

NOT DESIGNATED FOR PUBLICATION

No. 125,157

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

ESTELLA ELIZABETH OWENS,
Appellant.

MEMORANDUM OPINION

Appeal from Sumner District Court; WILLIAM R. MOTT, judge. Opinion filed June 16, 2023.
Affirmed.

Kristen B. Patty, of Wichita, for appellant.

Ryan J. Ott, assistant solicitor general, and *Kris W. Kobach*, attorney general, for appellee.

Before WARNER, P.J., COBLE and PICKERING, JJ.

PER CURIAM: Estella Elizabeth Owens was the driver in a single-vehicle accident, following which her passenger, Raymond Shiner, could not be resuscitated by emergency responders. As a result of the accident, the State charged Owens with multiple crimes. At trial, a jury convicted Owens of vehicular homicide in Shiner's death and other traffic and license-related offenses. Owens now appeals from her conviction for vehicular homicide, arguing there was insufficient evidence to establish that her actions proximately caused Shiner's death. She also argues the prosecutor erred by referencing facts not in evidence during closing arguments. Finding sufficient evidence to support the conviction and no prosecutorial error, we affirm Owens' convictions.

FACTUAL AND PROCEDURAL BACKGROUND

Mid-day on January 13, 2020, Owens was driving a vehicle that was involved in a single-vehicle accident west of Belle Plaine, Kansas. Owens admitted that she ran a stop sign immediately before the accident. Although she did not believe she was speeding, evidence suggested otherwise. Owens' vehicle skidded and veered left and right before leaving the road and striking a tree on the passenger side of the vehicle. Although she was pinned in the vehicle, Owens was able to call 911 for help. When officers arrived at the scene, the passenger—Shiner—was unresponsive and hanging halfway out the passenger-side window, partially beneath a tree branch. Emergency medical services (EMS) could not revive Shiner and declared him dead at the scene.

After the accident, the State charged Owens with one count each of vehicular homicide, a class A person misdemeanor, in violation of K.S.A. 2019 Supp. 21-5406; driving while suspended, a class B nonperson misdemeanor, in violation of K.S.A. 2019 Supp. 8-262; speeding, a traffic infraction, in violation of K.S.A. 2019 Supp. 8-1558; and failure to stop at a stop sign, a traffic infraction, in violation of K.S.A. 8-1528. The State later amended the complaint after the preliminary hearing to add a count of involuntary manslaughter while in the commission of reckless driving, a severity level 5 person felony, in violation of K.S.A. 2019 Supp. 21-5405(a)(2), (b)(1)(A).

Because Owens' appeal centers on her conviction of vehicular homicide and does not dispute her other convictions for driving while suspended, speeding, and failure to stop at a stop sign, we likewise primarily focus on the facts related to the vehicular homicide charge.

During the jury trial, the State's case consisted mainly of testimony by officers who had participated in the investigation of the accident. Deputy Sam Wylie was the first officer to arrive at the scene after Owens' 911 call. He was advised this was an injury

accident with the female driver pinned in the vehicle and a passenger who was unconscious, hanging halfway out the passenger-side window. When Deputy Wylie arrived, EMS and fire personnel were already there trying to extricate Owens. Deputy Wylie began taking photographs and making measurements to construct a diagram of the crash scene. The State admitted these photographs and the resulting diagram into evidence.

Shiner—who Deputy Wylie identified at the scene by retrieving his wallet and driver's license from his back pocket—was unresponsive when Deputy Wylie arrived. Shiner was partially hanging out of the passenger-side window from the waist up and a tree branch had fallen on top of him. At no point during Deputy Wylie's investigation of the scene was EMS able to revive Shiner. EMS gave a triage code black, and first responders contacted the Sumner County Coroner, who determined Shiner's time of death to be 11:53 a.m. EMS did not transport Shiner to the hospital in an ambulance; instead, the mortuary was contacted to pick him up.

Deputy Wylie testified he did not attempt to interview Owens at the scene because she appeared to be in a lot of pain due to the accident. He did ask Owens' name and used that information to identify her and confirm the vehicle belonged to her.

Detective Tyler Carmichael testified that he responded to the accident after Deputy Wylie reported it involved a fatality over the radio. Detective Carmichael helped identify Shiner and then left the scene to make a death notification, using the information from Shiner's driver's license to figure out his address. After meeting with Shiner's family, Detective Carmichael met again with Deputy Wylie. Based on the way the vehicle hit the tree, Detective Carmichael believed speed may have been a factor in the accident, so the officers decided to keep investigating the accident.

Detective Carmichael also spoke with Owens a few times about the accident. Owens told the officers in the hospital that Shiner had jerked the steering wheel. Detective Carmichael did not believe there was any evidence at the crash scene to corroborate that statement. The detective next spoke with Owens by telephone in May 2020, at which time she agreed to a subsequent interview. During this brief telephone conversation, Owens again stated that Shiner jerked the steering wheel.

The third and final time Detective Carmichael spoke with Owens was in August 2020 when she was arrested on charges related to the case. Owens told the detective that the morning of the accident, she had gone to pick Shiner up from his job because he had gotten fired. Owens brought him back to her house in Belle Plaine, where they ended up having sex. Shiner then began "acting out" after Owens went outside to speak with a neighbor, so she decided to take him to his own apartment. It was during this drive that the accident occurred. Based on text messages between Owens and Shiner—which defense counsel admitted into evidence on cross-examination—Detective Carmichael believed they had a "pretty toxic" relationship.

During that interview, Owens repeated her previous statement that Shiner had jerked the steering wheel, adding that it went all the way around until she heard a click and that she accidentally hit the accelerator when she went to apply the brakes. Owens also acknowledged running the stop sign and said she was driving about 50 miles per hour. She was not aware her license had been suspended. Detective Carmichael said that Owens recalled other details, like the location of her cigarettes and phone, and managed to call 911 after the accident.

Detective Carmichael's investigation led to a search warrant for the restraint control module on Owens' vehicle, which he executed with help from Trooper Bryan Wade from the Kansas Highway Patrol. Trooper Wade, who had training in such devices, testified that he downloaded the event data recorder (EDR) information from Owens'

vehicle into a report. He testified in depth regarding that EDR report, which revealed the vehicle's speed in the seconds leading up to the accident.

Following Trooper Wade's testimony, the State rested. Owens' counsel moved for a directed verdict on the involuntary manslaughter and vehicular homicide charges, arguing that the State presented no evidence about Shiner's cause of death. The district court denied Owens' motion, finding there was enough evidence presented from which the jury could infer that the car crash caused Shiner's death.

Owens called Travis Jones, an expert witness in vehicle accident reconstruction, in her defense. Jones was previously employed as a police officer for 14 years and had training and experience in accident reconstruction. He also taught courses in accident investigation to other police officers and published several articles on the topic. Jones mentioned several omissions from the documentation provided by the officers that would have helped determine the cause for the crash. Jones concluded—based on Owens' statement and the observations from the officers' investigation—that the crash occurred because of the steering wheel being jerked by a passenger.

During closing arguments, the prosecutor stated the following:

"I do want to briefly address the element of, Killed [*sic*] Raymond Shiner. Ladies and gentlemen, I may have made a mistake by not bringing in a paramedic or a doctor to describe to you in gruesome detail the injuries that Mr. Shiner suffered. However, I again invite you to look at the photographs carefully, listen to the testimony you heard of the two men that were the first people there. Maybe not the first people there but . . . Deputy Wylie, who was the first law enforcement on scene, and, of course, Detective Carmichael, who arrived shortly after. They advised to you that during the entire time they were there, Mr. Shiner was nonresponsive from the injuries received in that accident. And we heard that paramedics pronounced him dead at the scene. He didn't even make it to the hospital."

In response, defense counsel pointed out that the "only medical testimony" offered by the State was that the county coroner pronounced Shiner dead at the scene.

At the conclusion of the trial, the jury acquitted Owens of the involuntary manslaughter charge, but found her guilty of vehicular homicide, driving while suspended, speeding, and failure to stop at a stop sign. Owens moved for a judgment of acquittal on the vehicular homicide charge despite the jury's verdict, arguing the State failed to establish all the elements of the offense. The district court denied the motion, noting there was sufficient evidence presented from which the jury could have concluded that Owens—and not Shiner—was at fault for the crash because she "operated the vehicle in a manner that constituted a material deviation from the standard of care."

The district court then sentenced Owens to 12 months in jail on the vehicular homicide charge and 6 months in jail on the driving while suspended charge, ordering the sentences to be served consecutively for a total jail sentence of 18 months. The court also imposed fines of \$1,000 and \$100 for these convictions, respectively, along with fines of \$105 and \$500 for the traffic infractions.

Owens timely appeals.

WAS THERE SUFFICIENT EVIDENCE PRESENTED
TO SUPPORT A VEHICULAR HOMICIDE CONVICTION?

Owens argues her conviction for vehicular homicide should be set aside because the State failed to present sufficient evidence establishing the cause and manner of Shiner's death. In her view, the State was required to present some evidence to prove that the accident caused Shiner's death, but instead, merely established a coincidence of time and place between the accident and his death. In response, the State concedes it introduced no autopsy or other medical testimony directly related to the cause of death,

but it argues circumstantial evidence supports the jury's verdict and that there was no evidence admitted suggesting Shiner's death resulted from anything but the crash.

Applicable legal standards

Owens brought this argument to the district court's attention twice: First, by making an oral motion for judgment of acquittal shortly after the State rested its case, and then again in a renewed motion once the jury had rendered its verdict. Even though Owens certainly preserved the issue, a criminal defendant need not challenge the sufficiency of the evidence below to preserve that issue for appeal. *State v. Hilyard*, 316 Kan. 326, 330, 515 P.3d 267 (2022).

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

As Owens also points out, "[t]here must be evidence supporting each element of a crime to meet the sufficiency of the evidence standard." *Hilyard*, 316 Kan. at 330. A verdict can be supported by circumstantial evidence, if such evidence provides a basis for a reasonable inference by the fact-finder about the fact in issue. Circumstantial evidence, in order to be sufficient, need not exclude every other reasonable conclusion. *State v. Colson*, 312 Kan. 739, 750, 480 P.3d 167 (2021).

Sufficient evidence supported Owens' conviction for vehicular homicide.

The State charged Owens with both involuntary manslaughter and vehicular homicide, yet the jury only found her guilty of vehicular homicide. Kansas law defines vehicular homicide relevant to this appeal as

"the killing of a human being committed by the operation of an automobile, . . . in a manner which creates an unreasonable risk of injury to the person or property of another and which constitutes a material deviation from the standard of care which a reasonable person would observe under the same circumstances." K.S.A. 2019 Supp. 21-5406(a).

Although not explicitly stated in the statute, Kansas courts have long recognized that a conviction for vehicular homicide requires proof that a defendant's conduct proximately caused the victim's death. In *State v. Gordon*, 219 Kan. 643, 653, 549 P.2d 886 (1976), *superseded by statute on other grounds as stated in State v. Murry*, 271 Kan. 223, 21 P.3d 528 (2001), the Kansas Supreme Court explained that "[w]hile contributory negligence is no defense in a prosecution for vehicular homicide, it is a circumstance to be considered along with all other evidence to determine whether appellant's conduct was or was not the proximate cause of decedents' deaths." See also *State v. Trcka*, 20 Kan. App. 2d 84, 88, 884 P.2d 434 (1994) ("Proximate cause is one of the elements which must be proved in order to convict a defendant of vehicular homicide.").

The only element of the vehicular homicide conviction Owens challenges is whether the State proved that her actions proximately caused Shiner's death. Accordingly, Owens abandons any challenge to the remaining elements of vehicular homicide—i.e., that she operated an automobile "in a manner which create[d] an unreasonable risk of injury . . . which constitute[d] a material deviation from [a reasonable] standard of care." K.S.A. 2019 Supp. 21-5406(a); see *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021) (issues not briefed are waived or abandoned).

In its response, the State draws to our attention that Owens relies, in part, on cases interpreting the involuntary manslaughter statute to support her sufficiency argument. But reviewing Owens' arguments makes it clear that she merely relies on cases discussing involuntary manslaughter to explain what it means for a criminal defendant's conduct to be the proximate cause of a victim's death. To that end, the State suggests courts should apply a different proximate cause analysis depending on whether the defendant has been convicted of involuntary manslaughter versus vehicular homicide. But although these are technically different crimes, the Kansas Supreme Court has held that involuntary manslaughter involving an automobile and vehicular homicide *both* require that the defendant's conduct was the proximate cause of the victim's death. *State v. Chastain*, 265 Kan. 16, 24-25, 960 P.2d 756 (1998); see also *State v. Scott*, 285 Kan. 366, 372, 171 P.3d 639 (2007) (holding under prior version of the involuntary manslaughter statute that "the State must prove that a defendant's behavior was the proximate cause of the victim's death"). So, there is no discernable reason we cannot rely on the cases Owens cites to determine whether there was sufficient evidence that Owens' conduct proximately caused Shiner's death.

Owens frames her argument as an application of the rationale used by the Kansas Supreme Court in the 2007 case of *Scott*, in which the court held there was insufficient evidence to support a conviction for involuntary manslaughter. The facts involved a customer who died after consuming an alcoholic concoction at the defendant's bar, and the primary issue on appeal was whether the State proved by sufficient evidence that the defendant's actions proximately caused the victim's death. The Kansas Supreme Court determined the evidence presented could not sustain the conviction because the State failed to prove that the alcohol alleged to have been supplied by the defendant "marked the doorway from her intoxication to [the victim's] death." 285 Kan. at 373. In reaching that conclusion, the court examined several Kansas cases which "consistently held" that a conviction for involuntary manslaughter requires proof that a defendant's *conduct* caused the victim's death. See 285 Kan. at 369-71. Of those cases, Owens asserts three help to

resolve her appeal because they explain the extent of proximate cause that must be shown.

First, Owens argues that "some causal connection and/or legal relation between the commission of the unlawful act and the death must appear and that *there must be more than a mere coincidence of time and place between the wrongful act and the death.*" (Emphasis added.) *State v. Yowell*, 184 Kan. 352, 361, 336 P.2d 841 (1959). In *Yowell*, the defendant raised a jury instruction challenge on appeal based in part on the district court's instruction that the jury could convict him of manslaughter simply because he was driving without a valid license when a fatal traffic accident occurred. The Kansas Supreme Court found the instruction amounted to reversible error because the district court failed to instruct the jury about proximate cause. 184 Kan. at 363-64.

Although the Kansas Supreme Court was merely compiling rules from other jurisdictions on the topic of proximate cause when it made this statement in *Yowell*, it has continued to state the rule as a valid explanation of proximate cause. In *Williams v. Esaw*, 214 Kan. 658, 522 P.2d 950 (1974), our Supreme Court examined the cause of a collision in a wrongful death action. In doing so, the court reviewed several cases discussing the rule that a traffic violation could only give rise to liability for another's injuries in a traffic accident if there was evidence proving the violation proximately caused the accident and resulting injuries. The court concluded this discussion by citing the same passage from *Yowell* as an "aptly phrased" summary of the rationale in those cases. *Williams*, 214 Kan. at 661-62.

Second, Owens cites an earlier, similarly named opinion in *State v. Scott*, 201 Kan. 134, 439 P.2d 78 (1968), which also involved a defendant convicted of manslaughter following a traffic accident which resulted in another driver's death. More directly applicable to the facts here, the defendant on appeal had challenged the State's use of a doctor's testimony about the victim's injuries rather than an autopsy. Our Supreme Court

found defendant's argument lacked merit because the doctor's testimony "clearly established that death was due to the injuries sustained in the collision." 201 Kan. at 137.

Finally, Owens relies on *State v. Maxfield*, 30 Kan. App. 2d 873, 878-79, 54 P.3d 500 (2001), to argue the State was required to present evidence that Shiner's death was due to the injuries sustained in the collision. In *Maxfield*, a jury convicted the defendant of involuntary manslaughter after a bar fight resulted in a man's death. On appeal, Maxfield challenged the sufficiency of the evidence, arguing the State failed to prove beyond a reasonable doubt that he struck the victim in the head as he lay unconscious on the ground. The Kansas Court of Appeals panel disagreed, noting ample evidence existed in the record that the defendant repeatedly hit the victim in the head. 30 Kan. App. 2d at 879. Unlike this case, in *Maxfield* the evidence included medical evidence, such as the coroner's testimony that the victim died due to multiple blows to the head and because of several injuries combined.

Based on these three decisions, Owens asserts this court should overturn her conviction for vehicular homicide because the State proved only that Shiner was an occupant in Owens' vehicle and that he had died by the time the emergency responders arrived. In other words, Owens argues the State presented no evidence to show that her driving "marked the doorway" to Shiner's death or that his death was little more than "a mere coincidence of time and place" between her driving and his death. See *Scott*, 285 Kan. at 373; *Yowell*, 184 Kan. at 361. We find Owens' argument unpersuasive.

The essence of Owens' argument is that without explicit medical testimony about Shiner's injuries or cause of death, a rational fact-finder could not reasonably conclude that her actions caused his death. But neither the language of the vehicular homicide statute nor the common law requires a specific type of evidence. For example, the 1968 *Scott* decision—the case with facts most similar—approved using medical testimony from a doctor rather than an autopsy. Yet the Supreme Court did not go as far as saying a

specific form of evidence was preferable. Rather, the court's focus was on whether the evidence presented showed proximate cause. 201 Kan. at 137.

Caselaw has established that 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) (citing *State v. Logsdon*, 304 Kan. 3, 25, 371 P.3d 836 [2016]). For circumstantial evidence to sufficiently sustain a conviction, it "need not rise to that degree of certainty which will exclude any and every other reasonable conclusion," but it must provide a foundation for the jury to make a reasonable inference about a fact at issue. *State v. Colson*, 312 Kan. 739, 750, 480 P.3d 167 (2021). And Owens bears a high burden to succeed on her sufficiency of evidence claim. See *Meggerson*, 312 Kan. at 247 ("[O]nly when the testimony is so incredible that no reasonable fact-finder could find guilt beyond a reasonable doubt should we reverse a guilty verdict.").

Owens' sole argument seems to be that the State did not prove precisely what injuries Shiner sustained or his exact cause of death through any type of medical or other testimony. But Owen's attempt to frame Shiner's death as a mere coincidence of time and place is misguided. Given the amount of circumstantial evidence in the record, the jury could reasonably infer that Shiner sustained fatal injuries during the crash. See *Colson*, 312 Kan. at 750.

Here, Owens essentially concedes in her briefing that sufficient evidence supports the following facts: (1) She was speeding and ran a stop sign while Shiner was in the passenger seat of her vehicle; (2) shortly after committing these traffic violations, Owens' vehicle spun, entered the ditch, and crashed into a tree on the front passenger side—where Shiner was sitting at the time; (3) Shiner was unconscious just after the accident when Owens called 911; and (4) EMS declared Shiner dead at the scene of the crash. Witnesses testified that Shiner was pronounced dead at the scene of the accident. Photos admitted into evidence—including the photo of Shiner hanging halfway out the

passenger-side vehicle window—also support the jury's reasonable inference that Shiner's death was proximately caused by the accident. And Owens' own argument that Shiner yanked the steering wheel immediately before the accident lends credibility to the inference that he was very much alive before the accident but deceased immediately after the accident, when emergency responders arrived on scene.

This court's standard of review requires us to view the evidence in the light most favorable to the State, without reweighing evidence or resolving evidentiary conflicts. *Aguirre*, 313 Kan. at 209. Doing so, we find sufficient circumstantial evidence to support Owens' conviction of vehicular homicide.

DOES PROSECUTORIAL ERROR REQUIRE REVERSAL OF OWENS' CONVICTIONS?

Owens next argues the State committed prosecutorial error in its closing arguments by misstating facts to the jury and referring to evidence that was not presented at trial, specifically evidence detailing Shiner's injuries. According to Owens, the prosecutor's statements "compounded" the State's failure to present sufficient evidence to support all the elements of vehicular homicide.

Applicable legal standards

Although Owens' counsel did not object to the prosecutor's statement at issue, we may still reach the issue. Appellate courts will review a prosecutorial error claim based on a prosecutor's comments made during voir dire, opening statement, or closing argument even without a timely objection. *State v. Bodine*, 313 Kan. 378, 406, 486 P.3d 551 (2021).

To evaluate claims of prosecutorial error, appellate courts use a two-step process by first determining whether error occurred and, if so, determining whether that error

prejudiced the defendant's right to a fair trial. *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016). At the first step, appellate courts evaluate error by deciding "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." 305 Kan. at 109.

At the second step, the court applies the traditional constitutional harmless inquiry, which requires the State to 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.'" *Sherman*, 305 Kan. at 109 (quoting *State v. Ward*, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 [2011]). When conducting this analysis, an appellate court must consider "any and all alleged indicators of prejudice, as argued by the parties, and then determine whether the State has met its burden." *Sherman*, 305 Kan. at 111. While the strength of the evidence can be considered, the court's focus must be on "the impact of the error on the verdict [because] prejudice can exist even 'in a strong case.'" 305 Kan. at 111.

We find no error in the prosecutor's statements.

Owens' argument centers on the State's closing argument, during which the prosecutor said he "may have made a mistake by not bringing in a paramedic or a doctor to describe in gruesome detail the injuries that Mr. Shiner suffered." Owens argues this statement amounts to error because the prosecutor was referring to facts not in evidence and suggesting evidence existed without offering proof. See *State v. Stimec*, 297 Kan. 126, 128, 298 P.3d 354 (2013) ("This court has repeatedly emphasized that it is improper for a prosecutor to comment on facts not in evidence."); *State v. Tahah*, 293 Kan. 267, 277, 262 P.3d 1045 (2011) ("It is fundamental that prosecutors must not argue facts not in evidence."). Owens also argues that the prosecutor's use of the word "gruesome"

indicates the prosecutor was suggesting to the jury that he could have made the jurors' duty "much more unpleasant" but chose not to do so.

Among the cases cited by Owens is the 1935 United States Supreme Court case of *Berger v. United States*, 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935). In *Berger*, the Court explained that a prosecutor oversteps the bounds of legal conduct when he misstates facts, suggests facts exist without proof, or "assum[es] prejudicial facts not in evidence," along with other improper behavior. 295 U.S. at 84. Owens also cites to an older edition of the American Bar Association (ABA) Standards for Criminal Justice and to the Kansas Rules of Professional Conduct (KRPC) to argue the prosecutor erred. See KRPC 3.4(e) (2023 Kan. S. Ct. R. at 395). The most current ABA Standard states: "When before a jury, the prosecutor should not knowingly refer to, or argue on the basis of, facts outside the record, *unless such facts are matters of common public knowledge based on ordinary human experience . . .*" (Emphasis added.) Standard 3-6.9, Facts Outside the Record, ABA Standards for Criminal Justice (4th ed. 2015).

Although Owens claims the prosecutor erred by generally commenting about injuries Shiner suffered, despite not presenting evidence to establish any particular injuries, we find no error in the prosecutor's statement. The State is permitted to draw and argue reasonable inferences from the evidence presented. See *Tahah*, 293 Kan. at 277 ("[P]rosecutors are given wide latitude during closing to argue reasonable inferences based on the evidence adduced at trial."). It would not be unreasonable to infer that Shiner indeed suffered injuries during the crash, because he did not survive the accident. Proof of a specific injury was unnecessary because the inference that Shiner experienced an injury in the crash that resulted in his death is a matter of common public knowledge based upon ordinary human experience. Thus, we find the prosecutor did not err by generally mentioning that he could have presented medical testimony to establish Shiner's injuries.

As to her second argument, Owens suggests the prosecutor was alluding to a deliberate choice he made to spare the jury from a more unpleasant experience by omitting evidence of Shiner's particularly "gruesome" injuries. Although not expounding on this point in her brief, Owens appears to be arguing that the prosecutor erred by suggesting to the jury that Shiner's injuries were "gruesome" to garner sympathy for him. If that were the case, such a statement could amount to prosecutorial error. See *State v. Holt*, 300 Kan. 985, 992, 336 P.3d 312 (2014) ("[I]t is well known that jurors 'must decide a case on evidence and controlling law, and not on sympathy, emotion, or prejudice.'").

But Owens misconstrues the prosecutor's statement. The prosecutor mentioned he failed to secure medical testimony to describe Shiner's injuries "in gruesome detail"—not that Shiner's injuries, themselves, were gruesome. And even if the prosecutor had referenced "gruesome" injuries, the record reflects that the jury considered both the officers' testimony about seeing Shiner hanging halfway out the passenger-side window underneath a tree branch and the photographs depicting the same. In either circumstance, the prosecutor did not misstate the evidence as to establish error.

Affirmed.