NOT DESIGNATED FOR PUBLICATION

No. 124,732

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

ALBERT L. HARPE,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; TYLER J. ROUSH, judge. Opinion filed September 15, 2023. Affirmed.

Kai Tate Mann, of Kansas Appellate Defender Office, for appellant.

Lance J. Gillett, assistant district attorney, *Marc Bennett*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before ARNOLD-BURGER, C.J., GREEN and HILL, JJ.

PER CURIAM: Albert L. Harpe appeals his conviction for aggravated sexual battery, arguing that the State did not present sufficient evidence and that the trial court erred in instructing the jury. He also argues that the statute is unconstitutionally vague and that the Kansas Offender Registration Act (KORA) violates the First Amendment and Fourteenth Amendment to the United States Constitution. For the reasons set out below, we affirm.

FACTS

Harpe was in a relationship with A.D. for about three-and-a-half years, and they had twin children together. Harpe and A.D. lived together in Wichita until sometime before August 2019. Shortly after Harpe left the home, A.D. sought and obtained a temporary protection from abuse order against Harpe.

According to A.D.'s trial testimony, Harpe "got involved with [a] pastor," and the pastor "tricked" her into allowing Harpe back into her life. In late September 2019, A.D. agreed to bring the twins to see Harpe and the pastor at a coffee shop. While Harpe spent time with the children, the pastor and some men held a Bible study with A.D. A.D. left the coffee shop with Harpe and the children. Harpe drove A.D. to an eye appointment and watched the kids while A.D. had a procedure done on her eye. Harpe drove A.D. home from eye surgery and stayed at her home to watch the children while she recuperated. Once at A.D.'s home, Harpe "basically just stayed and didn't leave" and A.D. "allowed it basically" because the pastor had made her feel obligated to let Harpe back into her life.

On September 30, 2019, Harpe and A.D. went to bed arguing. While in the bed, Harpe attempted to initiate intercourse with A.D., attempting to verbally convince her to have sex with him. A.D. testified that Harpe pulled her pants down. While she was trying to pull them back up, he penetrated her vagina with his erect penis. A.D. pushed Harpe off her, but he wrapped his arms around her head.

One of A.D.'s children woke up and knocked on the bedroom door. The child testified that her mother's scream was not a "she-seen-something scream," but instead a "she's hurt type of scream." The child had never heard her mother scream like that, so she went and knocked on A.D.'s bedroom door. The child's knocking caused Harpe to stop and let go of A.D. A.D. called the police.

On the 911 call, A.D. reported that Harpe tried to have sex with her against her wishes and that she wanted him gone. A voice, which A.D. identified as Harpe's voice, could be heard demanding A.D.'s phone, but she did not give it to him. When police arrived, the officers spoke to Harpe and A.D. separately. In addition to the interviews, police also took DNA swabs. Although police were conducting an investigation, Harpe was not immediately charged with a crime.

After the incident on September 30, 2019, Harpe no longer stayed in A.D.'s home. But A.D. testified that she saw Harpe again on October 7, 2019. A.D. testified that she woke up somewhere around 2 or 3 a.m. to see Harpe standing over her bed wearing blue latex gloves. She testified that a screwdriver fell out of his pocket. A.D. testified that Harpe asked to pray with her and after they prayed, he grabbed her phone and ran away, leaving the gloves behind.

The next day, police learned that Harpe was in Wichita Municipal Court for another matter, and detectives went to interview him. During the interview, Harpe denied going to A.D.'s home the previous day but admitted to being in the neighborhood and throwing blue latex gloves at A.D. when he saw her near the neighborhood mailboxes. Investigators photographed pry marks on the lock on A.D.'s front door and the blue gloves on the floor in front of the door.

At trial, the pastor and his wife testified that Harpe was staying at their home on October 7, 2019, and he slept on the couch. The pastor and his wife also testified that it would be highly unlikely Harpe could have left their house without their dogs barking and waking them up.

Based on the incidents of September 30 and October 7, 2019, the State filed two complaints against Harpe. The State charged Harpe with rape, in violation of K.S.A. 2019 Supp. 21-5503(a)(1)(A); aggravated sexual battery, in violation of K.S.A. 2019 Supp. 21-

5505(b)(1); and violating a protective order, in violation of K.S.A. 2019 Supp. 21-5924(a)(1) for the events of September 30, 2019. And, related to October 7, 2019, the State charged Harpe with aggravated burglary, in violation of K.S.A. 2019 Supp. 21-5807(b)(1); theft, in violation of K.S.A. 2019 Supp. 21-5801(a)(1); robbery, in violation of K.S.A. 2019 Supp. 21-5420(a); criminal damage to property, in violation of K.S.A. 2019 Supp. 21-5813(a)(1); and violating a protective order, in violation of K.S.A. 2019 Supp. 21-5924(a)(1). The cases were consolidated for trial.

A jury convicted Harpe of aggravated sexual battery and two counts of violating a protective order. The sentencing court determined that Harpe had a criminal history score of C. The sentencing court imposed a prison sentence of 57 months (4 years, 9 months) for aggravated sexual battery, to run concurrent with his 12-month jail sentences for each violation of a protective order. The sentencing court also advised Harpe of his duty to register under KORA.

Harpe timely appeals.

ANALYSIS

Did the State present sufficient evidence to sustain a conviction of aggravated sexual battery?

Harpe argues that the State failed to present evidence that A.D. was overcome by force or fear, which is an element of aggravated sexual battery. The State argues that the evidence shows that Harpe used some force in pulling down A.D.'s pants and penetrating her. And the State argues that A.D.'s testimony evinced fear.

Our standard of review is the following:

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

"This is a high burden, and only when the testimony is so incredible that no reasonable fact-finder could find guilt beyond a reasonable doubt should we reverse a guilty verdict." *State v. Meggerson*, 312 Kan. 238, 247, 474 P.3d 761 (2020).

A verdict may be supported by circumstantial evidence, if such evidence provides a basis for a reasonable inference by the fact-finder regarding the fact in issue. Circumstantial evidence, to be sufficient, need not exclude every other reasonable conclusion. *State v. Colson*, 312 Kan. 739, 750, 480 P.3d 167 (2021).

A conviction of even the gravest offense can be based entirely on circumstantial evidence. *State v. Pattillo*, 311 Kan. 995, 1003, 469 P.3d 1250 (2020). But see *State v. Banks*, 306 Kan. 854, 859, 397 P.3d 1195 (2017) (circumstances utilized to infer guilt must be proved and cannot be inferred or presumed from other circumstances). There is no legal distinction between direct and circumstantial evidence in terms of their respective probative value. *Aguirre*, 313 Kan. at 209.

K.S.A. 2019 Supp. 21-5505(b)(1) defines aggravated sexual battery as the touching of a victim who is 16 or more years of age without consent with the intent to arouse or satisfy the sexual desires of the offender or another when the victim is overcome by force or fear. Harpe argues that the State failed to establish that A.D. was "overcome by force or fear." K.S.A. 2019 Supp. 21-5505(b)(1). Our Supreme Court has provided guidance on each of the key words, "overcome," "force," and "fear" under K.S.A. 2019 Supp. 21-5505(b)(1).

Our Supreme Court has found that "'overcome'" means "'to get the better of'" and "'to affect or influence so strongly as to make physically helpless or emotionally distraught.'" *State v. Brooks*, 298 Kan. 672, 691, 317 P.3d 54 (2014) (quoting from Webster's Third New International Dictionary 1607 [1993]). In short, "'overcome'" is synonymous with the terms "'overpower,' 'conquer,' and 'subdue.'" 298 Kan. at 691. This definition from *Brooks* is particularly useful not just for what is included in the definition, but also what is specifically excluded. In the battle over definitions between the majority in *Brooks* and the dissents, the majority disagreed with the proposed synonyms "'immobilized'" and "'paralyzed.'" 298 Kan. at 691-92.

In *Brooks*, the defendant managed to access his ex-wife's e-mail account just two months after their divorce was finalized. He forwarded to his own account some e-mails which indicated that his ex-wife was having an affair with a married male coworker. Brooks then called his ex-wife, read portions of the e-mails, and said that he would be coming over to her house for sex that evening. When Brooks arrived at her house, he threatened to give copies of the e-mails to her employer and to her coworker's wife if she did not do as he said. She told Brooks that she did not want to have sex with him, and it would be against her will. When Brooks told her to take off her underwear and she hesitated, Brooks started getting agitated. So, she took off her underwear. While Brooks had intercourse with her, she closed her eyes and covered her face with her hands so that she would not have to look at Brooks.

The dissents pointed to certain behaviors of Brooks' ex-wife before and after the intercourse as showing she succumbed to conspiracy or blackmail but was not overcome by fear. Justice Nancy Moritz focused on the fact that the ex-wife was not immobilized, a key term in precedent. *Brooks*, 298 Kan. at 695 (Moritz, J., dissenting) (quoting *State v. Borthwick*, 255 Kan. 899, 913, 880 P.2d 1261 [1994]). In responding to the dissents, the majority set out the limits of the definition of overcome by including some synonyms while excluding others. The meaning of overcome does include such concepts as to make

physically helpless, to get the better of, to make emotionally distraught, to overpower, to conquer, or to subdue; but it does not require immobilization or paralysis. *Brooks*, 298 Kan. at 691-92.

Our Supreme Court has described "[f]orce or fear" as a "highly subjective concept that does not lend itself to definition as a matter of law." *State v. Tully*, 293 Kan. 176, Syl. ¶ 12, 262 P.3d 314 (2011). Our Supreme Court has quantified the amount of force to sustain a sex crime conviction as follows:

> "The 'force' required to sustain a rape conviction in this state does not require that a rape victim resist to the point of becoming the victim of other crimes such as battery or aggravated assault. K.S.A. 21-3502 [now codified as K.S.A. 2022 Supp. 21-5503] does not require the State to prove that a rape victim told the offender she did not consent, physically resisted the offender, and then endured sexual intercourse against her will. It does not require that a victim be physically overcome by force in the form of a beating or physical restraint. It requires only a finding that she did not give her consent and that *the victim was overcome* by force or fear to facilitate the sexual intercourse." *Borthwick*, 255 Kan. at 914.

And the concept of fear is subjective because "[w]hat renders one person immobilized by fear may not frighten another at all." *Borthwick*, 255 Kan. 899, Syl. ¶ 6. The plain language of K.S.A. 2019 Supp. 21-5505(b)(1) requires that the victim "is overcome by force or fear," not that the victim is overcome by force or *fear of force*. Part of the *Brooks* court's rationale for reversing the Court of Appeals is that the panel had incorrectly construed the statute as requiring force or fear of force. The *Brooks* court held that this interpretation meant the Court of Appeals had read language into the statute that was not readily found in it. *Brooks*, 298 Kan. at 687-88. To meet this element, the State must show that the victim felt fear, but not necessarily a fear of force.

Harpe's conviction is supported by evidence of both force and fear. The record shows that the jury considered evidence of force. A.D. explained that Harpe tried to pull her pants down while she tried to pull them up. Then Harpe attempted to penetrate A.D., at which point A.D. pushed him off. Harpe responded by wrapping his arms around her head—something like a headlock. On appeal, Harpe asserts that this headlock was the only use of force, and that it happened after the sexual battery, not as part of the sexual battery. But the earlier struggle—an unequal contest between A.D.'s attempt to keep her pants on and Harpe's desire to pull them down—is sufficient to show that A.D. did not consent, as described in *Borthwick*, 255 Kan. at 914. The unequal contest over A.D.'s pants was the beginning of force, the sexual battery occurred in the middle, and the headlock was the final act of an escalation of force. Thus, the State presented the jury with sufficient evidence for the jury to find that Harpe used force.

An additional reason showed that A.D. was overcome by force is vividly illustrated by the testimony of A.D.'s 10-year-old daughter. The daughter testified that she was sleeping in the living room but awoke to her mother screaming. The daughter testified that her mother's scream was not a "she-seen-something scream," but instead a "she's hurt type of scream." The daughter had never heard her mother scream like that before. So, she went and knocked on her mother's bedroom door. The daughter's persistent knocking caused Harpe to stop and let go of A.D. After A.D. left her bedroom, she called the police. Here, the daughter's testimony not only supports the jury's verdict as evidence of force, but also evidence of fear, which we will discuss in the next paragraph.

The record shows that the jury considered evidence of fear. A.D. testified as follows: "Yeah, and I was scared, you know. We all—it's just—it's scary, the whole situation is scary. I don't understand—I just don't understand it. I don't." A.D. had a protection from abuse order in place against Harpe at the time. But the State argues that A.D.'s religious belief allowed the pastor to persuade A.D. into allowing the father of two

of her children back into her life. A.D.'s testimony showed that she only reluctantly allowed Harpe to be present in her life, in her home, and in her bed. The protection from abuse order remained in place. Given this context, the jury could reasonably conclude that A.D.'s phrase "the whole situation" referred to all the events of that night, including the sexual battery. And again, the jury placed A.D.'s testimony about a "scary" situation alongside her child's testimony about hearing A.D. scream. So, the State presented sufficient evidence that the sexual battery occurred when the victim was overcome by force or fear, the additional element required to turn a sexual battery into an aggravated sexual battery. Because the State's evidence was sufficient for the jury to convict Harpe of aggravated sexual battery, we affirm.

Did the trial court err in instructing the jury?

Harpe next argues that the trial court clearly erred by not instructing the jury on the lesser included offense of sexual battery. The State notes that Harpe did not request the lesser included offense instruction and thus has the burden on appeal to firmly convince this court that the jury would have reached a different verdict.

When the giving of or failure to give a lesser included offense instruction is challenged on appeal, appellate courts apply the analytical framework for jury instruction issues. See *State v. Gray*, 311 Kan. 164, 173, 459 P.3d 165 (2020). Appellate courts follow a multi-step process when reviewing challenges to jury instructions:

> "'First, it considers the reviewability of the issue from both jurisdiction and preservation viewpoints, exercising an unlimited standard of review; next, it applies unlimited review to determine whether the instruction was legally appropriate; then, it determines whether there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, that would have supported the instruction; and finally, if the district court erred, this court determines whether the error was harmless, utilizing the test and

degree of certainty set forth in *State v. Ward*, 292 Kan. 541, 256 P.3d 801 (2011). [Citation omitted.]'" *State v. Owens*, 314 Kan. 210, 235, 496 P.3d 902 (2021).

"However, if a defendant fails to object to the instructional error below, the clear error standard is applied to assess prejudice. Instructional error is clearly erroneous when '"the reviewing court is firmly convinced that the jury would have reached a different verdict had the instruction error not occurred."'" *Owens*, 314 Kan. at 235.

When evaluating whether a lesser included instruction is factually appropriate in the individual case, courts use the following test: "Is there some evidence when viewed in the light most favorable to the defendant that would allow a rational factfinder to find the defendant guilty of the lesser included offense?" *State v. McLinn*, 307 Kan. 307, 324-25, 409 P.3d 1 (2018); see K.S.A. 2022 Supp. 22-3414(3); see also *State v. Randle*, 311 Kan. 468, 472, 462 P.3d 624 (2020) (expressly disapproving of often-used statement from *State v. Fisher*, 304 Kan. 242, 258, 373 P.3d 781 [2016], requiring courts to view the evidence in the light most favorable to the prosecution).

The trial court shall instruct the jury on lesser included offenses where there is some evidence, viewed in a light most favorable to the defendant, that would reasonably justify a conviction of the lesser included offense. K.S.A. 2022 Supp. 22-3414(3); *State v. Haygood*, 308 Kan. 1387, 1408, 430 P.3d 11 (2018). This duty to instruct applies even if the evidence is weak or inconclusive. *State v. Maestas*, 298 Kan. 765, 778-79, 316 P.3d 724 (2014). But see *Haygood*, 308 Kan. at 1408-09 (tempering general rule with regard to a defendant's self-serving statements). This duty applies "only when there is sufficient supporting evidence from which a rational factfinder could find that the events occurred consistent with the defendant's theory." *State v. Rutter*, 252 Kan. 739, Syl. ¶ 2, 850 P.2d 899 (1993).

The substance of the skip rule is the following:

> "[W]hen a lesser included offense has been the subject of an instruction and the jury convicts of the greater offense, the reviewing court deems any error resulting from failure to give an instruction on another still lesser included offense to be cured. The skip rule is not actually a rule but a logical deduction that may be drawn from jury verdicts in certain cases. This court does not apply the deduction automatically or mechanically, but considers it to be one factor, among many, when analyzing instructional issues for harmlessness. [Citations omitted.]" *State v. Nunez*, 313 Kan. 540, 553, 486 P.3d 606 (2021).

Sexual battery is a lesser included offense of aggravated sexual battery. K.S.A. 2022 Supp. 21-5505(a), (b); K.S.A. 2022 Supp. 21-5109(b)(1) (defining lesser included crime); *State v. Pfannenstiel*, 302 Kan. 747, 753, 357 P.3d 877 (2015). Thus, the lesser included offense instruction is legally appropriate.

Harpe argues, and the State concedes, that the lesser included offense instruction is factually appropriate because when viewing the evidence in the light most favorable to Harpe there is some evidence that would support a conviction of the lesser included crime. *State v. Berkstresser*, 316 Kan. 597, 601, 520 P.3d 718 (2022).

Harpe and the State agree that the lesser included offense instruction is both legally and factually appropriate and, thus, the trial court should have given the instruction if requested. But Harpe did not request the lesser included offense instruction, so he must show clear error to obtain relief. This court will reverse only if it is "firmly convinced the jury would have reached a different verdict had the instructional error not occurred." *Berkstresser*, 316 Kan. at 605.

Harpe argues that, by not instructing on the lesser offense, the trial court left the jury in the position of acquitting Harpe or convicting him of an unnecessarily high charge. He notes that the jury rejected the rape claim. The State notes that A.D. vacillated about whether there was vaginal penetration. The State describes the jury's decision as

"perplexing" because it also acquitted Harpe of attempted rape, despite Harpe admitting he was "going for . . . [A.D.'s] vagina."

Harpe asserts that the jury did not convict him of the more severe crime of rape, opting instead for the less severe crime of aggravated sexual battery. He contends that if the jury had the option of convicting him of sexual battery, then it "very likely would have" convicted him of the lesser crime. But Harpe invites us to use the lower standard that the *Berkstresser* court admonished this court not to use. 316 Kan. at 598. Even if we accepted Harpe's contention that the jury could have convicted him of sexual battery while acquitting him of aggravated sexual battery, this argument would still fail to meet Harpe's burden to show clear error. He would show only that the jury might have rendered a different verdict. Here, the State showed the jury sufficient evidence of A.D.'s fear and of Harpe's force. Harpe cannot firmly convince us that the jury would have reached a different verdict. Because the trial court's failure to instruct the jury on the lesser included offense was not clearly erroneous, we affirm.

Is the statute on sexual battery unconstitutionally vague?

Harpe argues that the "overcome by force or fear" element of aggravated battery is unconstitutionally vague. See K.S.A. 2019 Supp. 21-5505(b)(1). The State argues that the force or fear element is subjective, to be determined by the jury as a matter of fact, but the element does not render the statute void for vagueness.

Issues not raised before the district court cannot be raised on appeal. See *State v. Green*, 315 Kan. 178, 182, 505 P.3d 377 (2022). Constitutional grounds for reversal asserted for the first time on appeal are not properly before the appellate court for review. *State v. Pearce*, 314 Kan. 475, 484, 500 P.3d 528 (2021).

There are several exceptions to the general rule that a new legal theory may not be asserted for the first time on appeal, including the following: (1) The newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) the consideration of the theory is necessary to serve the ends of justice or to prevent denial of fundamental rights; and (3) the district court was right for the wrong reason. *State v. Allen*, 314 Kan. 280, 283, 497 P.3d 566 (2021). Our Supreme Court Rule 6.02(a)(5) (2023 Kan. S. Ct. R. at 36) requires an appellant to explain why an issue that was not raised below should be considered for the first time on appeal. *State v. Johnson*, 309 Kan. 992, 995, 441 P.3d 1036 (2019).

"[A] 'decision to review an unpreserved claim under an exception is a prudential one.' Even if an exception may apply, we are under no obligation to review the claim. [Citation omitted.]" *State v. Rhoiney*, 314 Kan. 497, 500, 501 P.3d 368 (2021).

"As a general rule, unless there are exceptional circumstances, appellate courts do not consider issues on appeal that were not raised by the parties. [Citation omitted.]" *State v. Laborde*, 303 Kan. 1, 7, 360 P.3d 1080 (2015), *overruled on other grounds as stated in Balbirnie v. State*, 311 Kan. 893, 468 P.3d 334 (2020).

Harpe argues that K.S.A. 2019 Supp. 21-5505(b)(1) is facially unconstitutionally vague because it completely lacks guidance as to what constitutes force or fear to sustain a conviction for aggravated sexual battery. The State argues that Kansas appellate courts apply the requirement that the victim is "overcome by force or fear" the same way under K.S.A. 2019 Supp. 21-5503, the rape statute, as under K.S.A. 2019 Supp. 21-5505, the aggravated sexual battery statute. The State cites binding precedent showing that the force or fear element is an inherently subjective question of fact. See *Brooks*, 298 Kan. at 688; *Tully*, 293 Kan. 176, Syl. ¶ 12; *Borthwick*, 255 Kan. at 913-14. Then the State notes that this court has recently rejected an identical argument that the subjectivity of the force

or fear element renders it unconstitutionally vague. *State v. Ford*, No. 124,236, 2023 WL 1878583, at *16 (Kan. App. 2023) (unpublished opinion).

The State cites *Ford* and asks us to arrive at the same outcome. But *Ford* does not apply for an entirely different reason. In *Ford*, this court noted that Ford had preserved this argument below: "Ford argued this point earlier and the district court held that the rape statute was not unconstitutionally vague. We thus find the issue preserved." 2023 WL 1878583, at *15. While *Ford* is well-researched and well-reasoned, we decline to apply its rationale because Harpe raises this issue for the first time on appeal. Because Harpe failed to preserve this issue, we dismiss his claim that the statute is unconstitutionally vague as grounds for appeal.

Is KORA unconstitutional as a violation of the First Amendment's protection against compelled speech or as a violation of equal protection?

As his fourth issue on appeal, Harpe argues that the obligation to register as a sex offender under KORA violates his First Amendment right to be free from compulsion to speak at the government's behest. As his fifth issue, Harpe argues that the registration scheme of KORA violates equal protection because it provides a mechanism for some offenders to end registration but not others.

Several appellants have raised similar First Amendment challenges to KORA, leading this court to repeatedly decline to review the issue for the first time on appeal. See *State v. Spilman*, No. 124,775, 2023 WL 4376272, at *16-17 (Kan. App. 2023), *petition for review filed* August 7, 2023. In *State v. Pearson*, No. 125,033, 2023 WL 2194306 (Kan. App. 2023) (unpublished opinion), *petition for rev. filed* March 20, 2023, this court articulated a compelling reason for refraining from addressing the issue for the first time on appeal:

> "Identifying the compelling governmental interests KORA is meant to protect and then determining whether it is sufficiently narrowly tailored to serve those interests involves examining a host of issues best explored first at the district court level. Analyzing the proportionality of KORA requires an in-depth balancing of its benefits and costs, along with exploring potential alternatives to achieving those benefits and the accompanying costs and anticipated effectiveness of those alternatives. It may even involve evaluating KORA's effectiveness in protecting the compelling governmental interests it is meant to serve, which could involve the presentation of evidence and fact-finding. And '[f]act-finding is simply not the role of the appellate courts.' [Citations omitted.]" *Pearson*, 2023 WL 2194306, at *1.

The fact-finding mentioned in *Pearson* is doubly important, given that this court has also declined to review this argument while noting that it has weak legal support. "Because Masterson raises this issue for the first time on appeal, we need not address this issue. . . . Nevertheless, *if we were to address this issue*, it is legally and fatally flawed." (Emphasis added.) *State v. Masterson*, No. 124,257, 2022 WL 3692859, at *2 (Kan. App.) (unpublished opinion), *rev. denied* 316 Kan. 762 (2022). The *Masterson* court noted that the most persuasive legal authority came from federal courts upholding the Sex Offender Registration and Notification Act (SORNA), the federal equivalent to KORA. See *United States v. Fox*, 286 F. Supp. 3d 1219, 1221-24 (D. Kan. 2018). And KORA itself survived a compelled speech challenge in federal court. *Davis v. Thompson*, No. 19-3051-SAC, 2019 WL 6327420, at *3 (D. Kan. 2019) (unpublished opinion). Laws that compel speech are constitutional only if they can survive strict scrutiny. See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994). Strict scrutiny would require the State to show that a compelling government interest justifies restricting Harpe's First Amendment rights and that the restriction is narrowly tailored to achieve that interest. See *Hodes & Nauser, MDs v. Schmidt*, 309 Kan. 610, 680, 440 P.3d 461 (2019). Because Harpe did not challenge the KORA requirement at the district court level, that type of fact-finding is not contained in the

appellate record available here. Thus, we decline to consider Harpe's compelled speech claim for the first time on appeal.

Harpe also claims that KORA requirements result in different treatment for similarly situated individuals, violating the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The State argues that drug offenders, who can potentially exit the roll of registered offenders, are not similarly situated to sex offenders and violent offenders. But Harpe's equal protection claim suffers from the same defect as his compelled speech claim.

Harpe's argument on equal protection requires additional fact development. Appellate courts apply a rational basis test to equal protection challenges to a criminal statute. See *State v. Huerta*, 291 Kan. 831, 834, 247 P.3d 1043 (2011). A statute may treat similarly situated individuals differently, without violating equal protection, if the classifications distinguishing individuals bear a rational relationship to a legitimate government objective. *Crawford v. Kansas Dept. of Revenue*, 46 Kan. App. 2d 464, 471, 263 P.3d 828 (2011). The party challenging constitutionality must show more than one set of facts in which the classifications of similarly situated individuals does not advance a government interest. "Under the rational basis standard, the party asserting that the statute is unconstitutional has the burden to negate "'every conceivable basis which might support"' the classification." *Alliance Well Service, Inc. v. Pratt County, Kansas*, 61 Kan. App. 2d 454, 476, 505 P.3d 757 (2022) (quoting *Peden v. Kansas Dept. of Revenue*, 261 Kan. 239, 253, 930 P.2d 1 [1996]). Because Harpe failed to bring this challenge before the district court, the record is simply not sufficiently developed to allow us to conduct an adequate rational basis analysis. So, we decline to consider Harpe's equal protection challenge to KORA because he raises this claim for the first time on appeal.

For the preceding reasons, we affirm.

Affirmed.