NOT DESIGNATED FOR PUBLICATION

No. 124,980

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

STEVEN K. DAVIS,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; DAVID J. KAUFMAN, judge. Opinion filed September 8, 2023. Affirmed.

Korey A. Kaul, of Kansas Appellate Defender Office, for appellant.

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

Before SCHROEDER, P.J., MALONE, J., and MARY E. CHRISTOPHER, S.J.

PER CURIAM: Steven K. Davis appeals his convictions of two counts of aggravated indecent liberties with a child and one count of sexual exploitation of a child arising from two consolidated cases in district court. Davis claims for the first time on appeal that the Kansas aggravated indecent liberties statute is not narrowly tailored to satisfy any substantial compelling interest where it categorically restricts sexual activity for everyone aged 14 or 15 years old. Davis also claims the district court erred in denying his motion to suppress his statement to law enforcement. We find that Davis failed to

preserve his constitutional challenge, and he fails to show the district court erred in denying the motion to suppress. Thus, we affirm the district court's judgment.

FACTS

In 2019, the State charged Davis with one count of aggravated indecent liberties with a child for having sexual intercourse with D.M. In 2020, the State charged Davis in a separate case with one count of aggravated indecent liberties with a child and one count of sexual exploitation of a child for having sexual intercourse and promoting an explicit performance from B.A.

Facts related to D.M.

On May 26, 2018, officers responded to a rape report at a residence in Wichita. A mother had reported that her 15-year-old daughter, D.M., had sexual intercourse with Davis. The mother was concerned because she said that D.M. had a personality disorder and could easily be manipulated.

On May 30, 2018, Detective Michael Wint interviewed D.M., who stated that she had met Davis on Facebook in February or March 2018. The two began to regularly communicate using the social media application, Snapchat. According to D.M., Davis began to move their conversations in a sexual direction. Sometime in May, D.M. sent Davis "at least one nude photograph of herself." Soon after, Davis asked D.M. to have sex and she agreed. They met at the food court at Towne West Mall and then went outside the Dick's Sporting Goods and had sex. D.M. said that she was afraid to say no because Davis might get mad at her.

On June 6, 2018, Wint interviewed Davis. As Wint spoke with Davis, he noted that Davis "might be a little slow or have a little bit of a learning disability," but Wint did

not believe it would interfere with his understanding of their conversation. Davis told Wint that when he met D.M. at the food court, she seemed nervous and did not seem like she wanted to have sex. Davis then asked her if she still wanted to have sex and she said that she did. They then went behind the Dick's Sporting Goods and had sex. Wint completed the interview, but the State did not file any charges against Davis at that time.

Facts related to B.A.

On April 22, 2019, police received a report that Davis had impregnated B.A. when she was 15 years old. Davis and B.A. met online. After talking online for a while, they met in person and had sex in a park. B.A. said that Davis would take photos of her when she was naked. He also asked her to send him nude photographs and she would send them to him over Snapchat.

They continued to have sex for several months until B.A. broke up with Davis. Soon after, B.A. discovered she was pregnant. DNA testing showed that it was "'99.9'" percent that Davis was the father of B.A.'s child.

The State eventually filed separate cases against Davis, and the district court consolidated the two cases for trial. On May 20, 2020, Davis moved to suppress his statements to Wint about his interaction with D.M. The district court held an evidentiary hearing and Wint was the only witness. Wint testified that he telephoned Davis and asked if he would meet him for an interview. Wint explained that Davis got a ride from a friend and voluntarily came to the Child Advocacy Center. Davis was never handcuffed or shackled during the interview, was not told he was under arrest, and was allowed to go home after the interview. Wint was the only officer involved in the recorded interview and he never displayed a weapon or used any force in the interview.

Wint testified that during the interview, he never observed anything that raised any concerns to him about Davis' mental health. Wint noticed that Davis' vocabulary did not seem quite up to par for a typical 20-year-old, but he explained that Davis appeared to track his questions and answer them appropriately. Wint used simple terms during the interview, and Davis never said that he was confused or did not understand.

Wint testified that Davis "appeared fairly relaxed [and] jovial" during the interview, noted that Davis laughed several times during the conversation, and explained that Davis' body language indicated that he was "open and at ease." Wint also testified that Davis' story did not change based on how Wint phrased his questions, and he found that Davis' version of the events was "very close" to what D.M. had told Wint. After hearing the evidence, the district court denied the motion to suppress.

On January 10, 2022, the district court held a bench trial on stipulated facts and found Davis guilty as charged. On March 3, 2022, the district court sentenced Davis to 59 months' imprisonment for each of the three counts to run concurrent with each other. Davis timely appealed the district court's judgment.

On appeal, Davis first claims that the Kansas aggravated indecent liberties statute is not narrowly tailored to satisfy any substantial compelling interest where it categorically restricts sexual activity for everyone aged 14 or 15 years old. Davis also claims the district court erred in denying his motion to suppress his statement to Wint. We will address each of these claims in turn.

CONSTITUTIONAL CLAIM

Davis first claims that the indecent liberties statute under which he was charged, K.S.A. 2017 Supp. 21-5506(b)(1), is unconstitutional because it cannot pass strict scrutiny for restricting a 14- or 15-year old's sexual activity. Davis claims that the

decision on the right to an abortion in *Hodes & Nauser, MDs v. Schmidt*, 309 Kan. 610, 440 P.3d 461 (2019), confers the right for mature 14- and 15-year-olds to choose sexual partners. The State responds that Davis' claim was not preserved below and also lacks merit where similar claims have already been addressed and rejected by Kansas courts.

Standing and preservation

Davis concedes that he did not preserve his constitutional claim below. Instead, he argues that his claim involves purely a question of law on proved or admitted facts and that consideration of his claim is necessary to prevent the denial of a fundamental right. Generally, allegations of a constitutional violation may not be raised for the first time on appeal. *State v. Godfrey*, 301 Kan. 1041, 1043, 350 P.3d 1068 (2015). A court may, but is not required to consider unpreserved issues if they fall within a recognized exception:

> "'(1) The newly asserted claim involves only a question of law arising on proved or admitted facts and is determinative of the case; (2) consideration of the claim is necessary to serve the ends of justice or to prevent the denial of fundamental rights; or (3) the district court is right for the wrong reason.'" 301 Kan. at 1043.

Although Davis does not specify whether he brings his constitutionality challenge facially or as-applied, a review of his brief shows that his claim is an "as-applied" challenge. An "as-applied" challenge to the constitutionality of a statute involves applying the statute to a particular set of facts. *State v. Hinnenkamp*, 57 Kan. App. 2d 1, 4, 446 P.3d 1103 (2019). Davis does not try to apply K.S.A. 2017 Supp. 21-5506(b)(1) to the facts in his case; rather, he tries to show that the statute is unconstitutional as applied to hypothetical and specific circumstances of other, hypothetical children. Davis asks this court to find K.S.A. 2017 Supp. 21-5506(b)(1) unconstitutional as applied to "some" 14- and 15-year-olds who have sufficient maturity to have a right to sexual intercourse. Thus, Davis' argument is premised on a factual assertion that some children might be mature enough to have a constitutional right to sexual intercourse. Because his argument relies

on a factual assertion—the victim's maturity—his challenge must be an "as-applied" challenge. See *State v. Shipley*, 62 Kan. App. 2d 272, 282, 510 P.3d 1194 (finding a constitutional challenge to a statute was an as-applied challenge where the argument in the briefs did not rely solely on the language of the statute and instead relied in part on factual assertions), *rev. denied* 316 Kan. 763 (2022).

An "as-applied" challenge requires the district court to make factual findings on the specific circumstances being challenged for this court's review. *Hinnenkamp*, 57 Kan. App. 2d at 4 ("[A]n as-applied challenge contests the application of a statute to a particular set of circumstances, so resolving an as-applied challenge 'necessarily requires findings of fact.'"). The reason for the findings of fact requirement is simple: appellate courts cannot engage in a factual review without a developed factual record. *Shipley*, 62 Kan. App. 2d at 281-82. Here, Davis tries to apply the statute not to D.M. and B.A., but to "some" hypothetical children who have the maturity to have a right to sexual intercourse. But the district court did not make any factual findings about the maturity of D.M., B.A., or any other hypothetical victim.

This court has routinely declined to apply the preservation exceptions where, as in this case, a constitutional challenge relies on an assertion of facts not found by the district court. See, e.g., *Shipley*, 62 Kan. App. 2d at 282-83 (refusing to apply preservation exceptions where an as-applied constitutional challenge was based on facts not found by the district court); *State v. Jones*, No. 124,174, 2023 WL 119911, at *5 (Kan. App. 2023) (unpublished opinion) (same). Davis does not address why this court should depart from its prior and consistent holdings. Because Davis has not preserved his constitutional challenge and because it is an as-applied challenge based on facts not found by the district court, this court may decline to address the merits of the claim.

More critically, Davis lacks standing to raise his constitutional challenge even if he had preserved it. An appellate court may only exercise judicial review of a

constitutional challenge when it is presented in an actual case or controversy between the parties. *State v. Strong*, 317 Kan. 197, 211, 527 P.3d 548 (2023). As part of that case or controversy requirement, "[s]tanding is the 'right to make a legal claim.'" 317 Kan. at 211. To show standing when challenging the constitutionality of a statute, "a party must show that the statute affected the party's rights." 317 Kan. at 211. "'As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations.'" 317 Kan. at 211-12. Standing is a question of law over which this court's review is unlimited. 317 Kan. at 212.

A litigant lacks standing to challenge the application of a statute against hypothetical third parties. 317 Kan. at 211-12. But that is exactly what Davis tries to do. Nowhere in Davis' brief does he assert that K.S.A. 2017 Supp. 21-5506(b)(1), as applied to him, D.M., or B.A., is unconstitutional. Instead, Davis exclusively tries to apply the statute to "some" hypothetical children with heightened maturity. Although Davis argues that he has standing to bring the claim because he was injured by the statute, that argument does not refute the fact that, contrary to Kansas Supreme Court precedent, his attempt to challenge the statute inappropriately relies on its application to hypothetical third parties. Because Davis' constitutional challenge is not preserved and he lacks standing to bring it, we decline to address the merits of the claim.

MOTION TO SUPPRESS

Davis next claims the district court erred in denying the motion to suppress his statement to Wint. Davis concedes that he received *Miranda* warnings and that he signed a waiver of his *Miranda* rights. See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Even so, he claims that his statements were involuntarily made. The State disagrees and points to evidence supporting findings that Davis was of adequate mental acuity and that Wint did not coerce Davis.

In reviewing a district court's decision about the suppression of a confession, an appellate court reviews the factual underpinnings of the decision by substantial competent evidence standard and the ultimate legal conclusion by a de novo standard. When applying this standard, an appellate court does not reweigh evidence, assess witness credibility, or resolve conflicting evidence. *State v. Vonachen*, 312 Kan. 451, 463-64, 476 P.3d 774 (2020). If the evidence should have been suppressed, then the appellate court must also consider whether an error in admitting evidence was harmless. *State v. Thornton*, 312 Kan. 829, 831-32, 481 P.3d 1212 (2021).

The State has the burden to prove the voluntariness of a confession by a preponderance of the evidence—that the statement was the product of the defendant's free and independent will. *State v. Mattox*, 305 Kan. 1015, 1042, 390 P.3d 514 (2017). The court looks at the totality of the circumstances surrounding the confession to determine whether the confession was voluntary by considering the following nonexclusive factors:

> """(1) the accused's mental condition; (2) the duration and manner of the interrogation; (3) the ability of the accused on request to communicate with the outside world; (4) the accused's age, intellect, and background; (5) the fairness of the officers in conducting the interrogation; and (6) the accused's fluency with the English language. [Citations omitted.]""" *State v. Palacio*, 309 Kan. 1075, 1087, 442 P.3d 466 (2019).

Davis presents two arguments: (1) that he was mentally susceptible to coercion and (2) that Wint coerced him into confessing. Turning to the first argument, Wint testified that during the interview he perceived Davis was "a little slow" and wondered whether he might have a learning disability. Davis concludes that the district court ignored this testimony and failed to make findings on Davis' mental acuity.

As the State points out, the district court considered and directly ruled on Davis' mental acumen with several factual findings. The district court found that Wint had no concerns about Davis' mental state, that Davis agreed he understood and comprehended

the interview, and that Davis adequately tracked the conversation. The district court also found that Davis had completed high school and trade school. Finally, the district court found that Davis had no speech or pronunciation problems and that his responses were rational and appropriate. Each of these findings speaks to Davis' mental ability.

Substantial evidence supports the district court's findings. When asked to explain his testimony on Davis' mental state, Wint specified that Davis' vocabulary was limited for his age, but that he understood and answered the questions that Wint asked without complaint or needing clarification. Wint testified that he had no concerns about Davis' mental health. The district court also had a recording and transcript of the interview in evidence and the record shows that the court actively considered those when making its factual findings. As the district court found, the interview shows that Davis actively participated in the interview with appropriate responses throughout.

Davis acknowledges the district court's finding on his mental health and concedes that Wint testified in support of that finding. Even so, Davis asks this court to reweigh the evidence and find that Wint's statements about Davis seeming "a little slow" outweigh his testimony supporting Davis' mental ability. But an appellate court does not reweigh evidence, assess witness credibility, or resolve conflicting evidence. *Vonachen*, 312 Kan. at 463-64. Substantial evidence supports the district court's findings on Davis' mental health and mental acuity, and this factor supports the voluntariness of Davis' statement.

Davis next claims that Wint pressured him to cooperate in order to gain favor with the prosecuting attorney. During the interview, before Wint began to question Davis about his meeting with D.M., Wint cautioned Davis to tell the truth. Wint also made comments to try to persuade Davis that the district attorney would look more favorably upon someone who was "cooperative" rather than one who does not tell the truth.

Davis argues that these comments were coercive and rendered his statement involuntarily made. To support his argument, Davis cites *State v. Swanigan*, 279 Kan. 18, 106 P.3d 39 (2005). Swanigan took part in an interview with law enforcement officers about a robbery for which he was a suspect. Several officers interviewed Swanigan who first denied any wrongdoing. In response, the officers admonished Swanigan for lying. One officer lied that they found Swanigan's fingerprints near the crime scene to try to elicit a different response. Swanigan continued to deny wrongdoing, and officers continued to admonish him for failing to tell the truth. The officers then told him, at length, that they needed to put in their report that Swanigan cooperated because otherwise he would be charged in multiple robberies and not just the one that he participated in. All the while, Swanigan continued denying any wrongdoing, and the officers repeated their assertion that they would report him to the prosecutor as uncooperative and that his lack of cooperation would result in additional charges.

Eventually, after another long admonishment to tell the truth or risk harsher punishment, Swanigan changed his story and admitted to the facts of the robbery. But after this admission, Swanigan would again change his story back to a blanket denial of wrongdoing. When asked why he resumed his denials he stated, "'Because you guys are forcing me to do this,'" and "'When I try to tell you the truth you guys say it's me.'" 279 Kan. at 30. Based on those facts, along with the fact that Swanigan had a low IQ, the Kansas Supreme Court concluded that Swanigan made his statements involuntarily. The court emphasized that it based its decision on the totality of the circumstances and cautioned against reading broad implications into its holding. 279 Kan. at 44.

Davis claims that his interrogation was like Swanigan's because Wint insinuated that the prosecutor might treat him more leniently if he told the truth. Yet Davis' case does not rise to the level of coercion found in *Swanigan*. Davis was interviewed by a single officer, Wint, while Swanigan was interviewed by three officers. Unlike the officers in *Swanigan*, Wint did not repeat any threats of repercussions to try to get Davis

to change his story. Instead, Wint cautioned Davis to tell the truth one time before any questioning about D.M. had even begun. And at no point in the interview did Davis change his story or appear unwilling to admit that he had sexual intercourse with D.M. In contrast, Swanigan claimed soon after making his incriminating statement that he only did so because he felt forced to do it and voiced frustration that his repeated denials were met with admonishments to tell the truth. 279 Kan. at 30.

The record shows that Davis and Wint remained good tempered and cordial throughout the interview. Davis was consistent in his admissions of wrongdoing and often made his admissions in response to open inquiries from Wint. For example, Wint asked Davis, "Tell me, tell me about what happened when you meet up with [D.M.]." Davis responded at length about how and where he and D.M. met at the mall and that eventually they went on a walk. Wint then generally prompted, "And then what?" to which Davis again responded at length about how he shared sexually explicit online messages with D.M. before meeting her and that he met her at the mall to "do something." At that point, Wint asked very few questions at all while Davis, in detail, specified the facts of his sexual encounter with D.M. Rather than ask questions, Wint often merely kept the conversion moving with general statements like: "Um hum," "Right," and "Oh really." While Wint did caution Davis to tell the truth before the substantive questioning had begun, nothing in the record shows that Wint coerced or pressured Davis into admitting to sexual acts with D.M. As a result, the district court's finding that Wint did not coerce Davis is supported by substantial evidence and this factor supports the voluntariness of Davis' statements.

Finally, even if Davis' statement to Wint were involuntarily made, the State argues that any error in the admission of the statement was harmless. Davis recognizes that his statement to Wint concerned only his interaction with D.M. In any event, we need not address the State's argument on harmless error because Davis fails to show the district court erred in denying his motion to suppress his statement to Wint.

Affirmed.