NOT DESIGNATED FOR PUBLICATION

No. 125,172

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

MATTHEW COLE SCHERER,
Appellant.

MEMORANDUM OPINION

Appeal from Doniphan District Court; JAMES A. PATTON, judge. Opinion filed August 25, 2023. Affirmed.

Carl E. Cornwell, of Olathe, for appellant.

Charles D. Baskins, county attorney, and *Derek Schmidt*, attorney general, for appellee.

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

PER CURIAM: A surprise birthday party turned deadly when repeated physical altercations occurred during the gathering, and a short time later, Jason Pantle was dead. A jury convicted one partygoer, Matthew Cole Scherer, of second-degree murder in Pantle's death. Scherer now appeals his conviction raising several issues: (1) The prosecutor committed error during his closing statement by bolstering a State's witness and diluting the burden of proof; (2) the district court erred by allowing the State to elicit a lay opinion from Scherer; (3) the district court erred by providing a jury instruction for aiding and abetting when it was factually inappropriate; (4) the district court erred by denying Scherer's motion for a new trial and judgment of acquittal based on the jury

instruction error; and (5) cumulative error deprived Scherer of his right to a fair trial. For the reasons articulated below, we find Scherer's claims of prosecutorial and trial errors fail, and we affirm his conviction.

FACTUAL AND PROCEDURAL BACKGROUND

Scherer and codefendants Scott Vandeloo and Brian Spilman Jr. were part of a group of people attending a birthday party in September 2019 at a private shop in southern Doniphan County. A party host asked Pantle to leave the party and, thus, began a domino of altercations that would end with Pantle's death.

In December 2019, Scherer was charged with one count of murder in the second degree in violation of K.S.A. 2019 Supp. 21-5403(a)(2). A three-day jury trial convened in February 2022. Much of the trial consisted of testimony by multiple people who witnessed various portions of the altercations. Alcohol was consumed by many partygoers, and witness accounts varied as to details of what happened. See *State v. Spilman*, 63 Kan. App. 2d ___, 2023 WL 4376272, at *2-6 (2023) (discussing the facts in one co-defendant's case).

State's witness Gracie Seager testified that on September 21, 2019, a surprise birthday party for her mother, Amy Scherer, was held at her grandfather's shop. Scherer is Seager's uncle and was present at the party.

During the party, two men began arguing and Seager asked the men to leave. Seager also told Pantle to leave. Rather than leaving, Pantle called Seager a name, pushed her, and said to her, "[W]hat the fuck are you going to do about it?" Seager stated that Vandeloo, who was a friend of hers, came to her aid and began to argue with Pantle.

Another State's witness, Morgan Hull, testified that soon after Vandeloo began arguing with Pantle, codefendant Spilman Jr. shoved Pantle and hit him. Pantle fell to the ground and Hull saw Spilman Jr. straddle Pantle, punching him with both his left and right hands. Hull testified that the punches looked hard and lasted no more than five minutes. She stated that when Spilman Jr. got off Pantle, Vandeloo then got on top of Pantle and began hitting him. She testified Vandeloo also hit Pantle hard for about five minutes. When Vandeloo stood up, Pantle lay outside on the ground for a couple of minutes trying to get back to his feet.

Hull testified that Pantle got up and tried to walk back toward the shop to come in the overhead door. She saw Spilman Jr. run after Pantle and start hitting him again. Hull said that this altercation happened in the grass area between two vehicles. Although it was raining, and had been raining off and on all night, Hull left the shop and went into the rain to attempt to stop the fight. She said she told the men that "enough is enough, one fight was plenty," but then Brian Spilman Sr. threw her back onto a truck and told her it "wasn't [her] fucking problem." Hull testified she then turned around to go back to the shop. She told the jury that she heard Scherer say, "[Y]ou're good bro, get up bro you're good," to Pantle.

Pantle eventually got back on his feet and walked toward the door of the shop. Hull testified that she saw Pantle with his arms out and stopped in front of Scherer, but because she was on the opposite side of the shop, she could not hear what they were saying. Hull testified that she did not see Pantle spit on or try to headbutt or make any other aggressive action toward Scherer. While Pantle's hands were out, Hull saw Scherer hit Pantle in the jaw and knock him unconscious. Hull reported that Pantle fell backward straight onto his back and hit his head on the concrete. She testified the sound of Pantle's head hitting the ground was terrible.

Hull said that Pantle lay unconscious on the concrete with his legs inside the shop and his upper body laying outside the shop in the rain. Scherer dragged Pantle into the shop and leaned him up against a couch. Hull was worried Pantle would choke on vomit or something so she and Spilman Jr. laid Pantle on his side on the couch.

Having some certified nursing assistant training, Hull checked Pantle's pulse and made it known that she believed Pantle needed medical treatment. Hull testified that Scherer told her that if she wanted to get Pantle treatment, she could load him up and take him herself, discouraging her to call for an ambulance. Hull testified that, because she was afraid to call for help inside the shop after being told she could not, she finally went to her car and called her friend Kailen Kurtz for help at 2:34 a.m. Kurtz arrived about 45 minutes later and called Hull on her cellphone to come out of the shop. Hull recalled these specific times because she looked at her cellphone call log during her 2019 interview with the Kansas Bureau of Investigation.

In the meantime, Austin Spilman and Pantle's son, John, also tried to enter the shop to aid Pantle but were prevented from doing so by Scherer. Austin and John each testified that Scherer told them if they did not stop trying to get inside, they "were next." Austin and John testified Scherer at first told them that they could not take Pantle from the party. Neither Austin nor John were of legal drinking age, although each testified to having consumed alcohol that night.

Hull testified that by the time her friend Kurtz arrived, Austin and John had decided to take Pantle from the party. She said Spilman Sr., Spilman Jr., Vandeloo, Scherer, Austin, John, and two other partygoers together loaded Pantle into the backseat of Austin's truck. The men did not get Pantle completely into the truck, so Hull and Kurtz then helped Austin and John get his father completely into the truck as they were leaving. Hull testified that she remembered Pantle mumble an expletive as they were pulling him in the rest of the way into the truck. Hull said she told Austin and John that they should

take Pantle to the hospital. Kurtz also testified that she told the men they should take Pantle to the hospital.

Austin and John testified that they did not take Pantle to the hospital but took him to Austin's apartment. Austin testified that they did not take Pantle to the hospital because they did not know how serious the situation was and wanted to figure out what was going on. Although Pantle was unconscious most of the trip, he at times regained consciousness and murmured words, but neither Austin nor John could understand what Pantle was saying. Austin and John each testified they did not see the fighting between Pantle and Vandeloo or Spilman Jr. Neither Austin nor John witnessed Scherer punch Pantle.

A neighbor heard noise and called 911 at 4 a.m. The neighbor testified that she heard what sounded like muffled hitting and someone trying to wake somebody up. After law enforcement and an ambulance arrived Pantle was taken to the Atchison Hospital but was soon transferred to the University of Kansas Medical Center in Kansas City, where he eventually died.

Chief Forensic Pathologist, Altaf Hossain, at the Forensic Medical Morgue of Kansas City, Kansas, testified at trial regarding Pantle's injuries. The district court designated Dr. Hossain as an expert witness. Dr. Hossain testified that Pantle's injuries were mostly limited to his head. Dr. Hossain described to the jury that Pantle had global subgaleal hemorrhages or blood clots on all sides of his skull, non-displaced fracture of the frontal bone, fracture of the maxilla, fracture of the occipital bone, and other fractures running through Pantle's skull. Dr. Hossain concluded the injuries Pantle suffered resulted from the combined blows to Pantle's head and described that Pantle died from complications of subdural hematoma with multiple skull fractures. Dr. Hossain testified the manner of death was homicide.

Dr. Hossain testified that Pantle's initial chance of survivability was very small. Dr. Hossain added that earlier intervention would have been good, but he could not give a particular time frame as to when Pantle's survivability would have dramatically decreased. Dr. Hossain also testified that Pantle's prognosis would have worsened with delay in seeking medical assistance.

Scherer also testified on his behalf during trial. Scherer stated that he was outside the situation and was observing from behind a tractor. Scherer testified that he did not consider the interaction between Spilman Jr. and Pantle a fight, but a "detainment"; that it looked like Spilman Jr. was trying to remove Pantle from the shop. Scherer said he saw Spilman Jr. and Pantle rolling around but not really fighting.

Scherer testified that when he broke up the fight between Spilman Jr. and Pantle, Pantle said to Vandeloo, "[D]o you want some too[?]" That is when Pantle and Vandeloo got into a physical altercation. Scherer testified that he had to pull everyone back and got in between everyone and said, "[E]nough is enough." Scherer stated he told Pantle to break it up and said, "[Y]ou're good, let's get to your car and get out of here." Scherer testified that he and others were telling Pantle to just get to his truck and leave.

After Scherer went back to the shop, Pantle then approached him at a very fast pace to the right side of the shop door where he was standing. Scherer testified it was raining very heavily to the point you could not see in front of your face. He stated that Pantle was coming toward him aggressively. Scherer told the jury that Pantle called him a "nigger" and asked him, "[W]hat the fuck are you going to do about it?" Scherer testified that Pantle was 3 feet away from him, outside the door, when Pantle said those words.

Scherer testified he did not see Pantle raise his fist at him. He said Pantle had his head back slightly and he thought Pantle planned to head butt him across the nose. Scherer had an earlier football injury to his neck and fearing Pantle would hit him and

potentially paralyze him, Scherer stated he feared for his life. Scherer admitted that when Pantle was within arm's length, he punched Pantle in the jaw, knocking him unconscious.

Scherer also admitted that he told people not to call the police. He testified that he did not want to get the police involved because he knew Pantle was on bond for a criminal case. He also stated that he did not want Pantle's bond revoked because Pantle was a musical "prodigy" and "a beautiful piece of work."

After witness testimony concluded, on the third day of trial, defense counsel objected to the State's request to include an aiding and abetting jury instruction. Defense counsel argued that there was no evidence that Scherer acted in concert with the two codefendants, Vandeloo and Spilman Jr., and Dr. Hossain's testimony showed that Scherer's single hit did not cause Pantle's death. The State countered that Scherer was present during the altercations, the testimony of the witnesses showed that Scherer prevented others from getting medical aid for Pantle, and that he would not let them leave. The district court overruled defense counsel's objection and allowed the aiding and abetting instruction to be read to the jury as jury instruction No. 9.

The jury found Scherer guilty of murder in the second degree. Scherer filed a motion for a new trial or judgment of acquittal based on insufficient evidence. The district court denied both motions and ultimately sentenced Scherer to 131 months' imprisonment.

Scherer timely appeals.

THE PROSECUTOR DID NOT COMMIT REVERSIBLE ERROR IN CLOSING ARGUMENT

In his appeal, Scherer claims the prosecutor erred during closing argument by (1) bolstering and vouching for witness credibility, which diluted the State's burden under an

affirmative defense of self-defense; and (2) by arguing facts not in evidence and misstating the law. We address each of Scherer's claims in turn.

Standard of Review

Although Scherer's trial counsel did not object during the prosecutor's closing argument, appellate courts will review claims of prosecutorial error based on a prosecutor's comments made during voir dire, opening statement, or closing argument without a timely objection. But the court may use the presence or absence of an objection in its analysis of the alleged error. *State v. Butler*, 307 Kan. 831, 864, 416 P.3d 116 (2018). A claimed misstatement of controlling law in the State's closing argument must be reviewed on appeal, even if the defendant failed to make a timely objection at trial. *State v. Gunby*, 282 Kan. 39, 63, 144 P.3d 647 (2006).

The appellate court uses a two-step process to evaluate claims of prosecutorial error: error and prejudice. *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016).

> "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.' We continue to acknowledge that the statutory harmlessness test also applies to prosecutorial error, but when 'analyzing both constitutional and nonconstitutional error, an appellate court need only address the higher standard of constitutional error.' [Citations omitted.]" *Sherman*, 305 Kan. at 109.

See *State v. Blansett*, 309 Kan. 401, 412, 435 P.3d 1136 (2019). Even if the prosecutor's actions are egregious, reversal of a criminal conviction is not an appropriate sanction if the actions are determined to satisfy the constitutional harmless error test. *Sherman*, 305 Kan. at 114.

The Prosecution Did Not Bolster Witness Credibility

Scherer contends mainly that the prosecutor improperly bolstered and vouched for the credibility of State's witness Hull. Specifically, Scherer challenges this portion of the prosecutor's closing statement:

> "You heard the defendant testify that he was in fear of his life from [Pantle]. Again remember Morgan Hull and other witnesses told you that [Pantle] had already been engaged with two co-defendants three times. He was in fear for his life. [Hull] testified that [Pantle] stood in front of this defendant like this (indicating with arms and hands.) The defendant said it was more like this (indicating with arms and hands.) He said this was an aggressive posture. Ladies and gentlemen, you are allowed to use your common knowledge and experience. If one of the KBI agents sitting in the audience or the sheriff's deputy stands up right now and says hands up, how many people in this room would do this? Is this an aggressive posture?"

Scherer maintains that the prosecutor erred by telling the jury that they could use their "common knowledge and experience" as they deliberated about the "hands up" simulation the prosecutor recreated, because the simulation was not the same situation Scherer was in when claiming self-defense.

The State responds that the prosecutor's statement simply reminded the jury what Hull testified and did not address the credibility or the veracity of her testimony. The State claims the prosecutor was simply asking the jury to consider the credibility of Scherer based on the inconsistencies between his testimony and Hull's.

A prosecutor errs when arguing a fact or factual inference without an evidentiary foundation. *State v. Watson*, 313 Kan. 170, 179, 484 P.3d 877 (2021). And a prosecutor may not comment on the credibility of witness testimony. *State v. Lowery*, 308 Kan. 1183, 1207, 427 P.3d 865 (2018). But prosecutors are generally afforded wide latitude in crafting closing arguments to address the weaknesses of the defense. *Watson*, 313 Kan. at 176. And the prosecutor may craft arguments that draw reasonable inferences from the evidence and explain to the jury "what they should look for in assessing witness credibility," including pointing out any inconsistencies. *Lowery*, 308 Kan. at 1207.

When determining whether the prosecutor's statements fall outside the wide latitude given to the prosecutor, we cannot simply analyze the statements in isolation but we must consider the context in which the statements were made. *State v. Ross*, 310 Kan. 216, 221, 445 P.3d 726 (2019). "Often the line between permissible and impermissible argument is context dependent." *State v. Martinez*, 311 Kan. 919, 923, 468 P.3d 319 (2020).

Our review of the record does not support Scherer's claim that the prosecution improperly bolstered Hull's credibility by assuming a posture that encouraged the jurors to find Hull's testimony more reliable than Scherer's own. When we examine the context of the prosecutor's entire closing argument, we see that the statements at issue came after the prosecutor's summary of the inconsistencies in Scherer's testimony compared to other witnesses, including Hull's.

Here, the prosecutor was reminding the jury about the differences between witnesses' testimonies and commenting on the inconsistencies in Scherer's version of events. A prosecutor is allowed to comment on the weakness or inconsistencies in the defendant's statements or story. *State v. Bridges*, 297 Kan. 989, 1013, 306 P.3d 244 (2013).

And, in the same closing argument, the prosecutor reiterated to the jurors that it was for them to decide the credibility of the witnesses. In pertinent part, the prosecutor stated, "Ladies and gentlemen, you are the final arbitrator of the credibility of the witnesses. It's your job to determine the credibility you give his testimony and the weight." The district court also provided in jury instruction No. 1 and No. 4 that it is for the jury to "determine the weight and credit to be given the testimony of each witness." Jurors are presumed to follow the instructions provided by the district court. *State v. Rogers*, 276 Kan. 497, 503, 78 P.3d 793 (2003). When a jury is properly instructed on the burden of proof, a prosecutor may argue inferences based on "the balance or lack of evidence." *State v. McKinney*, 272 Kan. 331, 346, 33 P.3d 234 (2001), *overruled on other grounds by State v. Davis*, 283 Kan. 569, 158 P.3d 317 (2006).

The prosecutor used Hull's testimony to emphasize the inconsistency in Scherer's testimony. And the jury was properly instructed that they alone could determine witness credibility. In the context of the entire closing argument, we find the prosecutor's comments did not fall outside the wide latitude afforded to prosecutors.

The Prosecutor Did Not Dilute the State's Burden of Proof

Scherer also argues that in the same closing argument, the State diluted its burden of proof to disprove his self-defense theory. In pertinent part, the prosecutor stated the following regarding Scherer's defense:

> "Now the defendant claims that he hit [Pantle] in self-defense. Judge Patton read that instruction. I want you to pay particular attention to the second paragraph. The burden never shifts. *It's the State's burden to prove he didn't have to use self-defense or that self-defense wasn't warranted. It's not his burden to prove that at all*, but I want to draw your attention to the definition. He had to have a reasonable belief both—the second paragraph reads a reasonable belief requires both a belief by the defendant. We have that in this case. He testified to you he believed he had to, and the existence of facts

> that would persuade a reasonable person to that belief. Ladies and gentlemen, you're that reasonable person. I submit to you the question of whether the reasonable belief that such physical force was necessary as defined by that instruction rests entirely upon the testimony of Morgan Hull and the defendant. Did the State meet[] its burden of proof through the testimony of Morgan Hull that she saw no . . . aggressive behavior—
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> . . . .
>
> "That she did not see the defendant attempt to head butt or the victim attempt to head butt this defendant, that's a question you have to resolve." (Emphasis added.)

In the closing argument, Scherer maintains the prosecutor failed to present to the jury that the State had the burden to disprove the self-defense claim beyond a reasonable doubt. Scherer asserts that the prosecutor's comments during closing argument about self-defense, combined with the prior statements that the jury could use their common knowledge and experience, diluted the State's burden of proof.

It is true that a prosecutor may not attempt to shift the burden of proof to the criminal defendant or misstate the legal standard about the applicable burden. *State v. Williams*, 299 Kan. 911, 939, 329 P.3d 400 (2014). But a prosecutor may properly discuss the weaknesses of the defense's case by pointing to a lack of evidence supporting the defendant's theory. 299 Kan. at 940; *State v. Duong*, 292 Kan. 824, 832-33, 257 P.3d 309 (2011).

Under K.S.A. 2022 Supp. 21-5108(c), once a defendant provides competent evidence supporting a theory of self-defense "the state has the burden of disproving the defense beyond a reasonable doubt." Here, the district court found that Scherer provided competent evidence of self-defense, and the State does not claim otherwise. So, the State's burden at trial was to disprove the self-defense theory beyond a reasonable doubt.

Scherer argues that the prosecutor's question, "Did the State meet its burden . . . through the testimony of Morgan Hull that she saw no . . . aggressive behavior," along

with the statement that the jury may use their common knowledge and experience, together diluted the State's burden of proof to something below beyond a reasonable doubt. And again, Scherer contends the prosecutor's statements improperly bolstered Hull's credibility. We disagree.

The prosecutor's prior statement on common knowledge and experience was in context of the posture Pantle was in when approaching Scherer during their encounter. The prosecutor did not suggest that the jury should use common knowledge and experience in determining whether the State disproved the self-defense theory. The prosecutor was unclear about the State's precise burden to disprove Scherer's self-defense theory, but he did say unequivocally that it was the State's burden to prove that self-defense was unwarranted. Also, the prosecutor clearly stated that the burden to disprove self-defense never shifts and that it was not Scherer's burden to prove self-defense. Scherer's argument improperly removes the prosecutor's statements from their context.

The prosecutor's closing argument did not dilute the State's burden of proof or shift the burden to Scherer. And even if the prosecutor did not specifically outline that the State's burden was to disprove the affirmative defense beyond a reasonable doubt, the jury instructions given by the district court did so.

Jury instruction No. 10 provided general instructions for the defense:

> "Defendant claims his use of force was permitted as self-defense.
>
> "Defendant is permitted to use physical force against another person when and to the extent that it appears to him and he reasonably believes such physical force is necessary to defend himself against the other person's imminent use of unlawful force. Reasonable belief requires both a belief by defendant and the existence of facts that would persuade a reasonable person to that belief.
>
> "When use of force is permitted as self-defense, there is no requirement to retreat."

The district court then provided clarification of the burden of proof for the affirmative defense in the next instruction, jury instruction No. 11:

> "The defendant raises self-defense as a defense. Evidence in support of this defense should be considered by you in determining whether the State has met its burden of proving that the defendant is guilty. *The State has the burden to disprove this defense beyond a reasonable doubt. The State's burden of proof does not shift to the defendant*." (Emphasis added.)

Contrary to Scherer's argument on appeal, the district court made clear that the State's burden to disprove the defense was beyond a reasonable doubt. But even if the district court had failed to clarify the burden of proof when a self-defense instruction is given, our Supreme Court has held that such omission is not clear error warranting reversal. *State v. Staten*, 304 Kan. 957, 964-67, 377 P.3d 427 (2016). Our Supreme Court has established that considering the instructions given as a whole, the general burden of proof instruction sufficiently made it clear to the jury that the State's burden of proof beyond a reasonable doubt attached to the defense of self-defense. *State v. Crabtree*, 248 Kan. 33, 39-40, 805 P.2d 1 (1991).

The instructions here were clear and informed the jury of the State's burden to disprove Scherer's self-defense theory beyond a reasonable doubt and that the burden never shifted. Jurors are presumed to follow the instructions provided by the district court. *Rogers*, 276 Kan. at 503. Scherer's claim that the jury was not informed of the State's burden of proof or that the prosecution shifted the burden fails and we find the prosecution did not err.

The Prosecutor Did Not Misstate the Facts or the Law

For his final prosecutorial error claim, Scherer first argues that the prosecutor at various times misstated the facts or the law. He first argues that the prosecutor misstated

the testimony of the sole expert witness, Dr. Hossain, to display extreme indifference to the value of human life, an element to the crime charged. Second, Scherer asserts that the prosecutor misstated the facts to elicit a statement from Scherer that Pantle could have been alive if he were taken to the hospital sooner.

Scherer claims that the prosecutor misstated Dr. Hossain's prognosis that Pantle's survivability was very low to start with. During trial, Dr. Hossain testified that with the type of injury sustained by Pantle, the survivability rate was very small and receiving treatment earlier is better. Dr. Hossain also stated that, although he could not give a particular time frame in the decline of the survivability rate for a person with Pantle's prognosis, earlier intervention by medical personnel is always good and that more delay would worsen the person's prognosis.

Scherer argues that the prosecutor misused Dr. Hossain's testimony to show that any delay in Pantle receiving medical care was evidence that Scherer displayed extreme indifference to human life. Scherer objects to the following statement by the prosecutor:

> "Instead of calling an ambulance for [Pantle] so that he could get medical treatment, you've heard testimony that this defendant with others loaded him in the truck with a 19 year old and a 20 year old, who didn't see the three prior altercations and who admitted to you they were very drunk. *The chance of success for them was very low*. I would ask you to consider that bit of evidence and the previous when you consider whether this defendant acted with extreme indifference to the value of a human life." (Emphasis added.)

Scherer asserts that the prosecutor was unclear whether the "chance of success" comment referenced Pantle's rate of survivability or the possibility that the two young men would get Pantle to the hospital. He argues, however, that regardless of the context the prosecutor erred by stating that Scherer showed extreme indifference to the value of human life by sending Pantle with the two young men.

But again, Scherer ignores the entirety of the prosecutor's comments and takes the single statement out of context. The prosecutor clearly stated that the jury should consider "that bit of evidence and the previous" evidence when determining whether Scherer acted with extreme indifference. He did not rely solely on the act of sending Pantle away with the two young men. Rather, the prosecutor's comment encouraged the jury to consider all the evidence presented by the State's witnesses during trial. In his prior comments, the prosecutor emphasized that Pantle was denied treatment for at least 50 minutes as he laid on the couch. The prosecutor also relied on the evidence that Scherer prevented others from coming to Pantle's aid or calling the police or for an ambulance. Taken in context, the "chance of success" statement does not equate to error.

Scherer also alleges that the prosecutor misused Dr. Hossain's testimony about Pantle's prognosis to state that no matter when he was taken to the hospital, it would not have impacted his survivability. He argues that the following comment by the prosecutor mischaracterized the evidence:

> "*Extremely low prognosis of survival* and at least 50 minutes being held there. And I dispute the testimony was *if he'd have got to the hospital quicker he would have survived*. I don't believe you heard the coroner testify to that. *I don't believe the coroner would testify that after 30 minutes the survivability rate drastically reduced. So he certainly wasn't pinned down with if they would have just got him to the hospital sooner he would have made it*." (Emphases added.)

Yet Scherer once more takes the prosecutor's comment out of context. The prosecutor made these survivability comments in his rebuttal after defense counsel stated in his closing argument that if the two young men "had taken [Pantle] to the hospital, he'd be alive today." The prosecutor objected to that statement during defense counsel's closing argument, and then used the rebuttal argument to counter defense counsel's characterization of the evidence by restating Dr. Hossain's testimony. The prosecutor was pointing out that Scherer's defense counsel's closing argument was not supported by the

evidence, and his comments fell within the wide latitude afforded to prosecutors during closing arguments. See *Williams*, 299 Kan. at 940.

Scherer's final argument on the prosecutor's misstatement of fact is the allegation that the prosecutor elicited statements from Scherer during cross-examination that were unsupported by evidence. But this statement was not introduced during closing arguments, and we address it separately in the following section.

Next, Scherer claims that the prosecutor misstated the law in his closing argument by arguing that Scherer committed reckless second-degree murder solely based on his actions after he struck Pantle. Scherer contends it was improper for the State to rely on Scherer's alleged inactions, because the reckless second-degree murder statute requires an act causing death. The burden is on the State to prove beyond a reasonable doubt that Scherer: (1) killed Pantle and (2) *acted* recklessly under circumstances manifesting an extreme indifference to the value of human life. See K.S.A. 2022 Supp. 21-5403(a).

But again, when taking the prosecutor's comments as a whole, the State did not focus solely on Scherer's post-encounter actions. The prosecutor mentioned Scherer's actions preventing others from coming to Pantle's aid only after summarizing the events leading up to him striking Pantle and rendering him unconscious. Once more, a prosecutor's closing argument is reviewed in its entirety and statements are not considered in isolation. *Ross*, 310 Kan. at 221. The prosecutor asked the jury to "consider *that bit of evidence* [Scherer's inactions after striking Pantle] *and the previous* when you consider whether this defendant acted with extreme indifference to the value of a human life." (Emphasis added.) The record is clear that the prosecutor's closing statements, reviewed in the context in which they were made, asked the jury to consider Scherer's actions before, during, and after he hit Pantle.

Certainly, a misstatement of the law falls outside the wide latitude afforded to the prosecutor and would be error. *Watson*, 313 Kan. at 179. Scherer, on appeal, focuses on the nature of the act that caused Pantle's death, suggesting the State's emphasis on inaction violates law. As noted, we do not find the prosecutor's statements so singularly focused. But even if they had been, our appellate courts have found that one factor supporting a finding of the requisite state of mind for reckless second-degree murder is whether you try to render aid after your actions injure another. See *State v. Davidson*, 267 Kan. 667, 684, 987 P.2d 335 (1999) ("[D]efendant created an unreasonable risk and then consciously disregarded it in a manner and to the extent that it reasonably could be inferred that she was extremely indifferent to the value of human life."); *State v. Claerhout*, 54 Kan. App. 2d 742, 750, 406 P.3d 380 (2017) (one factor persuasive of the requisite state of mind in depraved heart second-degree murder cases arising out of fatal traffic collisions includes failing to aid the victim); *State v. Doub*, 32 Kan. App. 2d 1087, 1091, 95 P.3d 116 (2004) (one factor to determine the necessary state of mind in a second-degree reckless murder case was whether the defendant sought aid for the victim).

The prosecutor's statement did not misstate the facts in evidence, and based on the evidence stated by the prosecutor, a reasonable juror could have concluded that Scherer acted with extreme indifference to the value of human life based on the evidence presented during the trial. Nor did the prosecutor misstate the law when asking the jury to find Scherer acted with extreme indifference to the value of human life. And so the prosecutor did not misstate the evidence or the law, and the prosecutor's comments did not fall outside the wide latitude afforded to prosecutors.

No Prosecutorial Error

For reasons outlined above, the prosecution did not bolster witness credibility or dilute the State's burden of proof. Nor do we find the prosecutor misstated either the evidence presented or the applicable law. The challenged comments did not fall outside

the wide latitude of fair argument afforded to prosecutors. Because we find no prosecutorial error in the questioned statements, we need not consider the prejudice prong of the *Sherman* analysis. See *State v. Lax-Dudley*, No. 119,253, 2019 WL 5849919, at *4, (Kan. App. 2019) (unpublished opinion) (citing *Sherman*, 305 Kan. at 109).

THE DISTRICT COURT DID NOT ERR BY ALLOWING THE STATE TO ELICIT OPINION FROM SCHERER

Scherer argues that the district court erred by allowing the State to elicit lay opinion from Scherer about Pantle's survivability. He claims that the district court abused its discretion by allowing the admission of Scherer's testimony over the objection of defense counsel, because it was unreasonable and based on an error of law.

Standard of Review

An appellate court reviews the admission or exclusion of opinion testimony under K.S.A. 2022 Supp. 60-456 for an abuse of discretion. *State v. Hubbard*, 309 Kan. 22, 43, 430 P.3d 956 (2018). 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 District Court Did Not Abuse Its Discretion

Scherer testified during trial that he told others not to call the police because Pantle was on bond for a criminal case. In response, the prosecutor cross-examined Scherer about his reasons for not calling law enforcement. Scherer's defense counsel objected to the State's questioning because it was speculative. The challenged questioning included the following:

"[PROSECUTOR:] You never called the cops did you?

"[SCHERER:] Uh no, sir.

"[PROSECUTOR:] All right. And you did that as a favor to him so he didn't get arrested for bond violation?

"[SCHERER:] I mean this guy was a prodigy. [Pantle] was a beautiful piece of work, man. I did not want, no way I mean—

"[PROSECUTOR:] It didn't work out for him though did it?

"[SCHERER:] I did not want to get his bond revoked.

"[PROSECUTOR:] Did it work out for him?

"[SCHERER:] What his musical deals?

"[PROSECUTOR:] You not calling the law enforcement—

"[DEFENSE COUNSEL:] I'm going to object to that. *That is speculative. I don't know if he wants my client to assume something. I would suspect that dying didn't work out for him, but that's not because my client didn't call the police, Judge, and I object to that line of questioning*.

"[PROSECUTOR:] Well I think that's for the jury to decide based on the coroner's testimony.

"THE COURT: Overruled. If you can answer the question answer the question.

"[SCHERER:] Could you please repeat the question?

"[PROSECUTOR:] You bet. If he would have been arrested on a bond violation on that night, if you would have called the police and he got arrested because he was drinking and the drugs you allege, that would have been better off for him than what happened wouldn't it?

"[SCHERER:] I suppose.

"[PROSECUTOR:] You suppose?

"[SCHERER:] Yes.

"[PROSECUTOR:] I mean he'd still be alive?

"[SCHERER:] Yes." (Emphasis added.)

On appeal, Scherer again challenges the State's questioning, but now argues the questioning was an improper admission of lay opinion.

K.S.A. 60-404 generally precludes an appellate court from reviewing an evidentiary challenge absent a timely and specific objection made on the record. *State v. Dupree*, 304 Kan. 43, 62, 371 P.3d 862 (2016). Here, defense counsel objected based on speculation, claiming that the line of questioning was asking Scherer if Pantle died because he did not call the police. The trial court overruled the objection on that specific ground. A party cannot object on one ground at trial but argue another potential ground on appeal. *State v. Garcia-Garcia*, 309 Kan. 801, 810, 441 P.3d 52 (2019) ("The contemporaneous objection rule is not satisfied by objecting on one ground at trial and arguing another ground on appeal because it would undercut the statute's purpose."). Here, the trial court was not afforded the opportunity to consider Scherer's objection to the State's question on the basis of admission of lay opinion that he now argues. As a result, this issue is not properly preserved for review by this court.

THE CHALLENGED JURY INSTRUCTION WAS FACTUALLY APPROPRIATE

Scherer next argues that the district court erred by providing the jury the aiding and abetting instruction because it was not factually appropriate.

Standard of Review

When analyzing jury instruction issues, appellate courts follow a three-step process: (1) determining whether the appellate court can or should review the issue, in other words, whether there is a lack of appellate jurisdiction or a failure to preserve the issue for appeal; (2) considering the merits of the claim to determine whether error occurred below; and (3) assessing whether the error requires reversal, in other words, whether the error can be considered harmless. *State v. Holley*, 313 Kan. 249, 253, 485 P.3d 614 (2021); see K.S.A. 2022 Supp. 22-3414(3) ("No party may assign as error the giving or failure to give an instruction . . . unless the party objects thereto before the jury

retires to consider its verdict . . . unless the instruction or the failure to give an instruction is clearly erroneous.").

At the second step, appellate courts consider whether the instruction was legally and factually appropriate, using an unlimited standard of review of the entire record. *Holley*, 313 Kan. at 254. In determining whether an instruction was factually appropriate, courts must examine whether there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, that would have supported the instruction. 313 Kan. at 255.

If the challenging party preserved the issue below, an appellate court applies one of two harmless error tests. If the instructional error impacts a constitutional right, an appellate court assesses whether the error was harmless under the federal constitutional harmless error standard—whether there was no reasonable possibility that the error contributed to the verdict. When no constitutional right is impacted, as it is here, an appellate court assesses whether there is no reasonable probability the error affected the trial's outcome in light of the entire record. 313 Kan. at 256-57.

Neither party argues on appeal that the issue is unpreserved or that the instruction was legally inappropriate. So our review of the issue focuses on whether the instruction was factually appropriate—that is, whether there was sufficient evidence to support the instruction.

The Jury Instruction Was Factually Appropriate

When examining whether a jury instruction was factually appropriate, we analyze whether sufficient evidence, viewed in a light most favorable to the requesting party, supports the instruction. *State v. Davis*, 306 Kan. 400, 418-19, 394 P.3d 817 (2017). As an appellate court, we do not reweigh the evidence, resolve conflicts in the evidence, or

pass on the credibility of witnesses. And circumstantial evidence is enough to support a conviction of even the gravest offense. *State v. Aguirre*, 313 Kan. 189, 209, 485 P.3d 576 (2021) (citing *State v. Potts*, 304 Kan. 687, 694, 374 P.3d 639 [2016]).

Over Scherer's objection during trial, the district court provided the following jury instruction No. 9—an aiding and abetting instruction:

> "A person is criminally responsible for a crime committed by another if the person, either before or during its commission, and with the mental culpability required to commit the crime intentionally aids the other person to commit the crime.
>
> "All participants in a crime are equally responsible without regard to the extent of their participation. However, mere association with another person who actually commits the crime or mere presence in the vicinity of the crime is insufficient to make a person criminally responsible for the crime."

On appeal, Scherer points out that the jury instruction examines the defendant's actions either before or during the commission of a crime. He argues that the instruction was not supported by sufficient evidence because the State's allegations focused on Scherer's actions after the altercations, preventing others from coming to Pantle's aid. Scherer claims that the State failed to establish that Scherer prohibited anyone from intervening during the altercations. The State responds that Scherer's argument ignores the trial testimony of multiple witnesses.

Viewed in a light most favorable to the State, we find sufficient evidence in the record—including the testimony of multiple witnesses—to support the aiding and abetting instruction. Hull and Scherer each testified that Scherer struck Pantle and knocked him unconscious, supporting that Scherer was a direct participant in the blows to Pantle's head. Along with Scherer's direct action, other witnesses testified that Vandeloo and Spilman Jr. each struck Pantle. Much of the witness testimony corroborated other witness testimony and supported a conclusion that Pantle was hit in the head by all three

men. Dr. Hossain testified that a combination of all blows ultimately killed Pantle. The State also presented testimony from Hull, John, and Austin, who each testified that Scherer prevented them from either calling for help or taking Pantle to seek help on their own.

And although Scherer seeks to divorce his actions after he struck Pantle from his actions leading up to and through that single punch, there is no legal or factual basis for doing so. Viewed in the light most favorable to the prosecution, as we are required to do, Scherer's striking of Pantle was not the end of his actions "during" the commission of the entire crime. The evidence presented at trial considered Scherer's actions in preventing others from seeking help and his own inaction in seeking aid for Pantle as not separate acts, but all as a part of the commission of the same crime—the crime being a combination of blows to Pantle's head and lack of immediate medical aid which ultimately caused Pantle's death.

Accordingly, the aiding and abetting jury instruction was factually appropriate. Because the instruction was both legally and factually appropriate, the district court did not err in giving it.

THE DISTRICT COURT DID NOT ERR BY DENYING SCHERER'S MOTION FOR NEW TRIAL AND JUDGMENT OF ACQUITTAL

Scherer next argues that the district court erred in denying his motion for a new trial and judgment of acquittal based on the erroneous inclusion of the aiding and abetting jury instruction and a lack of sufficient evidence.

Standard of Review

A district court may grant a new trial to a defendant "if required in the interest of justice." K.S.A. 2022 Supp. 22-3501(1). An appellate court reviews the district court's

decision on a motion for a new trial for an abuse of discretion. *Butler*, 307 Kan. at 852. Again, a judicial action constitutes an abuse of discretion if (1) it is arbitrary, fanciful, or unreasonable; (2) it is based on an error of law; or (3) it is based on an error of fact. *Levy*, 313 Kan. at 237. Here, Scherer bears the burden of showing that the district court abused its discretion. *State v. Crosby*, 312 Kan. 630, 635, 479 P.3d 167 (2021).

When reviewing a district court's decision to deny a defendant's motion for a judgment of acquittal, the appellate court will consider all the evidence in the light most favorable to the State and determine whether a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. In doing so, the appellate court will not reweigh the evidence, assess the credibility of the witnesses, or resolve conflicting evidence. *State v. Cottrell*, 310 Kan. 150, 163, 445 P.3d 1132 (2019).

The Motion for New Trial or Judgment of Acquittal Properly Failed

Scherer first repeats his argument over the aiding and abetting instruction addressed above. He also claims that the State's evidence of survivability was insufficient to prove the crime beyond a reasonable doubt. Finally, Scherer claims that the district court erred by basing its sufficiency of evidence finding for aiding and abetting on the joint venture of wanting Pantle to leave the shop.

The claims related to the aiding and abetting jury instruction and the survivability claims have been addressed above. Reaffirming the analysis above, none of those claims would have entitled Scherer to receive a new trial. Scherer now raises a new claim that the district court erred in denying his motion for new trial below based on incorrect legal standards. He argues that the district court erroneously considered the motive of all co-defendants—wanting Pantle to leave the party—rather than the conduct of beating Pantle as the joint venture required to aid and abet.

The trial court found, during the hearing denying the motion for new trial and judgment of acquittal, "In this particular case the evidence established that there was a joint venture and that joint venture was to get Mr. Pantle away from that place." But much like Scherer's other arguments on appeal, this statement was taken out of context. Following the statement, the district court continued to articulate additional facts established during the trial, including the three men striking Pantle, no one doing anything to help him, and Scherer preventing attendees from calling the authorities. The district court then gave full credit to the jury's determination of credibility of the witnesses and stated, "[T]hey weighed the evidence and they drew the justifiable inferences of fact and they found him guilty, and the Court is not going to change that." The district court found that guilt beyond a reasonable doubt was a fairly possible result based on the jury's findings and denied the motion for judgment of acquittal and new trial.

The district court's decision was not unreasonable, as a rational fact-finder could have found Scherer guilty beyond a reasonable doubt based on the jury instruction provided and evidence presented at trial. Scherer fails to meet his burden of showing that the district court abused its discretion when denying his motion for new trial.

On appeal, Scherer has presented no argument regarding the district court's denial of his motion for judgment of acquittal. A point raised incidentally in a brief and not argued is deemed waived or abandoned. *State v. Meggerson*, 312 Kan. 238, 246, 474 P.3d 761 (2020). Also, issues not adequately briefed should not be considered by this court. *State v. Gallegos*, 313 Kan. 262, 277, 485 P.3d 622 (2021). We therefore find that the district court likewise did not abuse its discretion in denying Scherer's motion for a judgment of acquittal.

DID CUMULATIVE ERROR DEPRIVE SCHERER OF A FAIR TRIAL?

Finally, Scherer asserts his conviction must be vacated and his case remanded for a new trial because cumulative error deprived him of a fair trial.

Cumulative trial errors, when considered together, may require reversal of the defendant's conviction when the totality of the circumstances establish that the defendant was substantially prejudiced by the errors and denied a fair trial. *State v. Hirsh*, 310 Kan. 321, 345, 446 P.3d 472 (2019). But when an appellate court finds no errors exist, the cumulative error doctrine cannot apply. *State v. Lemmie*, 311 Kan. 439, 455, 462 P.3d 161 (2020). Even a single error cannot support reversal under the cumulative error doctrine. *State v. Ballou*, 310 Kan. 591, 617, 448 P.3d 479 (2019); see also *Butler*, 307 Kan. at 868 (citing both no error and single error rules).

Here, Scherer has failed to show that the prosecutor committed errors during his closing argument. See *Sherman*, 305 Kan. at 109. Furthermore, Scherer has failed to show that the district court abused its discretion by allowing the State to elicit lay opinion from Scherer regarding the survivability of Pantle and denying his motion for a new trial and judgment of acquittal. Lastly, Scherer fails in his claim that the district court erred for providing the jury instruction on aiding and abetting.

Given the nature and relationship of the alleged errors, the context in which they occurred, and the overwhelming evidence against Scherer presented during trial, the State met its burden of showing beyond a reasonable doubt there was no reasonable possibility that any errors contributed to the verdict. As such, we find that cumulative error did not deny Scherer a fair trial. See *State v. Williams*, 308 Kan. 1439, 1462-63, 430 P.3d 448 (2018); *State v. Walker*, 304 Kan. 441, 458, 372 P.3d 1147 (2016).

Affirmed.