NOT DESIGNATED FOR PUBLICATION

No. 125,504

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellant,

v.

ERIK M. PETERSON,
Appellee.

MEMORANDUM OPINION

Appeal from Douglas District Court; AMY J. HANLEY, judge. Submitted without oral argument. Opinion filed December 29, 2023. Reversed and remanded with directions.

Jon Simpson, assistant district attorney, *Suzanne Valdez*, district attorney, and *Kris W. Kobach*, attorney general, for appellant.

Patrick H. Dunn, of Kansas Appellate Defender Office, for appellee.

Before BRUNS, P.J., PICKERING, J., and TIMOTHY G. LAHEY, S.J.

PER CURIAM: The trial court's power to dismiss a criminal case with prejudice should be exercised with great caution and only as a last resort in cases where no other remedy would protect against abuse. Here, the district court dismissed the State's case with prejudice as a means of remedying what it viewed as an attempt to abuse the justice system by the prosecution. Because we find Peterson was not prejudiced by State's actions, and the court could have achieved the same result with a lesser sanction, we reverse the dismissal and remand the case to the district court for trial.

FACTUAL AND PROCEDURAL BACKGROUND

Erik M. Peterson was charged with one count each of criminal damage to property and criminal threat arising from an incident involving his former wife. He waived his preliminary hearing and pleaded not guilty to both charges. A jury trial was promptly scheduled for early January 2020 with a pretrial hearing set for the preceding week. When Peterson did not show up for the pretrial hearing, the district court removed Peterson's case from the jury trial docket but did not issue a bench warrant. Peterson appeared in court in January on the day his jury trial had been scheduled. After another hearing, the district court set a new jury trial date in mid-April 2020.

In March 2020, the COVID-19 pandemic began, prompting our Supreme Court to issue numerous administrative orders which resulted in all trials, including Peterson's, being continued until further notice. But the district court continued to schedule status hearings for Peterson's case, and between April and December of 2020, Peterson failed to appear at least four times. Peterson did appear in December 2020, and his case was again set for jury trial, this time in April 2021. At a status hearing held shortly before the April trial date, Peterson's counsel informed the district court that Peterson was in custody in Franklin County on a different case. Eventually, the district court again rescheduled Peterson's trial, this time for January 31, 2022.

About two weeks before the trial, the State sought a continuance, citing concerns related to an uptick in the number of COVID cases. Defendant objected to the continuance. A week later, following a hearing, the district court denied the motion, finding there were adequate COVID protocols in place to allow the trial to safely move forward. In making the ruling, the district court noted the motion "has the same language from a continuance request . . . last week [in] another case." The court found that our justice system is "essential" and the public "has an interest in their health but they also have an interest in the administration of justice: Efficient courts, fair trials, due process."

Finally, the district court noted Peterson was asking to move forward with his trial and that further delay was not warranted. The court found that additional delay was prejudicial insofar as memories of witnesses fade over time, and even though statutory speedy trial was on hold during the COVID pandemic, delay could impact Peterson's constitutional right to speedy trial.

Four days after the State's request for a continuance was denied, the State moved to dismiss the case against Peterson without prejudice due to "unavailability of material witnesses." Defense counsel sent an e-mail requesting more information from the prosecutor but received no response and therefore objected to the dismissal. At the hearing the following day, Peterson's counsel orally moved for dismissal of his case with prejudice, noting her client was insisting on going forward with trial and contending the State was failing to prosecute in a timely manner.

Upon questioning by the district court, the prosecutor identified the "unavailable witnesses" as two Lawrence Police Department (LPD) officers who responded to the incident. When pressed to explain what he meant by "unavailable," the prosecutor said that he just learned on Monday that the two officers were no longer employed by the LPD and he had "no idea" where they could be found.

The prosecutor advised the district court that after the continuance request was denied, he talked with the victim and then decided the officers' testimony was material to the case so he promptly filed the motion for dismissal without prejudice. The prosecutor explained that he did not seek a continuance because he had no idea where or when he might locate the police witnesses. The State's memorandum opposing Peterson's oral motion to dismiss clarified that the officers were not just material witnesses—they were "essential witnesses." But during the hearing, the prosecutor admitted he had undertaken no effort to locate these "essential" witnesses since learning they had not been served with subpoenas.

When the district court noted the returns of service of the subpoenas for the officers were filed on January 10—three days *before* the motion for continuance based on COVID was filed—the prosecutor explained that a different prosecutor was assigned to the case at that time and was unaware if she received the electronic notification when the returns of service were filed. The prosecutor also told the court that he moved to dismiss the case rather than seek a continuance because he wasn't sure "that this is a case that would be refiled," and he didn't know if or when he might be able to locate the officers. Furthermore, he informed the district court, "I'll say as an officer of the Court, if I thought that I could have proceeded with Ms. Peterson alone, I would have still gone ahead and proceeded with trial, we would have just had one witness."

The district court made the following comments at the conclusion of the argument on the motions to dismiss:

> "Well, the Court has many concerns based on the motion. I would note that this trial was set many months ago, and while Mr. Seiden was not the originally assigned prosecutor, there certainly was an assigned prosecutor who had a duty to do their due diligence in securing availability of witnesses, and there was—there's certainly records in the court system that indicate that the State had every ability to be aware of this issue prior to the hearing that we had just last week where this issue could have been raised, so I have that concern.
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> "I would note that another concern stems from the fact that a motion to continue filed by the State, in which the State strongly opposed proceeding to trial in this matter and asked to move it out, was very recently denied, and that hearing, as stated by counsel, raised no issues of witness problems or any other grounds for a continuance other than the COVID concerns . . . I would be remiss in not pointing out that it's the second motion to continue based on COVID concerns that this Court, that I have denied . . . .
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> "I have concerns. I will point out the case law with regard to dismissal with prejudice is very clear that the power should only be exercised with great caution and only in cases where no other remedy would protect against abuse, . . . but I will be granting a

> dismissal that will allow both parties to cease preparation of trial and a jury will not have to be brought in but [the court is] taking under advisement the important legal issue, recognizing that it is a very serious thing to prevent the State from refiling."

The court then gave the parties time to brief their respective positions.

The parties reconvened approximately three months later, and the district court announced its ruling. The district court found the conduct of the State was an abuse of the process and dismissed Peterson's case with prejudice. The court observed that not only did the State fail to prepare the case for a trial that had been scheduled for six months, when it learned it had not obtained service on the two officers, the State made no effort to locate and serve the witnesses. And the lack of service on the witnesses was readily apparent in the court records before the State sought the continuance based on COVID. The district court also observed that the State apparently believed it was entitled to a dismissal without prejudice and it need not explain or provide any reason for doing so. And the court commented that the prosecutor "exhibited incredulity" when the court insisted that the State justify its "very vague" request to dismiss the case without prejudice. The district court found no due diligence by the State and no good faith effort to obtain the presence of the witnesses for trial.

The district court dismisses the State's case with prejudice.

In finding the interests of justice required a dismissal with prejudice, the district court noted the "defendant would suffer prejudice due to refiling as it may increase his criminal history for future cases" and "no other remedy would protect against abuse."

The district court noted that when the motion to continue the case because of COVID was denied, the State moved to dismiss for an entirely different reason—the unavailability of witnesses. But the district court found the grounds advanced by the State

for dismissal without prejudice—that witnesses were not unavailable—was unfounded. Rather, the State simply made no effort to secure the witnesses' attendance when it learned the subpoenas had not been served. Furthermore, the court identified a pattern, mentioning two cases in which the denial of a motion to continue by the court was quickly followed by a motion from the State to dismiss the case without prejudice. Finding the State's motion to dismiss in this case was unfounded, the district court announced its belief the reason the State filed the motion to dismiss was because its continuance request was denied. The court stated:

> "The State is not entitled to file a motion to dismiss whenever a motion to continue is denied. There has to be grounds for a dismissal. [Otherwise] [t]hat would simply disregard any denial of a continuance and if allowed to do this, what would prevent it being done in future cases?
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> . . . .
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> ". . . Allowing the State to start over by dismissing after their motion to continue was denied and no efforts were made to secure attendance of witnesses for a trial set six months out would be abuse."

Finding actual prejudice would result if the State were allowed to dismiss and refile, the court determined that dismissal with prejudice was the only remedy to protect against the abuse.

The State timely appealed.

ANALYSIS

We review the district court's decision for an abuse of discretion.

Appellate courts review a district court's decision to dismiss a case with prejudice for an abuse of discretion. *State v. Mulleneaux*, 316 Kan. 75, 82, 512 P.3d 1147 (2022). 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. Bilbrey*, 317 Kan. 57, 63, 523 P.3d 1078 (2023). The State, as the party asserting the district court abused its discretion, bears the burden of showing such abuse of discretion. *State v. Keys*, 315 Kan. 690, 708, 510 P.3d 706 (2022).

> "In reviewing the order dismissing with prejudice, '[w]e recognize that a county attorney or district attorney is the representative of the State in criminal prosecutions; and he or she has broad discretion in controlling those prosecutions.' We also acknowledge that a judge's decision to dismiss criminal charges can improperly infringe on a prosecutor's discretion. And a court usually cannot interfere with the prosecutor's discretion to dismiss charges.
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> "'Nevertheless, a prosecutor's discretion is not limitless; and the doctrine of separation of powers does not prevent court intervention in appropriate circumstances.' Dismissal with prejudice may thus be appropriate if the interests of justice so demand. [Citations omitted.]" *Mulleneaux*, 316 Kan. at 82.

As the district court properly stated in its ruling, "dismissal with prejudice should only be ordered when the interest of justice require[s] it and no other remedy would protect against abuse." In *State v. Bolen*, 270 Kan. 337, 342-43, 13 P.3d 1270 (2000), our Supreme Court cautioned:

> "We have recognized that in a proper case, a trial court has the power to dismiss a criminal complaint with prejudice if the interests of justice require such action. However, such power should be exercised with great caution and only in cases where no other remedy would protect against abuse. Dismissal with prejudice should be used only in extreme circumstances. Dismissal of charges oftentimes punishes the public rather than the prosecutor and creates a windfall for the defendant. Where there has been no showing that the defendant suffered actual prejudice as a result of a prosecutor's misconduct, and alternative means of sanctioning the prosecutor exist for the violation, dismissal of pending charges with prejudice may constitute an abuse of discretion by the trial court. [Citations omitted.]"

In *Bolen*, the district court dismissed the State's case when the State announced it was not ready to proceed on a dispositive motion to suppress because it did not have an experienced prosecutor available and had released its witnesses without informing or consulting the district court. The dismissal was entered with prejudice as a sanction for the State's failure to "'properly pursue the case and to properly notify counsel,'" and the district court viewed the prosecution's release of subpoenaed witnesses as preempting the court's control over its docket. 270 Kan. at 340. In reversing the district court, our Supreme Court noted the inability of the State to proceed was largely beyond its control and that the district court found the actions of the State were not malicious, intentional, or taken in bad faith. Furthermore, the Supreme Court observed that there was only minimal prejudice to the defendant and that alternative means of sanctioning the prosecutor existed, although the *Bolen* court did not specify what the alternative sanctions might be. 270 Kan. 344-45.

In *State v. Davis*, 266 Kan. 638, 647, 972 P.2d 1099 (1999), the trial court dismissed charges with prejudice because the prosecutor failed to comply with the court's discovery order, and our Supreme Court reversed that ruling. Although it upheld the district court's finding that the prosecutor was in contempt of court, the *Davis* court found the district court abused its discretion by dismissing the charges. Affirming "the concept that sound policy considerations favor resolution of criminal charges on their merits," the *Davis* court found it was an abuse of discretion to dismiss the charges. 266 Kan. at 646. In *Davis*, not only was there no showing of actual prejudice to the defendant for the prosecutor's failure to comply with the order, there also existed an alternative means to sanction the county attorney directly.

But just as the prosecutor's discretion to control its cases is not without limits, the district court's discretion to direct that a case be dismissed with prejudice is likewise not boundless: "Where there has been no showing that the defendant suffered actual

prejudice as a result of a prosecutor's misconduct, and alternative means of sanctioning the prosecutor exists for the violation, dismissal of pending charges may constitute an abuse of discretion by the trial court." *Davis*, 266 Kan. at 646 (citing *State v. Ramos*, 83 Wash. App. 622, 637, 922 P.2d 193 [1996]).

A common theme underlying cases in which dismissal with prejudice has been upheld by the appellate courts is continuous or repeated misconduct or delay by the State. For example, in *State v. Clovis*, 248 Kan. 313, 331, 807 P. 2d 127 (1991), the Kansas Supreme Court upheld a dismissal with prejudice where the State continuously refused to comply with a district court discovery order requiring disclosure of a confidential informant's identity. In *State v. Funk*, 27 Kan. App. 2d 712, 714, 8 P.3d 32 (2000), this court affirmed the district court's dismissal with prejudice following multiple State-caused delays in proceeding with Funk's preliminary hearing. More recently, panels of this court upheld the dismissal of charges with prejudice. *State v. Bird*, No. 124,686, 2022 WL 15527745, at *4 (Kan. App. 2022) (unpublished opinion) (The State admitted it was not prepared to go to trial following more than four years after Bird's indictment and in spite of an earlier dismissal of charges without prejudice.); *State v. Pickerill*, No. 100,189, 2009 WL 929319, at *2 (Kan. App. 2009) (unpublished opinion) (citing lack of diligence by the State in compelling a detective's testimony for a preliminary hearing two years after the case had been dismissed and refiled).

The most recent pronouncement by our Supreme Court on the issue of dismissal of a case with prejudice is *Mulleneaux*. There, the trial court suppressed evidence based on the State's failure to comply with a discovery order, and when the State thereafter sought dismissal of the case, the trial court dismissed the charges with prejudice. A panel of our court reversed the district court for abusing its discretion by imposing the dismissal as a sanction for the State's violation of a discovery order. The Supreme Court analyzed the case differently—it viewed the request for dismissal without prejudice as an attempt by the State to circumvent a ruling with which it disagreed instead of challenging the order

through an interlocutory appeal. 316 Kan. at 79. The State's "attempt to avoid the judge's ruling created an abuse of process, which the district court had discretion to prevent." 316 Kan. at 84. Although *Mulleneaux* ultimately affirmed the trial court under a harmless error analysis, relying on the principles stated in *Bolen* and *Davis* (among others), the court found the judge infringed on the prosecutor's discretion by dismissing the case with prejudice:

> "In many similar cases, dismissing with prejudice would be inappropriate because it is a uniquely harsh sanction a judge should order only after considering other options. See *Bolen*, 270 Kan. at 342-43. One option would have been to deny the State's request to dismiss without prejudice and to reiterate the previously implied decision to not continue the trial setting. The prosecutor would still have been in control of the case and could have proceeded to trial." *Mulleneaux*, 316 Kan. at 84-85.

The State raises three basic challenges to the district court's ruling: that the district court did not have substantial evidence supporting the conclusion that the State engaged in an abuse of the process by attempting to circumvent the district court's denial of the State's request for continuance; that Peterson suffered no actual prejudice from a dismissal without prejudice; and that the district court had alternative means of sanctioning any misconduct by the State.

Substantial competent evidence supports the district court's determination of misconduct by the State.

The analysis by the Supreme Court in *Mulleneaux* is the closest analogue to the present case because both cases involve a conclusion that the State was seeking to circumvent an earlier court ruling. The district court here viewed the State's motion to dismiss as an attempt to circumvent the court's previous denial of the State's request for continuance. On that specific point, the State contends there is a lack of substantial evidence to support the district court's conclusion.

We begin our analysis by declining the State's invitation to reweigh the evidence or second-guess the district court's conclusions about the State's underlying intent for seeking dismissal of the case. "The trial judge is in the best position to evaluate the testimony of the witnesses, and the appellate court will not reweigh the evidence, substitute its evaluation of it for that of the trial court's, or pass upon the credibility of the witnesses." *State, ex rel. Secretary, DCF v. M.R.B.*, 313 Kan. 855, 863-64, 491 P.3d 652 (2021). This principle applies equally to considerations of credibility of statements made by counsel to the district court. Here, the district court was in the best position to evaluate the credibility of the representations made by the prosecutor and we will not redetermine the district court findings in that regard.

The State contends now, as it did before the district court, that it had no intent to subvert the district court's denial of the request for continuance; that the request to dismiss was unrelated to the motion to continue the trial; that the State was unaware it was lacking service on essential witnesses at the time it filed the request for continuance; and that the reason the State sought to dismiss the case rather than seek a continuance was because it did not know if or when it could locate the officers and be prepared for trial. The district court was plainly unpersuaded by the State's assertions.

The district judge was candid in her assessment of the State's actions. The facts contained in the record, along with the court's assessment of the statements made by counsel, well support the district court's conclusion that the State was using the unfounded motion to dismiss as a procedural mechanism to circumvent the court's denial of the State's request for continuance.

The court file reflects that the missing witnesses had not been served with subpoenas and that information, which is typically provided electronically to the State, was in the court file before the State sought the continuance. The prosecutor arguing the

motion to dismiss could not say whether or not the previously assigned prosecutor knew the witnesses had not been served. The court found the motion to dismiss was vague because it did not identify the "unavailable" witnesses or explain how or why they were unavailable. And the prosecutor did not respond to defense counsel's inquiry for additional information in advance of the hearing. As noted by the district court, the prosecutor exhibited incredulity to the court when asked about the details underlying the motion to dismiss. Only after persistent questioning by the court did the State reveal that the reason for the dismissal motion was that the State was not prepared for trial. The witnesses were not unavailable – the truth was the witnesses had not been served and thus would not be present for the trial. As relayed by the State, although it learned at least a week before trial that the witnesses had not been served, it made absolutely no effort to locate and serve the witnesses. The court concluded that the dismissal was not because witnesses were "unavailable," rather the request was the result of a complete lack of diligence on the part of the State to secure the attendance of the witnesses for a trial date that had been set by the court for six months.

The district court determined that the State was not entitled to dismissal because the motion was based on the State's complete lack of diligence. And based on the timeline of events, and in light of the explanations by the prosecutor, the trial judge concluded that the motions for continuance and for dismissal were, contrary to the State's explanation, related to one another. Given that connection, the district court found that allowing the State to "start over by dismissing after their motion to continue was denied" would be an abuse of the system. The State never explained why it made no effort to locate the witnesses even though it had at least a week to do so. Given the complete lack of effort on the part of the State to find its witnesses, we think it a reasonable conclusion that the State did nothing because it anticipated the continuance that the district court had denied.

The district court's conclusions were supported as well by its awareness of at least one other very recent case before it in which the State filed a motion to continue based on COVID, and when the motion for continuance was denied, the State sought dismissal without prejudice. The district judge characterized her doubts about the State's actions as "concerns," and it is apparent the totality of circumstances caused the judge to conclude that the State, having had its request for continuance denied, sought to use the mechanism of a dismissal without prejudice to effectively continue the trial. We find sufficient evidence in the record supports the conclusion reached by the district court that the attempt to use dismissal as an alternative method of obtaining a continuance was an abuse of process by the State.

As the court in *Mulleneaux* held, it is an abuse of process when the State tries to circumvent a ruling with which it disagreed instead of through an appeal. The district court has discretion to prevent such an abuse. 316 Kan. at 84. Here, the question, as in *Mulleneaux*, is whether dismissal with prejudice is appropriate.

It was error for the district court to dismiss the State's case with prejudice.

In *Mulleneaux*, the court found the judge erred by dismissing the case with prejudice rather than by simply denying the State's motion to dismiss, which would have allowed the case to proceed to trial. 316 Kan. at 85. Our analysis here is the same. In our view, a denial of the motion to dismiss would have prevented the State from circumventing the court's earlier denial of the motion for continuance. We note the court did consider but rejected the possibility of denying the motion in its entirety, stating:

> "So here I must examine if there's any other remedy short of dismissal with prejudice that would protect against abuse and I find that due to the posture we're in, there is only one remedy. The State requested dismissal. They moved for dismissal, so that's the posture the Court was in. Denying dismissal in its entirety would have moved

> the trial forward and prejudiced the defendant making him face a trial so the Court must take up the issue of whether dismissal should be with or without prejudice."

The State challenges the district court's conclusion that the defendant would be prejudiced by having to face trial. After all, it points out "[n]o citizen . . . is immune from prosecution, in good faith, for his alleged criminal acts," quoting *Beal v. Missouri Pac. R.R. Corp.*, 312 U.S. 45, 49, 61 S. Ct. 418, 85 L. Ed. 577 (1941). If the trial court was suggesting that merely being required to face trial was prejudicial to the defendant, we would disagree. But we understand the court's comments regarding the "posture" of the case to refer back to the time of the original hearing on the State's motion when the court indicated to the parties it would grant the motion to dismiss—a result requested by the State and Peterson. By the time of the district court's ruling, the scheduled trial date was long past. In context, when the district court indicated that "dismissal [without prejudice] in its entirety would have moved the trial forward and prejudiced the defendant," we find the court was expressing its concern the State could now make the effort to subpoena the police witnesses and present their testimony against Peterson, thereby successfully circumventing the continuance that had been denied. As was the case in *Mulleneaux*, the State, by seeking a dismissal without prejudice, was seeking a tactical advantage in avoiding any sanction for its decision to not even attempt to locate and secure the attendance of the witnesses for the long-scheduled trial.

The only other prejudice referenced by the court in its ruling was "the defendant would suffer prejudice due to refiling as it may increase his criminal history for future cases." Peterson had two other pending criminal cases at the time the district court dismissed the case, one in Franklin County and one in Douglas County. Part of Peterson's impetus for going forward with trial in the present case was his view that the Franklin County case would not move forward until the present action was resolved. But nothing in the record persuades us that the present case was causing a legal impediment to resolution of the Franklin County case. Nonetheless, addressing the district court's

conclusion regarding prejudice, we agree with the State's analysis that the *potential* prejudice Peterson *might* face *if* his criminal history should change between the date of dismissal and the *possible* refiling and conviction of the charges in this case is not actual prejudice. See *State v. Clemons*, 261 Kan. 66, 69, 929 P.2d 749 (1996) ("'To show prejudice to the substantial rights of the defendant, there must be more than speculation.'"); *Tomlin v. State*, 35 Kan. App. 2d 398, 405-06, 130 P.3d 1229 (2006) ("[Defendant] asks us to engage in multiple exercises in speculation to arrive at a conclusion of prejudice. This we are not prepared to do."). Hypothetical prejudice is not actual prejudice, and caselaw from *Davis* to *Bolen* to *Mulleneaux* instructs us that actual prejudice is the factor to be considered in determining whether dismissal with prejudice is warranted.

In his brief, Peterson contends that the district court's reference to defendant's constitutional right to speedy trial indicates the district court recognized there was actual prejudice to Peterson's speedy trial right. We find the discussion by the district court was related to its finding that Peterson had a right to object to a request for continuance or dismissal by the State. Even if the court dismissed the case and it was refiled, Peterson retained his constitutional right to speedy trial and could assert it at any future time. We find no prejudice related to Peterson's constitutional right to speedy trial.

We find the lack of prejudice to Peterson is a factor which weighs against imposing a dismissal with prejudice. Furthermore, we conclude there was an alternative and less drastic manner of dealing with the State's lack of diligence and its attempt to circumvent the district court's denial of the request for continuance, which would have achieved the same result. After hearing argument by the parties and determining that the State failed to reasonably justify its request for dismissal without prejudice, the district court could have simply denied the motion and allowed the case to proceed to trial as scheduled.

Thus, we conclude that the district court erred because an evaluation of the two primary considerations—prejudice to the defendant and lack of an alternative method of dealing with the State's conduct—fail to support dismissal with prejudice.

The entry of dismissal with prejudice was not harmless error so we remand the case for trial.

Peterson suggests that *Mulleneaux* is "exactly on point and requires this Court to affirm." While we do not agree that *Mulleneaux* is exactly on point, there are significant similarities. In that case, the State attempted to circumvent a discovery sanction which prohibited the State from using certain evidence. It did so by seeking a dismissal without prejudice. The State in that case, as here, denied its motion was intended to circumvent the court's earlier order. As noted above, our Supreme Court concluded that rather than dismiss the case with prejudice, the trial court had an available, less onerous course of action—it could have just denied the State's motion to dismiss and proceeded to trial as scheduled. 316 Kan. at 85. But rather than reverse the court for its error, the Supreme Court found the court's error was harmless because the State, at the time of the hearing, admitted it could not proceed to trial without the excluded evidence. 316 Kan. at 85. Thus, even if the case proceeded to trial as scheduled, the State effectively admitted it would not have been able to successfully prosecute the case.

Similarly, in the present case, when questioned by the district court about the unserved witnesses, the prosecutor made a specific and concrete admission that the State could not proceed to trial without those witnesses, telling the court, "I'll say as an officer of the Court, if I thought that I could have proceeded with Ms. Peterson alone, I would have still gone ahead and proceeded with trial, we would have just had one witness." In it's brief on appeal, the State reiterated that the two witnesses were "essential" to the State's case. We view the prosecutor's statement as an admission that the State could not

successfully prosecute the case without the witnesses—witnesses the State made no effort to locate for Peterson's scheduled trial date.

The difference in the two cases is that in Peterson's case, had the district court simply denied the motion to dismiss, the State would still have had four days to attempt to locate and serve its witnesses, while in *Mulleneaux*, there was no way for the State to introduce the excluded evidence if the case proceeded to trial. In other words, here the State had time remaining before trial to secure the attendance of its essential witnesses and proceed with trial. Thus, we find the harmless error doctrine is not applicable under the facts.

We reverse the district court's entry of dismissal with prejudice. Because the State failed to present a basis for dismissal without prejudice, we remand the case to the district court for trial.

Reversed and remanded with directions.