because they were evidence of prior crimes or civil wrongs. Generally, "evidence of prior crimes or civil wrongs cannot be admitted 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.'" *State v. Gunby*, 282 Kan. 39, 48, 144 P.3d 647 (2006) (citing K.S.A. 60-455).

On appeal, this court follows a three-step process to determine whether the prior bad acts evidence admitted pursuant to K.S.A. 60-455 is relevant to establish a material fact at issue in the case. *State v. Evans*, 313 Kan. 972, 987, 492 P.3d 418 (2021). First, under de novo standard of review, this court determines whether the evidence is material. Second, under an abuse of discretion standard of review, it must determine "whether the material fact is disputed and whether the material fact is relevant to prove the disputed fact." 313 Kan. at 987. Finally, this court applies the abuse of discretion standard to determine whether the probative value of the evidence outweighs its prejudicial effect. 313 Kan. at 987.

Relevant material facts include "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." K.S.A. 60-455(b). Here, the State argued that Moore's jailhouse phone calls showed his consciousness of guilt, which goes to his motive and intent. Moore's attorney essentially conceded the point in arguing that the calls would make the jury's job "a cakewalk rather than a meaningful deliberation" because they show "that the defendant himself thinks he's guilty. . . ." It is well established that "evidence demonstrating a defendant's consciousness of guilt can be material to several issues in a criminal case, including intent, identity, plan, or other matters." *State v. Huddleston*, 298 Kan. 941, 960, 318 P.3d 140 (2014). Moore was

charged with crimes, including aggravated kidnapping, that required the State to prove Moore's intent. Thus, the phone calls demonstrating his consciousness of guilt were material to the issue of his intent and lack of mistake.

This court must then determine whether the district court abused its discretion in finding the material fact of Moore's intent was disputed, and whether the phone calls were relevant to demonstrate his intent. A trial court's action constitutes an abuse of discretion if (1) it was arbitrary, fanciful, or unreasonable; (2) it was based on an error of law; or (3) it was based on an error of fact. *State v. Levy*, 313 Kan. 232, 237, 485 P.3d 605 (2021). Moore bears the burden of establishing that the court abused its discretion in admitting his jailhouse calls to his mother. See *Crosby*, 312 Kan. at 635.

As part of his defense, which it appears the victim attempted to aid, Moore denied causing the victim bodily harm and denied intending to hold her in the garage. Therefore, Moore's intent to kidnap the victim was disputed at trial. The court must then determine whether the phone calls had "any tendency in reason to prove the disputed material fact." *State v. Brazzle*, 311 Kan. 754, 758, 466 P.3d 1195 (2020); see *Evans*, 313 Kan. at 987. In the jail calls, Moore stated that if the victim testified, he would be found guilty. He repeatedly pressured his mother to get the victim to recant her story or to not show up for the trial. These statements tend to show Moore's consciousness of guilt and contradicted his testimony that he did not intend to commit the alleged acts. Moore's consciousness of guilt and attempts to get the victim to recant her statements had a tendency to prove the disputed, material fact of Moore's intent. As a result, the jail calls were relevant as to the material issues of Moore's intent, and his lack of mistake or accident in allegedly kidnapping the victim. See *Huddleston*, 298 Kan. at 960.

Lastly, the appellate court applies an abuse of discretion standard to "consider whether the probative value of the evidence outweighs its prejudicial effect." *Evans*, 313 Kan. at 987; see also *State v. Satchell*, 311 Kan. 633, 644, 466 P.3d 459 (2020) (the risk

of undue prejudice must "substantially outweigh" the evidence's probative value, despite occasional references in some cases which omit the word "substantially"). On appeal, Moore argues that admission of the jail calls—in addition to the lethality assessment questions—as evidence of prior bad acts pursuant to K.S.A. 60-455 magnified the prejudice to Moore. There are three types of prejudice commonly thought to result from the introduction of prior bad acts evidence: (1) the risk of the jury giving exaggerated value to the prior bad acts as evidence of propensity to commit crimes in general; (2) the risk that the jury will punish the defendant as a general wrongdoer, rather than for the crime charged; and (3) the risk that the jury will consider the defendant a criminal and generally discredit the defense. See, e.g, *Gunby*, 282 Kan. at 48-49.

In evaluating the probative value, this court considers, among other factors, "how clearly the prior act was proved; how probative the evidence is of the material fact sought to be proved; how seriously disputed the material fact is; and whether the government can obtain any less prejudicial evidence." *State v. Boysaw*, 309 Kan. 526, 541, 439 P.3d 909 (2019). There is no dispute that Moore made the phone calls from jail to his mother and thus the prior acts were clearly proven. As described above, Moore's statements in the jail calls could be used to demonstrate his consciousness of guilt, drawing into issue the material facts of intent and lack of mistake or accident in allegedly kidnapping the victim. The jail calls were the State's only evidence to demonstrate Moore's consciousness of guilt and there has been no assertion that other less prejudicial evidence existed. Moore's intent to hold the victim in the garage was a critical, disputed issue, as he was claiming not to have possessed the requisite intent to commit aggravated kidnapping. The probative value of Moore's jail calls to his mother was high.

In comparing the probative value to the prejudicial effect, this court must consider, "among other factors: the likelihood that such evidence will contribute to an improperly based jury verdict; the extent to which such evidence may distract the jury from the central issues of the trial; and how time consuming it will be to prove the prior conduct."

Boysaw, 309 Kan. at 541. The jail calls were not a time-consuming part of the trial, so did not overwhelm the jury by the amount of prior bad act evidence presented. Additionally, the jailhouse calls were not likely to distract from the central issue because the calls related to Moore's underlying conduct. Although this court cannot say the evidence was wholly unlikely to contribute to an improperly based jury verdict—because the evidence did demonstrate Moore's consciousness of guilt—the district court mitigated the potential prejudice with a limiting jury instruction.

In discussing the jail calls before trial, the court stated that it would give a contemporaneous limiting instruction if defense counsel desired. During trial, when the first set of jail calls were admitted, the court offered to provide a contemporaneous limiting instruction, but Moore's attorney declined the offer. Thereafter, the court admitted three more jail calls. However, at the conclusion of evidence before the jury went to deliberate, the court gave a limiting instruction that:

"Evidence has been admitted tending to prove that the defendant committed a crime other than the present crimes charged. This evidence may be considered solely for the purpose of proving the defendant's motive, intent, and the relationship between the parties.

"It is for you alone as the jury to determine what weight to give this evidence in determining whether the State of Kansas has met its burden of proving all elements of the current crime beyond a reasonable doubt."

These instructions are consistent with those approved by the Kansas Supreme Court. See, e.g., *State v. Claerhout*, 310 Kan. 924, 931-32, 453 P.3d 855 (2019); *Gunby*, 282 Kan. at 58-59. The district court did not abuse its discretion in finding the probative value of the jail calls outweighed the potential prejudicial effect of the calls. This court finds no error of law or fact, and cannot say that no reasonable person would agree with the district court's determination under the circumstances. The trial court did not err in admitting the recordings of Moore's jailhouse calls to his mother.

IV. THE DISTRICT COURT DID NOT ERR IN DENYING MOORE'S REQUEST FOR A CONTINUANCE ON THE FIRST DAY OF TRIAL

On appeal, Moore argues the district court erred by denying his first-day-of-trial request for a continuance because the timing of the newly discovered jail calls prevented him from formulating a defense. However, his argument on appeal differs from that presented at trial. While Moore's attorney requested a continuance if the district court agreed to admit the newly discovered jail calls, he did not assert that the continuance was needed to present a defense. He argued only that Moore would need a continuance "so that we could best weigh this evidence and to see how to proceed; in other words, pursue a plea agreement." Moore's attorney stated that although he had not yet listened to the calls, the State's email summarizing the calls was "very specific and I understand the gist of what's going on, but no, Judge, I haven't listened to it. . . . But that's not what I'm complaining about." The State explained that there was no outstanding plea offer. At trial, Moore's counsel did not argue that admitting the calls prevented or otherwise harmed his ability to present a defense as he now alleges.

The district court has wide authority to grant or deny a motion for continuance "for good cause shown." K.S.A. 22-3401. Moore asserts this court should review the district court's denial of his request *de novo* because it interfered with his ability to present a defense. See *State v. Johnson*, 304 Kan. 924, 944-45, 376 P.3d 70 (2016) ("where a defendant claims the denial of continuance interfered with his or her ability to present a defense, we review the question *de novo*"). However, Moore did not assert that argument when requesting a continuance and thus did not preserve it for appeal. *State v. Green*, 315 Kan. 178, 182, 505 P.3d 377 (2022) (issues not raised before the trial court cannot be raised on appeal). As a result, this court will review the trial court's decision to deny Moore's continuance request for an abuse of discretion—which Moore carries the burden to demonstrate. See *State v. Gentry*, 310 Kan. 715, 734, 449 P.3d 429 (2019). A judicial action constitutes an abuse of discretion if (1) it is arbitrary, fanciful, or

unreasonable; (2) it is based on an error of law; or (3) it is based on an error of fact. *Levy*, 313 Kan. at 237.

In denying Moore's requested continuance, the trial court explained that the new jail calls were of the same nature as the calls the district court had already ruled admissible, thus minimizing any potential surprise to Moore. The district court also based its decision to deny the continuance on Moore's actions to conceal discovery of the calls by using another inmate's account to make the calls, and the State's quick actions to provide the new calls to Moore's attorney upon discovery. Moreover, this court notes that Moore was a party to the calls, so he knew their content. The district court also allowed the parties time to review the calls before trial.

This court finds no abuse of discretion from the district court's decision to deny Moore's day-of-trial continuance. The additional calls were similar to the ones already admitted and were not a surprise. The district court has wide authority to control its docket, and Moore has failed to show the district court abused that discretion. This court finds no error of law or fact, and the district court's decision was not so unreasonable that no other person would agree. See, e.g., *State v. Cook*, 281 Kan. 961, 990, 135 P.3d 1147 (2006) (trial court did not abuse its discretion when it denied defendant's request for a continuance shortly after new counsel was appointed); *State v. Ly*, 277 Kan. 386, 389, 85 P.3d 1200 (2004) (the appellate court will not disturb the district court's denial of a continuance without a showing of abuse of the court's discretion); *State v. Snodgrass*, 252 Kan. 253, 264, 843 P.2d 720 (1992) (trial court did not abuse its discretion in denying defendant's request for continuance two days prior to trial to conduct DNA testing when there was ample opportunity previously).

V. MOORE FAILED TO PRESERVE HIS CHALLENGE TO THE TRIAL COURT'S EXCLUSION OF TESTIMONY REGARDING HIS FATHER'S SUICIDE

Lastly, Moore argues that the district court erred in denying his request to admit evidence of his father's suicide to show Moore's mental state during the incident. On appeal, Moore asserts that the evidence of his father's suicide would have

"provided an alternate explanation for [Moore's] actions It would have supported the argument that [Moore] was not acting with the intent to hold anybody, terrorize anybody, or place anybody in fear—in fact he was not acting with any particular intent at all. Rather, [Moore] was acting out in a combination of rage, anguish, confusion, and sadness over his father's tragic passing."

Moore now alleges he sought the introduction of his father's suicide to negate the required mens rea for the crime of aggravated kidnapping. However, this was not what Moore argued to the district court.

At trial, Moore's attorney asked the victim if, on the day of the incident, she was aware that Moore's father had recently committed suicide. The State objected to the testimony as irrelevant to which Moore's attorney responded that the testimony "[g]oes to state of mind of the defendant" and was relevant to prove Moore had suicidal ideations at the time. The trial court sustained the State's objection, ruling that the testimony was not relevant and "the prejudicial effect of misleading the jury outweighs" any potential relevancy. But the court stated the testimony would be relevant to disposition of the case if Moore was found guilty.

The party alleging that evidence at trial was erroneously excluded must have "either made known the substance of the evidence in a form and by a method approved by the judge, or indicated the substance of the expected evidence by questions indicating the desired answers." K.S.A. 60-405. This statute serves dual purposes of (1) assuring the

trial court is advised of the evidence at issue and the parties' arguments, and (2) assuring an adequate record for appellate review. *State v. Gonzalez*, 311 Kan. 281, 299, 460 P.3d 348 (2020). In addition to notifying the court of the content of the evidence sought to be admitted, the attorney must also present the purpose for the admission. See *Gonzalez*, 311 Kan. at 299-300 (finding a proffer insufficient when it lacked explanation of the content and relevance. The party seeking to introduce evidence must provide the district court with all the necessary information to make the determination and cannot claim error on appeal from their own failure to make such an argument.

Here, Moore's counsel argued only that his father's recent suicide "goes to state of mind of the defendant." There was no explanation, as is provided at appeal, that Moore intended to negate specific intent with this testimony. Moore asks this court to find error with the district court's exclusion of evidence based on a different theory than was available to the district court to review. Moore's arguments on appeal are not properly preserved, and this court declines to search for error on a basis not presented to the district court.

CONCLUSION

While the majority of Moore's asserted errors are unavailing, the district court's failure to provide the full, accurate jury instruction for aggravated kidnapping created cumulative error as to that charge. Whether Moore caused the victim bodily harm or intended to hold her in the garage were both disputed at trial, and the district court's failure to include the definition of bodily harm or the essential element "to hold" denied Moore a fair trial on that charge. Moore's conviction for aggravated kidnapping is thus reversed, but Moore's remaining convictions are affirmed. This case is remanded for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded with directions.