NOT DESIGNATED FOR PUBLICATION

No. 124,830

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

JAMES D. YOHN,
Appellant.

MEMORANDUM OPINION

Appeal from Reno District Court; TRISH ROSE, judge. Opinion filed May 5, 2023. Affirmed.

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

Brian Koch, assistant district attorney, *Thomas Stanton*, district attorney, and *Kris Kobach*, attorney general, for appellee.

Before ISHERWOOD, P.J., SCHROEDER, J., and TIMOTHY G. LAHEY, S.J.

PER CURIAM: James D. Yohn timely appeals from his convictions and sentences for possession of methamphetamine and possession of drug paraphernalia, arguing: (1) The district court erred in denying his motion to suppress evidence; (2) the district court erred in denying his motion for new trial; and (3) prosecutorial error. After an extensive review of the record, we find no errors, and we affirm.

FACTS

On July 12, 2019, Lieutenant Jason Hoffman of the Kansas Highway Patrol (KHP) was dispatched to the scene of a single-vehicle motorcycle crash on Highway K-14 in Reno County. Hoffman spoke with a witness who explained the motorcycle left the roadway, entered tall grass and went into a ditch, then rolled several times. Hoffman later determined the motorcycle was being driven by Yohn and there had been no other riders. However, Yohn was already being attended to by emergency medical services, so Hoffman did not speak with Yohn at the scene. Because Yohn was being treated for his injuries and was later transported to the hospital, Hoffman determined he needed to arrange to have the motorcycle towed as it was inoperable due to the crash and there was no one present to remove it. Hoffman contacted dispatch to arrange for a tow while he continued with his accident investigation. Pursuant to KHP policy, Hoffman conducted an inventory search of the motorcycle prior to the tow truck's arrival. In the motorcycle's saddlebag, Hoffman found a sock with a bulb-like object, which he removed and determined was a glass pipe with suspected drug residue. Hoffman also found a baggie of methamphetamine in a toiletry case.

At some point after Hoffman requested a tow truck, Yohn's mother, Emma German, arrived at the scene in an SUV. Hoffman was uncertain whether this was before or after he conducted the inventory search. Hoffman was also uncertain whether German gave her name at that time; he could only recall German identifying herself as the mother of the motorcycle driver. At the time, Hoffman was unaware German was the registered owner of the motorcycle and he did not believe German was equipped to remove the motorcycle, given the size of her vehicle and lack of a trailer. German did not indicate she was the owner of the motorcycle, nor did she discuss making her own arrangements to have it towed. Hoffman's conversation with German was about Yohn's condition and the fact he was taken to the hospital. German then promptly left to check on her son at the hospital.

Hoffman later went to Hutchinson Regional Hospital to speak with Yohn. After being advised of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), Yohn agreed to speak with Hoffman. Yohn stated he was the only rider of the motorcycle and it belonged to him, although it was registered to German and her husband. Yohn indicated he kept rain gear and a cell phone in the motorcycle's saddlebags and sometimes kept a toiletry kit. When Hoffman told Yohn he was concerned about some of the other items found in the saddlebags, Yohn told Hoffman he had loaned the motorcycle to a friend and had gotten it back earlier that day but did not want to identify his friend.

Yohn was charged with possession of methamphetamine and possession of drug paraphernalia. He filed a motion to suppress the evidence collected in Hoffman's inventory search. The district court denied his motion, finding Hoffman's decision to tow and inventory the motorcycle was reasonable and the inventory search was not an investigatory ruse.

At trial, Hoffman testified as previously described. Yohn testified in his own defense. On cross-examination, Yohn indicated he loaned the motorcycle to a friend earlier that day but refused to say who it was and admitted he had not told anyone who he loaned the motorcycle to. The jury convicted Yohn as charged.

Yohn filed a motion for new trial, arguing the district court improperly admitted the evidence obtained in Hoffman's inventory search. The district court denied Yohn's motion and sentenced him to 24 months' imprisonment for possession of methamphetamine with a concurrent sentence of 6 months in jail for possession of drug paraphernalia, suspended to 18 months' supervised probation. Additional facts are set forth as necessary.

ANALYSIS

The Denial of Yohn's Motion to Suppress Evidence Was Proper

Standard of Review and Applicable Legal Principles

"On a motion to suppress, an appellate court generally reviews the district court's findings of fact to determine whether they are supported by substantial competent evidence and reviews the ultimate legal conclusion de novo." *State v. Cash*, 313 Kan. 121, 125-26, 483 P.3d 1047 (2021). In reviewing the factual findings, we do not reweigh the evidence or assess the credibility of witnesses. When the material facts supporting a district court's decision on a motion to suppress evidence are not in dispute, the ultimate question of whether to suppress is a question of law subject to unlimited review. *State v. Hanke*, 307 Kan. 823, 827, 415 P.3d 966 (2018).

The State has the burden to prove the search and seizure were lawful. K.S.A. 22-3216(2); *Cash*, 313 Kan. at 126. The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures, and warrantless searches are per se unreasonable unless they fall within one of the exceptions to the warrant requirement. *State v. Heim*, 312 Kan. 420, 422-23, 475 P.3d 1248 (2020). One such exception—the point at issue here—is an inventory search of a lawfully impounded vehicle. Our Supreme Court recognizes a vehicle may be lawfully impounded in the following circumstances:

> "'(1) an unattended-to car illegally parked or otherwise illegally obstructing traffic; (2) an unattended-to car from the scene of an accident when the driver is physically or mentally incapable of deciding upon steps to be taken to deal with his property, as in the case of the intoxicated, mentally incapacitated or seriously injured driver, (3) a car that has been stolen or used in the commission of a crime when its retention as evidence is necessary; (4) an abandoned car; (5) a car so mechanically defective as to be a menace to others

> using the public highway; [and] (6) a car impoundable pursuant to ordinance or statute which provides therefor as in the case of forfeiture.'" *State v. Shelton*, 278 Kan. 287, 294, 93 P.3d 1200 (2004).

To prove a lawful inventory search, the State must show the search was conducted pursuant to a standardized department policy. See *State v. Evans*, 308 Kan. 1422, 1432-33, 430 P.3d 1 (2018).

Discussion

Yohn argues Hoffman's inventory search was improper because he never consulted with Yohn or German about the disposition of the motorcycle. He asserts the search could have been avoided if Hoffman consulted with Yohn or German because German was the registered owner and could have arranged for a tow through her own prepaid tow service. Yohn's argument is problematic because he puts too much emphasis on what German *could* have done as the registered owner. But as Hoffman explained at the suppression hearing, he was unaware German was the registered owner of the motorcycle; he was not even certain if she gave her name. He also did not know if Yohn was the owner because he did not speak with Yohn at the scene as Yohn was receiving medical care from the responding EMTs.

Further, in *Shelton*, our Supreme Court explained:

> "The first question arising is whether under the Fourth Amendment, a police officer must give a driver who is competent of making a rational disposition of the vehicle, the opportunity to make that disposition in order to justify impoundment. The answer to this question is no. What is required under the Fourth Amendment is that the impoundment be reasonable under the totality of circumstances. The officer's inquiry of the driver regarding disposition is but one of the circumstances that is considered in the court's determination of whether the impoundment is reasonable." 278 Kan. at 293.

Here, Hoffman's actions were reasonable under the totality of the circumstances. Hoffman did not inquire what Yohn wanted done with the motorcycle because Yohn was seriously injured in the crash and required medical attention at the scene. Hoffman did not want to interfere with Yohn receiving the necessary medical attention—a far more pressing matter than the disposition of the motorcycle. Yohn's injuries were so serious he had to be taken by ambulance to the hospital where he received several tests for head trauma, and it was determined he suffered a broken wrist, a broken collar bone, and other serious injuries. Accordingly, Hoffman's decision to proceed with his accident investigation and wait to speak to Yohn at the hospital was reasonable.

Similarly, Hoffman reasonably limited his discussion with German to Yohn's condition and whereabouts. He had no reason to know German was the registered owner because, at the time, dispatch was determining who owned the motorcycle, and Hoffman did not recall whether German even gave her name. German did not tell Hoffman she was the registered owner; she did not ask about or discuss arranging for a tow on her own; and she did not appear to be equipped to transport the motorcycle, which was inoperable as a result of the crash. In fact, the motorcycle was leaking fuel when Hoffman arrived on scene. At the time German arrived, Hoffman had already requested a tow through dispatch and may have already completed the inventory search, although he was uncertain when he completed the inventory.

Hoffman reasonably determined the motorcycle needed to be impounded because (1) it had been in an accident and Yohn did not appear to be in a condition to decide what to do with it, and (2) as a result of the accident, it was either inoperable or so mechanically defective it presented a danger to others on the roadway. See *Shelton*, 278 Kan. at 294. At the time Hoffman requested the tow, Yohn was being transported to the hospital and no one was present to take possession of the motorcycle. Hoffman also had no indication Yohn did not want the motorcycle towed. Hoffman further testified the inventory search was done pursuant to KHP's established policies. And the district court

admitted KHP's written policies regarding inventory searches into evidence at the suppression hearing.

On appeal, Yohn does not argue the inventory search was not authorized by or done in accordance with KHP policy. Rather, he argues it was unreasonable to impound the motorcycle. But the district court found the decision to impound the motorcycle was reasonable, the search was valid, and Hoffman was not using the inventory search as an investigatory ruse. We find the State met its burden to show Hoffman's decision to impound the motorcycle was reasonable under the totality of the circumstances and the inventory search was properly conducted in accordance with KHP's established policies.

Yohn's Motion for a New Trial Was Not Persuasive

Standard of Review

"The court on motion of a defendant may grant a new trial to the defendant if required in the interest of justice." K.S.A. 2022 Supp. 22-3501(1). An appellate court reviews the district court's denial of a motion for new trial for an abuse of discretion. *State v. Breitenbach*, 313 Kan. 73, 97, 483 P.3d 448 (2021). "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." *State v. Levy*, 313 Kan. 232, 237, 485 P.3d 605 (2021). The party asserting the district court abused its discretion bears the burden of showing such abuse of discretion. *State v. Crosby*, 312 Kan. 630, 635, 479 P.3d 167 (2021).

Discussion

Yohn moved for a new trial, arguing, among other things, the district court erroneously denied his motion to suppress; thus, its admission of the evidence at trial was

erroneous. On appeal, Yohn limits his arguments to the district court's denial of his motion to suppress and admission of the evidence at trial. Accordingly, the other grounds raised before the district court are deemed waived or abandoned. *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021).

We observe two problems with Yohn's argument. First, it is largely a continuation of the first issue; thus, it is unpersuasive. Second, the factual arguments Yohn raises on appeal were not presented to the district court. In his motion, Yohn asserted, in relevant part: "[T]he Court erred when it denied the Defendant's motion to suppress," and "the Court erred in [its] admission into evidence testimony, and evidence, procured under an illegal search." He offered no specific reasons why the district court erred.

At the outset of sentencing, the district court considered the motion and gave the parties an opportunity to make arguments. Yohn's counsel stated, "I did file a motion for a new trial, motion for judgement of acquittal. I don't have anything to add. I'll just stand on the motions." The State responded, "[T]he basis for the defendant's motion seems to be that the Court erred at the suppression hearing and the evidence should have been suppressed but he doesn't really say what the error was or why. I can't really respond to something that vague, just saying it was done incorrectly." The State was correct Yohn's argument was vague. The district court properly denied Yohn's motion as he failed to specify any error in the prior rulings warranting reconsideration.

On appeal, Yohn argues German's trial testimony undermines the district court's prior suppression ruling. We could decline to consider this argument because Yohn failed to raise it before the district court. Yohn cannot establish the district court abused its discretion based on an issue it was never asked to decide. In any event, there are several problems with Yohn's argument. At trial, German claimed she arrived on scene, encountered two officers, identified herself as the owner of the motorcycle, and told them she wanted to arrange for a tow herself. However, German claimed the officers rushed

her away from the scene by telling her she needed to go see Yohn at the hospital. German also testified she did not know whether she was talking with sheriff's deputies or KHP officers. This is a point Yohn fails to acknowledge in his briefing and generally undercuts his argument because it is undisputed there were other law enforcement officers present at the scene. Without establishing she made these statements to Hoffman, this claim does not undermine the reasonableness of Hoffman's actions.

More problematic, though, is German testified at the suppression hearing but did not make any of these claims at that time. Her trial testimony is also largely at odds with Hoffman's testimony at trial and at the suppression hearing. This raises several concerns about the weight and credibility of the evidence, which the district court—not this court—must decide. See *Hanke*, 307 Kan. at 827. Here, the record reflects the district court did not resolve these issues because it was never presented with the argument Yohn now advances on appeal. Yohn has not met his burden to show the district court abused its discretion in denying his motion for a new trial.

There Was No Prosecutorial Error

Standard of Review

We use a two-step process to evaluate claims of prosecutorial error: error and prejudice.

> "To determine whether prosecutorial error has occurred, the appellate court must decide whether the prosecutorial acts complained of fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial. If error is found, the appellate court must next determine whether the error prejudiced the defendant's due process rights to a fair trial. In evaluating prejudice, we simply adopt the traditional constitutional harmlessness inquiry demanded by *Chapman* [*v. California*, 386 U.S. 18,

> 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)]. In other words, prosecutorial error is harmless if the State can demonstrate 'beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, where there is no reasonable possibility that the error contributed to the verdict.'" *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016).

A prosecutor commits error by misstating the law. A prosecutor also errs when arguing a fact or factual inference without an evidentiary foundation. *State v. Watson*, 313 Kan. 170, 179, 484 P.3d 877 (2021).

Discussion

Yohn argues the State committed prosecutorial error in closing arguments by (1) trying to shift the burden of proof, (2) erroneously defining reasonable doubt, and (3) misstating the evidence. His arguments are unpersuasive.

It is well-established prosecutors have wide latitude in discussing the evidence and reasonable inferences to be drawn therefrom. *State v. Crawford*, 300 Kan. 740, 749, 334 P.3d 311 (2014). The State is not allowed to shift the burden of proof to the defendant, but the State is permitted to point out a lack of evidence supporting a theory of defense. *State v. Williams*, 299 Kan. 911, 939, 329 P.3d 400 (2014). Here, the State was acting within its wide latitude to discuss the evidence and explain the lack of evidence supporting Yohn's theory of defense based on a discussion of reasonable inferences. Yohn's argument is largely premised on nothing more than inartful wording by the prosecutor. When viewed in context, the prosecutor was appropriately commenting on the strength of the evidence and made a permissible, common-sense argument why the jury should not believe Yohn's account.

Yohn argues the State attempted to shift the burden of proof in its closing argument when the prosecutor stated:

"[Yohn] said he loaned the bike to someone else. Even when Trooper Hoffman asked him at the hospital, he wouldn't say who it was. I had an opportunity today. I didn't ask him whose methamphetamine it was. I asked him who borrowed the bike. Those are different things. I would argue to you if this person does in fact exist, he clearly didn't want to testify or didn't come in to testify, and I ask you to consider that as far as possession goes."

But Yohn fails to acknowledge the prosecutor's statements immediately thereafter:

"The methamphetamine was in the saddlebag right next to his stuff, and he had some access and measure of control because it's his bike. Once again, the trooper found other items belonging to the defendant; some rain gear. There's testimony about a check with the defendant's name on it. The State argues that was the defendant's methamphetamine in that saddlebag, and we ask you return a verdict of guilty."

Yohn further takes issue with the following portion of the State's rebuttal:

"The bike wasn't his on paper but he testified and told the trooper that the bike was his, and his mother testified the same thing; he's the only person that uses it. And when the trooper was interviewing him in the hospital, he basically says, yeah, that's my stuff. That's my bike. And then when the trooper says I found something concerning, well, it's not really my bike. It's my stepdad's bike. I let some stranger, some unnamed person borrow the bike, and when they gave it back to me that must have been in there. The trooper testified methamphetamine is an addictive substance but apparently this theory is some person that uses methamphetamine put it in their friend's motorcycle and left it there, and then it's his bad luck he got into an accident the next day or so. I would argue that doesn't make sense. That's not reasonable. The only explanation here that's reasonable is the defendant had methamphetamine in his saddlebag. . . . He was the only one on the bike. He refuses to say who his friend was that he loaned the bike to. I'm not asking you who owned the methamphetamine. I'm asking you who owned the bike, and there's no reason for that, that would not make that person guilty no more than it automatically makes this person guilty. But one person looked into that to see what the story was. He didn't want to do that, and he didn't want to tell you that today. The State is

> asking you apply your common knowledge and the facts here, consider all the testimony and look at the evidence and return a guilty verdict."

Yohn asserts the thrust of the State's argument was he "did not do enough to assert his innocence at trial." He complains the State focused on the evidence he did not present rather than the evidence the State presented, thus shifting the burden of proof. His argument is unpersuasive. As previously noted, the State focused a considerable portion of its argument on the evidence it presented; Yohn simply fails to acknowledge this in his briefing. The State began its rebuttal argument by telling the jury, "[Yohn's counsel is] correct; it is my burden and the standard is beyond a reasonable doubt. But you get to apply your common sense and experience to the facts here."

Viewed in context, the State made appropriate arguments why the jury should find Yohn guilty based on the evidence the State presented and why, as a matter of common sense, the evidence did not support Yohn's theory of defense some other person borrowed his motorcycle and placed the methamphetamine and drug paraphernalia found in the saddlebag. The State did not attempt to shift the burden of proof in closing arguments.

Yohn further complains the State impermissibly attempted to define the burden of proof in its rebuttal by saying "[t]hat's not reasonable," and "[t]he only explanation that's reasonable here is the defendant had methamphetamine in his saddlebag." His argument erroneously conflates the prosecutor's use of "reasonable" with reasonable doubt. Viewed in context, the prosecutor was making a logical—and *reasonable*—argument why Yohn's account did not make sense. Contrary to Yohn's argument, the prosecutor was not attempting to "[define] reasonable doubt as something other than [Yohn's] account."

Finally, Yohn asserts the prosecutor misstated facts in rebuttal by arguing Yohn "let some stranger, some unnamed person borrow the bike." Viewed in context, the State's argument reflects only inartful wording. The prosecutor was not arguing Yohn

allowed someone he did not know to ride the bike. The prosecutor's use of "stranger" referred to the fact this was a person whose identity had not been disclosed. The prosecutor was arguing, if this person existed, Yohn was the only person in the courtroom who knew his identity.

Because Yohn has not identified any error in the State's closing arguments, he cannot show prejudice. But even assuming any of the comments Yohn takes issue with were erroneous, the State has shown the error was harmless beyond a reasonable doubt. The prosecutor made a logically sound, common-sense argument why Yohn's account did not make sense and why the State's evidence showed he was guilty. The prosecutor even reminded the jury of the State's burden of proof. The district court instructed the jury on the State's burden of proof. It further instructed the jury that counsel's arguments were not evidence, and it should ignore any arguments not supported by the evidence. Additionally, the district court instructed the jury it was for the jury to determine the weight and credibility of the evidence and to use their common knowledge and experience in deciding the strength of the State's evidence. Based on the district court's instructions, the overall thrust of the prosecutor's comments in context, and the strong evidence the State presented at trial, any error in the prosecutor's closing argument was harmless beyond a reasonable doubt.

Affirmed.