

NOT DESIGNATED FOR PUBLICATION

No. 125,884

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,  
*Appellee,*

v.

SAMANTHA ANN MARTIN,  
*Appellant.*

MEMORANDUM OPINION

Appeal from Atchison District Court; JOHN J. BRYANT, judge. Submitted without oral argument. Opinion filed December 15, 2023. Affirmed.

*Joseph A. Desch*, of Law Office of Joseph A. Desch, of Topeka, for appellant.

*Sherri L. Becker*, county attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before ISHERWOOD, P.J., GREEN and PICKERING, JJ.

PER CURIAM: During the State's opening arguments at Samantha Ann Martin's jury trial for aiding and abetting a burglary, aiding and abetting a theft, and criminal damage to property, the prosecutor stated that Martin's codefendant, Anthony Barnhart, had already pleaded guilty to burglary. The district court ruled that the prosecutor's statement violated Martin's due process right under the Fifth Amendment to the United States Constitution as made applicable to the states through the Fourteenth Amendment to the United States Constitution. Afterwards, however, the district court denied Martin's mistrial motion based on this constitutional error. It ruled that the prosecutor's error could be cured or mitigated.

Martin appeals, arguing that we should reverse her convictions for two interrelated reasons. First, she argues that the district court erred by denying her mistrial motion because the prosecutor's errant comment could not be cured, which she maintains resulted in her receiving an unfair trial. Second, she alternatively argues that the prosecutor's errant comment, in and of itself, is reversible prosecutorial error. Nevertheless, Martin's arguments are unpersuasive under the controlling law as applied to the unique facts of her case. Thus, we affirm Martin's convictions.

#### BACKGROUND

Edward Karafelis became very sick in mid-2021. On June 1, 2021, after falling on his front porch, Karafelis was rushed to the hospital by ambulance. Unfortunately, at the hospital, Karafelis learned that "he had a large tumor in his head." Although Karafelis' health improved temporarily, it seems that Karafelis never returned home after his fall. Rather, on July 21, 2021, Karafelis died in hospice care.

Shortly after his fall, though, Karafelis asked his mother, Edwarda Sukow, to care for his home and surrounding property while he remained in the hospital. Sukow, in turn, asked Karafelis' neighbor, Joshua VanDruff, to help care for Karafelis' property. VanDruff agreed to help Sukow by monitoring Karafelis' property. He agreed to check on Karafelis' property every day to ensure that everything appeared normal.

In addition to his home, Karafelis had a large free-standing shop containing tools, equipment, and six vehicles. So, during his daily trips to Karafelis' property, VanDruff always looked inside the shop to see if anything was missing. He also checked the locks to the shop's two entrances—a main door and a side door.

During one of his daily trips to Karafelis' property, VanDruff noticed that a few items were no longer in Karafelis' shop. After this discovery, VanDruff installed multiple

security lights and five trail cameras outside the shop. He programmed the trail cameras, which were pointed toward the shop's driveway, main door, and side door, to take five photographs when triggered by movement. And VanDruff started checking for any new photos saved on the trail cameras' memory cards during his daily visits to Karafelis' shop.

When VanDruff checked on Karafelis' shop midday June 28, 2021, he saw that the shop's side door was open. Then, upon closer inspection, VanDruff discovered the following: (1) that the side door's hasp was damaged; (2) that the side door's padlock was missing; (3) that Karafelis' air compressor and generator from inside the shop were missing; and (4) that one of his own trail cameras was missing. Immediately afterwards, VanDruff called law enforcement to report the break-in and missing items.

Deputy Cody Sprang responded to VanDruff's call, arriving at Karafelis' shop at 12:36 p.m. Once there, VanDruff told Deputy Sprang that Karafelis' air compressor, that Karafelis' generator, and that one of his trail cameras were missing. VanDruff also allowed Deputy Sprang to search Karafelis' property. During this search, Deputy Sprang noted that the hasp to the shop's side door was damaged. Deputy Sprang found a broken padlock lying in the grass about 10 feet from the shop's side door. Additionally, after getting VanDruff's permission, Deputy Sprang reviewed the photos saved on VanDruff's remaining four trail cameras' memory cards.

When reviewing the photos, which were all captured around 3 a.m., Deputy Sprang noted that a female appearing in the photos had tattoos and was carrying something that might have been bolt cutters. Deputy Sprang recognized one of the two men shown in the photos as Anthony Barnhart. Also, because the photos captured the license plates of the vehicles involved in the break-in, Deputy Sprang quickly learned who owned those vehicles. Deputy Sprang's license plate search revealed that the black SUV shown in the photos belonged to Jennifer Barnhart, Anthony's wife. The GMC Jimmy shown in the photos belonged to a man named Walter Taylor.

Later that same day, around 5 p.m., Deputy Sprang went to Jennifer and Anthony's home. When Deputy Sprang arrived at that house, Jennifer's car was parked outside, but Anthony was not home. When he approached Jennifer, she voluntarily spoke to Deputy Sprang, explaining that she heard Anthony drive off in her black SUV around 3 a.m. and then return in her black SUV later that morning. She explained that because Anthony was in a relationship with Martin, she did not find Anthony's behavior unusual. She also allowed Deputy Sprang to search the garage.

While searching the garage, Deputy Sprang found an air compressor and generator. When Deputy Sprang asked Jennifer about the air compressor and generator, Jennifer told Deputy Sprang that the items did not belong to her and that she did not know where they came from. As a result, Deputy Sprang returned to Karafelis' property, taking the air compressor and generator with him. Once there, VanDruff identified the air compressor and generator as the ones missing from Karafelis' shop.

As Deputy Sprang investigated the break-in at Karafelis' shop, other sheriff's deputies looked for Taylor. Although it is unclear what time Deputy Toby Smith spotted Taylor in his GMC, Deputy Smith stopped Taylor sometime on June 28, 2021. During the stop, Deputy Smith found a trail camera inside Taylor's vehicle. When Deputy Smith asked Taylor about the trail camera, Taylor said that it did not belong to him. Then, when Deputy Smith "contacted" VanDruff, VanDruff identified the trail camera as his. So, Deputy Smith seized the trail camera and reviewed the photos saved on its memory card. The photos from this trail camera showed Taylor as well as the "other suspects in [the] case."

About seven weeks after the break-in at Karafelis' shop, Deputy Sprang interviewed Martin. Deputy Sprang wanted to interview Martin because he had been "led to believe" that Martin had a sun tattoo on her back and a skull and crossbones tattoo on her left calf just like the tattooed woman shown in the trail camera photos. When he

asked Martin if he could take photos of her tattoos during her August 14, 2021 interview, Martin voluntarily allowed Deputy Sprang to photograph the sun tattoo on her back and the skull and crossbones tattoo on her left calf. After Deputy Sprang collected this evidence, the State charged Martin with three crimes: (1) aiding and abetting the burglary of Karafelis' shop, a severity level 7 nonperson felony contrary to K.S.A. 2020 Supp. 21-5807(a)(2); (2) aiding and abetting the theft of items in Karafelis' shop, a severity level 9 nonperson felony contrary to K.S.A. 2020 Supp. 21-5801(a)(1); and (3) criminal damage to property, a class B nonperson misdemeanor contrary to K.S.A. 2020 Supp. 21-5813(a)(1).

Eventually, Martin's case went on to jury trial. At trial, Sukow, VanDruff, Deputy Sprang, Deputy Smith, and Jennifer Barnhart testified on the State's behalf. Additionally, the State admitted, without objection, the photos of the tattooed woman taken by VanDruff's trail cameras, and the photos Deputy Sprang took of Martin's tattoos during her August 14, 2021 interview. Other than admitting a photo taken by the trail camera discovered by Deputy Smith in Taylor's GMC during VanDruff's testimony, Martin admitted no exhibits and presented no evidence on her behalf. Instead, Martin's defense hinged on whether the State had proven her guilt beyond a reasonable doubt. She asserted that the photos on the trail camera admitted by the State were too blurry to determine the identity of the woman shown in the photos.

Yet, the jury quickly rejected Martin's reasonable doubt defense. The jury found Martin guilty of aiding and abetting a burglary, aiding and abetting a theft, and criminal damage to property after deliberating for just 19 minutes. Afterwards, the district court imposed a total controlling sentence of 21 months' imprisonment followed by 12 months' postrelease supervision for her crimes.

Martin now timely appeals her convictions.

## ANALYSIS

### I. *Was Martin denied a fair trial?*

Martin's arguments on appeal focus on the prosecutor's statement during the State's opening arguments about Anthony having already pleaded guilty to burglarizing Karafelis' shop. She argues that the district court committed reversible error by denying her mistrial motion involving the statement while also asserting that the statement constituted reversible prosecutorial error, in and of itself. Thus, this court must examine the prosecutor's statement about Anthony's burglary guilty plea and the district court's ruling on Martin's mistrial motion before considering Martin's underlying appellate arguments. Of note, the district court's ruling largely relied on holdings in *United States v. Woods*, 764 F.3d 1242 (10th Cir. 2014), and *Phillips v. State*, No. 118,066, 2018 WL 6071388 (Kan. App. 2018) (unpublished opinion).

In any case, a review of the controlling law and a review of the parties' arguments proves that the prosecutor committed a constitutional error by mentioning Anthony's burglary guilty plea during the State's opening arguments. Nevertheless, the analysis of Martin's arguments also establishes two more things: (1) that the district court did not err by denying Martin's mistrial motion and (2) that any error stemming from the prosecutor's statement about Anthony's burglary guilty plea was harmless under the constitutional harmless error test stated in *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

#### A. *Additional facts and decisions of United States v. Woods and Phillips v. State*

During the State's opening arguments, the prosecutor pointed out that Anthony had already pleaded guilty to burglarizing Karafelis' shop. She told the jury that the State would prove the following during Martin's trial:

"So the evidence in this case that the State intends to elicit from various witnesses will be that on or around June 27, going into June 28 of last year, so 2021, there was a black SUV Crossover that entered Edward Karafelis's property around 2:37 A.M. [Karafelis'] property was located . . . in Atchison County.

"That black SUV is then seen left running while two occupants exit the vehicle around 2:45 A.M. One of the occupants has been identified and has—I'm sorry, he has been convicted of his role in this courtroom. And he is Anthony Barnhart. He has already pled guilty to the crime of burglary in this case.

"The second occupant is the reason that you're here. It's for you to determine who that occupant is, and the State is going to present evidence in this case, um, as to who that occupant is.

"You will be asked, then, to determine if the State has met its burden in proving who that second occupant was and that the person aided and abetted in committing a crime at Edward Karafelis's property."

Martin did not object when the prosecutor mentioned Anthony Barnhart's burglary guilty plea. Instead, the district judge raised this issue with the prosecutor's statement during the lunch break, which occurred after the State had already presented Sukow's testimony and some of VanDruff's testimony.

At the end of the lunch break, the district judge told the parties that from his understanding of the law, he should address potential errors "even if there ha[d] not been an objection." He explained that when he heard the prosecutor mention Anthony's burglary guilty plea, "something just stood out to [him]." He said that he had spent his lunch break researching the issue. He also said that from his understanding of the Tenth Circuit Court of Appeals' holdings in *Woods*, and this court's holdings in *Phillips*, the prosecutor may have violated Martin's due process rights.

In *Woods*, the Tenth Circuit reiterated that "'[a] codefendant's guilty plea may not be used as substantive evidence of a defendant's guilt.' *United States v. Baez*, 703 F.2d 453, 455 (10th Cir. 1983)." 764 F.3d at 1246. It explained that this "rule [was] grounded

in notions of fundamental fairness and due process" protections. 764 F.3d at 1246; see *United States v. Pedraza*, 27 F.3d 1515, 1525 (10th Cir. 1994); *United States v. Paterson*, 780 F.2d 883, 884 (10th Cir. 1986). It pointed out that barring evidence of a codefendant's guilty plea was important because "it curb[ed] the jury's temptation to find guilt by association." 764 F.3d at 1246. It pointed out that barring this evidence "help[ed] to ensure the government must prove every element of an offense against the defendant; the government may not borrow proof from another person's conviction." 764 F.3d at 1246. The *Woods* court also stressed that a prosecutor's reference to a codefendant's guilty plea was "'especially prejudicial'" when raised in a coconspirator's jury trial: "The government cannot argue 'to the jury that the coconspirators' convictions established the evidence of a conspiracy, an element of the crime with which defendants were charged.' [Citation omitted.]" 764 F.3d at 1246.

Even so, the Tenth Circuit held that "a codefendant's guilty plea may be entered into evidence when two conditions are met." 764 F.3d at 1246. To enter evidence of a codefendant's guilty plea (1) the district court must give the jury a limiting instruction saying that "the plea may not be used as substantive evidence," and (2) the plea evidence must be entered for a proper purpose, i.e., some reason other than to establish the defendant's guilt. 764 F.3d at 1246.

But it is important to note that the Tenth Circuit ultimately rejected Woods' argument that the district court should have sua sponte granted a mistrial because the prosecutor erred during closing arguments by discussing Woods' codefendants' testimony for several reasons. One reason was because the prosecutor's disputed comments could be interpreted as bolstering the codefendants' credibility as witnesses. 764 F.3d at 1247. Also, the Tenth Circuit held that even if the district court erred by not sua sponte granting a mistrial, Woods had not established that this error was clear and obvious under the plain error standard, which applied because Woods raised this argument for the first time on appeal. 764 F.3d at 1245, 1247-48. The court held that Woods failed to prove plain error



for the following reasons: (1) because the district court instructed the jury that an accomplice's guilty plea was not evidence of anyone else's guilt; (2) because Woods conceded that "a stronger admonishment during closing arguments might have sufficiently answered the offensive language"; and (3) because the State's evidence proving its charges against Woods was overwhelming. 764 F.3d at 1247-48.

In *Phillips*, this court relied on *Woods*' precedent to reject Phillips' argument that the prosecutor erred when pointing out Phillips' codefendant's conviction. *Phillips*, 2018 WL 6071388, at \*3. The State had charged both Phillips and his codefendant with premeditated murder. 2018 WL 6071388, at \*1; see *State v. Armstrong*, 299 Kan. 405, 324 P.3d 1052 (2014). At his jury trial, Phillips' codefendant, who had already been convicted of premeditated murder, testified. Then, in the State's closing arguments, the prosecutor referenced Phillip's codefendant's premeditated murder conviction. *Phillips*, 2018 WL 6071388, at \*3.

In a postconviction motion for relief under K.S.A. 60-1507, Phillips argued that the prosecutor's reference to his codefendant's conviction during closing arguments violated his due process rights. But this court disagreed, affirming the district court's summary denial of Phillips' K.S.A. 60-1507 motion. *Phillips*, 2018 WL 6071388, at \*3, 10. It held that Phillips' prosecutorial error argument was unpersuasive, explaining that the prosecutor never asked the jury to convict Phillips of premeditated murder because his codefendant had already been convicted of premeditated murder. 2018 WL 6071388, at \*3. Then, it held that even if the prosecutor committed constitutional error by referring to the codefendant's guilt, there was no reasonable possibility this error affected the jury's guilty verdict for the following reasons: (1) because the jury heard arguments from a different codefendant on trial with Phillips that the testifying codefendant's premeditated murder conviction did not establish his or Phillips' guilt; (2) because the district court instructed the jury to consider the guilt of each defendant separately from other codefendants; and (3) because the evidence supporting Phillips' guilt was overwhelming.

2018 WL 6071388, at \*3. Under those circumstances, this court determined that any error caused by the prosecutor's disputed comment was harmless beyond a reasonable doubt. 2018 WL 6071388, at \*3.

Thus, here, although the district judge never explicitly mentioned Martin's due process rights, when the judge brought up the *Woods* and *Phillips* cases, he did so because he thought that the prosecutor may have violated Martin's due process right to a fair trial. He was concerned that the prosecutor used Anthony's burglary guilty plea as substantive evidence that Martin had aided and abetted a burglary and aided and abetted a theft.

Turning our focus back to the facts of this case, once the district judge explained his concerns, we note that the prosecutor argued that she had not violated Martin's due process rights because she mentioned Anthony's guilty plea "for identification of the second person at the scene." But the district judge rejected this argument:

"Well, I don't think that that would alleviate the situation. Um, basically, you're using the guilt of one person to infer the guilt of another. You're using identification of one person to infer the identification of another. I think that identification would have to stand on its own. Um, especially in light of this case."

After the district judge rejected that argument, the prosecutor suggested that she could reference Anthony's burglary guilty plea because she intended to present evidence that Anthony and Martin were in a relationship in the State's case-in-chief. Yet again, the district judge rejected the State's argument:

"Well, I disagree. I don't think that the State can use it for that purpose. It talks about how that it's extremely prejudicial to use somebody else, a codefendant's conviction. She's charged with aiding and abetting. I think you have to prove that she aided and abetted someone, but not necessarily him. The fact whether it's him or not, the

charge is that she aided and abetted another person. So whether he's the person that's in the video or not is irrelevant, as far as the Court's concerned."

Martin's attorney responded, "In light of this, I think I'd have [to], on behalf of my client, move for a mistrial." Before the prosecutor made any counterarguments, the district judge told Martin's attorney that he did not think a mistrial was required:

"Well, I know that that was probably going to be the followup. Um, we have not had any evidence. We've had comments in opening statement of counsel. Um, I think that it could be cured by the fact that the Court would prohibit any other mention of his conviction, unless and until he would testify. I could admonish the jury to disregard those comments. I can ignore those comments. I think those are the two other options that I think would cure. I mean, they're going to be instructed that the comments of counsel are not evidence."

Once the district judge explained that the error could be cured, Martin's attorney said, "Judge, from what I'm reading, I think maybe the damage has been done." So, after the district judge had already rejected Martin's mistrial motion, Martin attempted to change the judge's mind. Although Martin's attorney never explicitly mentioned K.S.A. 22-3423(1)(c), it seems that Martin's attorney believed that the prosecutor's statement was so prejudicial that the statement "ma[de] it impossible to proceed with the trial without injustice to . . . the defendant" as stated under K.S.A. 22-3423(1)(c). Then, in addition to telling the district judge that he did not hear the prosecutor's reference to Anthony's burglary guilty plea because he "was preparing [his] opening" statement during the State's opening arguments, Martin's attorney asked that the district judge not admonish the jury because he believed that "an admonishment would only serve to draw attention to [the error]."

After Martin's attorney said this, the district judge asked the prosecutor if she had anything to say, at which point the following exchange between the judge, the prosecutor, and Martin's attorney occurred:

"[PROSECUTOR]: Can I just put on the record I didn't do it to prejudice the defendant. The State was looking for more identification and identifying the second individual, and then the association between Mr. Barnhart, as well as the defendant in this case, so I don't want Ms. Martin . . . to have an unfair trial. Um, so I would just tell the Court that it wasn't intentional to derail her trial. Um—(pause).

"[MARTIN'S ATTORNEY]: And that wasn't the argument, that the prosecution did that intentionally. I don't think you did that—

"[JUDGE]: Well, and in fairness, I tried to research it out here. And there's [a] Kansas case. The only one I could find on Google was prior to [*Woods and Phillips*]. In fact, it's from 1921. And it was a United States Supreme Court [case], and they didn't see any issue with it. So I'm not exactly sure when that changed, but I didn't—I didn't have a chance to do a full brief on this over the lunch hour, so—(laughs).

"[MARTIN'S ATTORNEY]: Right.

"[JUDGE]: Um—

"[PROSECUTOR]: I state to the Court, obviously, we never want to end up in a mistrial, but if the State (sic) feels that the statements are so prejudicial that Ms. Martin should be granted a mistrial, then I'm not going to stand here and argue that I didn't say that. I did say that. And I was obviously providing my reason for it. But it was—it wasn't to prejudice her.

"[JUDGE]: Well, I don't think there's any ill will behind the comments. I think that the State believes that they were fair based on the evidence the State intended to present.

"I do think, because they were only comments in opening, that a mistrial is not necessary.

"Um [Martin's attorney has] obviously protected the record at this point with the objection. If I am wrong, then the case may be barred from retrial. If I'm right, then I'm right.

"So I would admonish the State not to have any mention of Mr. Barnhart's conviction, although they certainly can identify Mr. Barnhart in any manner that exists,

the relationship between the parties, and the things the State had already planned to do and did at the preliminary hearing. I just don't think you can use the fact that he pled or was otherwise convicted as any evidence against Ms. Martin."

Afterwards, it seems that neither Martin, nor the prosecutor, nor the district judge discussed the reference to Anthony's burglary guilty plea. His guilty plea was not discussed during the remainder of Martin's trial. And no posttrial filings in the record on appeal mention the prosecutor's statement.

### *B. Standards of Review*

Once again, Martin contends that we should reverse her convictions either because the district court erred when it denied her mistrial motion or because the prosecutor otherwise committed reversible prosecutorial error. As a result, Martin's appeal requires this court to apply two different standards of review—the standard for reviewing a denied mistrial motion and the standard for reviewing a prosecutorial error.

K.S.A. 22-3423(1)(c) states that the district court "*may* terminate the trial and order a mistrial at any time that [it] finds termination is necessary because . . . [p]rejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without injustice to either the defendant or the prosecution." (Emphasis added.) So, when considering a mistrial motion under K.S.A. 22-3423(1)(c), the district court must decide whether there was prejudicial conduct that violated the defendant's constitutional rights that "created a fundamental failure in the proceeding." *State v. Fraire*, 312 Kan. 786, 790, 481 P.3d 129 (2021). If such an error occurred, "the district court next decides whether the prejudicial conduct made it impossible to continue the proceeding without denying the parties a fair trial." 312 Kan. at 790.

Under this second step, the district court must consider whether the disputed "conduct caused prejudice that could not be cured or mitigated through jury admonition

or instruction, resulting in an injustice." 312 Kan. at 790. Although the statutory harmless error test under K.S.A. 2022 Supp. 60-261 or K.S.A. 60-2105 applies when evaluating violations of a defendant's statutory rights, the constitutional harmless error test from *Chapman* applies when evaluating violations of a defendant's constitutional rights. *State v. Logsdon*, 304 Kan. 3, 39, 371 P.3d 836 (2016) (quoting *State v. Ward*, 292 Kan. 541, 569-70, 256 P.3d 801 [2011]). The constitutional harmless error test from *Chapman* requires the party that benefited from the constitutional error to prove that the error "will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, proves there is no reasonable possibility that the error affected the verdict." *Logsdon*, 304 Kan. at 39.

Because the district court has discretion to grant or deny a mistrial motion under K.S.A. 22-3423(1)(c), on appeal, this court reviews the district court's denial of a mistrial motion for an abuse of discretion. *Frquire*, 312 Kan. at 789. A district court abuses its discretion whenever it makes an error of law, an error of fact, or an unreasonable decision to support its ruling. *Logsdon*, 304 Kan. at 27.

For prosecutorial error claims, though, this court applies the well-known standard of review adopted in *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 harmless inquiry demanded by *Chapman*. 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.' [Citation omitted.]"

Hence, like the standard for reviewing a denied mistrial motion involving alleged constitutional errors, the standard for reviewing prosecutorial error requires this court to do the following: (1) to consider whether *the party alleging error* established a constitutional error; and if so, (2) to consider whether *the party benefiting from the constitutional error* established that this error was harmless beyond a reasonable doubt under *Chapman's* constitutional harmless error test. But it is important to stress that there is a key difference between the two standards of review as to preserving an argument. A defendant must move for a mistrial before the district court to preserve any argument about the district court's denial of his or her mistrial motion before this court. See *State v. Green*, 315 Kan. 178, 182, 505 P.3d 377 (2022) (issues not raised before the district court cannot be raised for the first time on appeal). On the other hand, a defendant may argue prosecutorial error based on a prosecutor's allegedly errant statement during opening arguments for the first time on appeal. *State v. Butler*, 307 Kan. 831, 864, 416 P.3d 116 (2018). A defendant's failure to object to the prosecutor's alleged error just alters this court's standard for reviewing the defendant's argument. When a defendant argues prosecutorial error for the first time on appeal, this court may consider the defendant's failure to object before the district court while analyzing the alleged error. 307 Kan. at 864.

### *C. Procedural Issues with the Parties' Arguments*

Although Martin seemingly suggests that she has two claims of reversible error, both her mistrial motion argument and her prosecutorial error argument ultimately hinge on a single alleged error—that she did not have a fair trial because the prosecutor violated her due process rights by mentioning Anthony's burglary guilty plea during the State's opening argument. Put another way, both arguments require Martin to prove that the prosecutor committed a constitutional error so prejudicial that she could not receive a fair trial as meant under K.S.A. 22-3423(c)(1). As a result, the analysis below on Martin's mistrial motion and prosecutorial error arguments overlap. If Martin can prove *reversible*

prosecutorial error based on the prosecutor's reference to Anthony's burglary guilty plea, it follows that the district court erred when it denied Martin's mistrial motion relying on the prosecutor's error. Likewise, if Martin cannot prove reversible prosecutorial error based on the prosecutor's reference to Anthony's burglary guilty plea, it follows that the district court did not err when it denied Martin's mistrial motion relying on the prosecutor's error. See *State v. Carr*, 314 Kan. 744, 769-70, 772-73, 502 P.3d 511 (2022) (relying on the same constitutional harmless error analysis to reject Carr's prosecutorial error argument and Carr's argument that the district court abused its discretion by denying his mistrial motion based on this same alleged prosecutorial error), *cert. denied* 143 S. Ct. 584 (2023).

Another procedural issue with Martin's argument is that Martin did not move for a mistrial until (1) the district judge sua sponte raised the constitutional error and (2) the district court rejected the prosecutor's argument that she had not infringed upon Martin's due process rights by mentioning Anthony's burglary guilty plea. Then, when Martin's attorney addressed the prosecutor's error, he merely stated that "in light of" the judge's ruling that the prosecutor had infringed upon Martin's due process rights, he would move for a mistrial on Martin's behalf. In addition, the district judge did not ask the prosecutor whether she had "any comment" until (1) after he determined that she had infringed upon Martin's due process rights and (2) after he determined that her error could be cured by admonishing the jury and a jury instruction that attorneys' arguments are not evidence. In making this determination, the district judge also stressed the fact that no evidence concerning Anthony's burglary guilty plea had been admitted into evidence. Afterwards, when the judge gave the prosecutor the opportunity to address her constitutional error, the prosecutor stressed that she did not intend to "prejudice" Martin by making the disputed statement.

So, in this case, there are some odd procedural issues. The district judge sua sponte made all the arguments to support Martin's mistrial motion and sua sponte made



all the arguments to deny Martin's mistrial motion. Both Martin's mistrial motion and the prosecutor's response about curing any prejudice relied on the judge's previous analysis and rulings. Indeed, because Martin's attorney admitted that he was not listening to the State's opening arguments, the record on appeal shows that Martin would not have moved for a mistrial but for the judge taking issue with the prosecutor's statement. What is more, once the district court sua sponte raised this issue, it did not follow the correct procedure for evaluating the prejudicial effect of a constitutional error. It immediately ruled that the prosecutor infringed upon Martin's due process rights *and* then ruled that this error could be cured before asking the prosecutor if she had any comment about her error. All in all, it is readily apparent that the district judge returned from his lunch break (1) knowing that he was going to address the prosecutor's reference to Anthony's burglary guilty plea, (2) knowing that he was going to rule that this reference infringed upon Anthony's due process rights, and (3) knowing that he was going to deny any motion for mistrial based on this errant comment.

Also, when viewing the judge's analysis in context, it is not entirely clear what the judge meant when he asked the prosecutor whether she had "any comment." Because the district judge had already explained that he thought the prosecutor's errant reference to Anthony's burglary conviction could be cured before he asked the prosecutor for any comment, the prosecutor may have thought that the judge had already denied Martin's mistrial motion. Since the judge already told Martin's attorney that he thought the prosecutor's error could be cured, the prosecutor may have thought that the judge was asking her to comment on why she made a constitutional error. This interpretation of the judge's question may explain why the prosecutor responded to the judge's question by saying that she never intended to prejudice Martin. In a nutshell, asking someone whether he or she has any comment is a very broad and ambiguous question. This question could be interpreted to mean many things.

To summarize, when the district judge sua sponte raised and ruled on Martin's mistrial motion based on the prosecutor's reference to Anthony's burglary conviction during the State's opening arguments, the district judge did not follow the proper procedures for evaluating a mistrial motion. The judge here carried the burden of proof for Martin in establishing constitutional error, and it also carried the burden of proof for the State in establishing that this constitutional error should be considered harmless beyond a reasonable doubt.

Despite these procedural irregularities, when discussing his mistrial motion, Martin contends that the State abandoned any constitutional harmless error argument. According to Martin, because the prosecutor told the district judge that she would defer to the judge's analysis regarding the prejudicial effect of her statement, the State did not carry its burden of proving harmlessness before the district court.

Yet, as just explained, neither Martin nor the State carried their respective burdens of proof to establish that the prosecutor erred by referencing Anthony's burglary guilty plea during opening arguments or that this error could be cured or mitigated. Additionally, Martin never objected to the district judge's errant procedure. See *Green*, 315 Kan. at 182 (issues not raised before the district court cannot be raised for the first time on appeal). Martin participated in and benefited from the district court's errant procedure that usurped the parties' burden of proof. See *State v. Divine*, 291 Kan. 738, 742, 246 P.3d 692 (2011) (rejecting the State's argument because it participated in the district court's procedural errors, which constituted invited error). Also, Martin never objected to the district court taking on the parties' respective burdens of proof. See *Thoroughbred Assocs. v. Kansas City Royalty Co.*, 297 Kan. 1193, 1204, 308 P.3d 1238 (2013) (quoting *Spurgeon v. Union National Bank*, 137 Kan. 98, Syl. ¶ 1, 19 P.2d 459 [1933]) (explaining that our Supreme Court has consistently held that a party must object to the district court applying the wrong burden of proof to preserve any argument about this error on appeal). Given these procedural irregularities, Martin cannot persuasively

argue that we should review her argument about the district court wrongly denying her mistrial motion while also contending that the State waived any argument that the prosecutor's disputed statement was harmless beyond a reasonable doubt under the constitutional harmless error test. Martin's argument is inconsistent, and thus, unfair to the State.

Regardless of the preceding reasons to reject Martin's argument about the State abandoning any argument that the prosecutor's error was harmless, our Supreme Court has affirmed the district court's denial of a defendant's mistrial motion under a somewhat similar procedural situation. In *Carr*, our Supreme Court affirmed the district court's denial of Carr's mistrial motion (1) although Carr had proven the prosecutor committed constitutional error and (2) although the district court had denied Carr's mistrial motion addressing this constitutional error without first allowing the prosecutor to make an argument on the State's behalf. 314 Kan. 769-70. When addressing the district court's ruling, our Supreme Court explained that it was not even sure "what the district court relied on to deny the [mistrial] motion." 314 Kan. at 773. Despite its bewilderment, our Supreme Court rejected Carr's mistrial argument after applying the constitutional harmless error test. It determined that the district court correctly denied Carr's mistrial motion for the following reasons: (1) because the prosecutor did not use the fact not in evidence to prove Carr's guilt; (2) because the district court quickly admonished the jury to disregard the prosecutor's statement; (3) because the prosecutor made just one reference to the fact not in evidence; and (4) because the district court instructed the jury that the parties' arguments were not facts in evidence. 314 Kan. at 770, 772-73.

Thus, in *Carr*, our Supreme Court affirmed the district court's denial of a defendant's mistrial motion concerning proven constitutional error (1) although the district court carried the State's burden of proof, and (2) although the district court never explained why it denied the defendant's mistrial motion. So, the *Carr* decision supports that when the district court applies the wrong procedure to deny a defendant's mistrial

motion, an appellate court may affirm the district court's denial of a defendant's mistrial motion as long as the State carries its burden of proving constitutional harmless error on appeal. Thus, besides the procedural issues just discussed, our Supreme Court's precedent supports rejecting Martin's contention that the State abandoned its ability to argue that the prosecutor's statement about Anthony's burglary guilty plea conviction was harmless under *Chapman's* constitutional harmless error test.

Next, the State has caused a procedural wrinkle in this case too. On appeal, the State makes numerous arguments why the prosecutor did not make an error, let alone infringe upon Martin's right to a fair trial, by referencing Anthony's burglary guilty plea during the State's opening arguments. The State spends much of its analysis arguing that the prosecutor's disputed statement was made for identification purposes. The State contends that the prosecutor never suggested that the jury should convict Martin because Anthony had already pleaded guilty to burglary. Instead, the prosecutor made the "connection between [Anthony] and [Martin], as they were in a dating relationship." But there are a couple of obvious problems with the State's current position on appeal.

To begin with, this court has the duty to question its own jurisdiction if the record on appeal reveals a potential jurisdictional problem. *State v. Herman*, 50 Kan. App. 2d 316, 327-28, 324 P.3d 1134 (2014). "An appellate court may not properly exercise jurisdiction over an appeal that has not been taken in conformity with that statutory grant." 50 Kan. App. 2d at 327. For this court to have jurisdiction over an appellee's cross-appeal, the appellee must file a cross-appeal no later than 21 days of being served with the appellant's notice of appeal. K.S.A. 2022 Supp. 60-2103(h); see K.S.A. 22-3606; 50 Kan. App. 2d at 328-29. Here, the State never cross-appealed the district court's rejection of the prosecutor's argument that she could mention Anthony's burglary guilty plea during the State's opening arguments for identification purposes. In short, because the State never cross-appealed the district court's adverse ruling, this court lacks jurisdiction to consider the State's arguments.

Yet, even if this court had jurisdiction to consider the State's contention that the prosecutor did nothing wrong by referencing Anthony's burglary guilty plea during the State's opening arguments, it is readily apparent that the prosecutor erred under the *Woods* precedent. Again, the Tenth Circuit in *Woods* held that "notions of fundamental fairness and due process" prevent the government from using a codefendant's guilty plea as substantive evidence of a defendant's guilt. 764 F.3d at 1246. It explained that when the government uses a codefendant's guilty plea as substantive evidence of the defendant's guilt, it encourages the jury to convict the defendant based on guilt by association. 764 F.3d at 1246. It also specifically stressed that the government's reference to a codefendant's guilty plea is "especially prejudicial" when brought up in a coconspirator's jury trial. 764 F.3d at 1246.

Here, the prosecutor told the district judge that she pointed out Anthony's burglary guilty plea during the State's opening arguments to help identify Martin as the second occupant of the black SUV used by the people who burglarized Karafelis' shop. But the district judge correctly pointed out that using the identification of one person who has already pleaded guilty to a crime to prove the identity of the defendant necessarily infers the defendant's guilt when that defendant has been charged with aiding and abetting the crime the codefendant has already pleaded guilty to.

Also, a closer review of the prosecutor's disputed comments during the State's opening argument is telling:

"That black SUV is then seen left running while two occupants exit the vehicle around 2:45 A.M. *One of the occupants has been identified and has—I'm sorry, he has been convicted of his role in this courtroom.* And he is Anthony Barnhart. He has already pled guilty to the crime of burglary in this case." (Emphasis added.)

Why would the prosecutor start saying that Anthony had been "identified" and then abruptly say, "I'm sorry, he has been convicted of his role in this courtroom," unless she intended to use Anthony's guilt as substantive evidence of Martin's guilt? Indeed, telling the jury that Anthony pleaded guilty to burglary "in this courtroom" is a blatant overture to the jurors that they may convict Martin of aiding and abetting a burglary, of aiding and abetting a theft, and of criminal damage to property because Anthony has already accepted responsibility for his criminal conduct in the exact place where they were about to decide Martin's criminal culpability. Simply put, the plain language of the prosecutor's reference to Anthony proves that she, acting on the State's behalf, intended to use Anthony's burglary guilty plea as substantive evidence of its charges against Martin. For the State to argue otherwise is disingenuous.

So, there are multiple procedural irregularities in this case that affect this court's review of Martin's appeal. Both of Martin's arguments hinge on a single claim of prosecutorial error. This constitutional error was firmly fixed when the State failed to cross-appeal the district court's ruling of the following: that the prosecutor's reference to Anthony's burglary guilty plea during the State's opening arguments infringed upon Martin's due process right to a fair trial. Also, although Martin argues to the contrary, under the unique facts of her case and our Supreme Court's precedent, the State did not abandon its ability to argue that the prosecutor's errant statement was harmless under *Chapman's* constitutional harmless error test.

Then the only issue left for this court to decide is whether the State established that the prosecutor's reference to Anthony's guilty plea was harmless beyond a reasonable doubt as required under *Chapman's* constitutional harmless error test.

*D. Did reversible error occur?*

To review, when the district court denied Martin's mistrial motion, it ruled that the prosecutor's errant reference to Anthony's burglary guilty plea during the State's opening argument could be cured through the following: a jury admonition and instructing the jury that attorneys' arguments are not evidence. The district court judge also stressed the fact that no evidence concerning Anthony's burglary guilty plea had been admitted into evidence. Alternatively, the district court seemingly suggested that it could ignore the prosecutor's error, saying nothing to the jury, if Martin believed that was best for her defense. Martin's attorney asked the court not to admonish the jury because he believed it might only emphasize the prosecutor's comment about Anthony having already pleaded guilty to burglary.

Of note, Martin briefly argues that the district court applied the defunct prosecutorial misconduct standard of review because it stated that it did not believe that the prosecutor referred to Anthony's burglary guilty plea with "ill will." But a quick review of the district court's ruling disproves this argument. The district court stated that it did not believe that the prosecutor made the errant reference to Anthony's burglary guilty plea with ill will (1) after it had already denied Martin's mistrial motion and (2) after the prosecutor responded to its question whether she had any comment by saying that she never intended to prejudice Martin. In context, it is clear that the district court judge told the prosecutor that he did not think that she made the errant statement with ill will so the prosecutor knew that he did not think that she acted unethically by intentionally violating Martin's due process right to a fair trial. So, Martin's "ill will" argument is flawed.

As for Martin's primary arguments, the State argues that we should affirm Martin's convictions because the district court correctly ruled that any error stemming from the prosecutor's errant reference to Anthony's burglary guilty plea could be cured. At the

same time, the State argues that any error stemming from the prosecutor's statement about Anthony's burglary guilty plea was harmless. In making these arguments, the State stresses that the jury heard just a single comment by the prosecutor about Anthony's guilt during its opening arguments. It stresses that it presented no evidence of Anthony's guilt in its case-in-chief. Also, it stresses that the district court instructed the jury that attorneys' arguments are not evidence. Citing the rule that jurors are presumed to follow jury instructions, the State contends that we should presume that the jurors followed this instruction, meaning the jurors ignored the prosecutor's errant reference to Anthony's burglary guilty plea because it was not supported by any evidence. See *State v. Slusser*, 317 Kan. 174, 193, 527 P.3d 565 (2023) (explaining that "jurors generally are presumed to follow their instructions"). Lastly, the State argues that the evidence supporting Martin's guilt was so overwhelming that the prosecutor's errant statement about Anthony's burglary guilty plea was harmless beyond a reasonable doubt under the facts of Martin's case.

Martin counterargues that the prosecutor's statement cannot be harmless beyond a reasonable doubt because the prosecutor's reference to Anthony's burglary guilty plea allowed the jury to convict her by association with Anthony. She argues that the jury's short deliberation proves that the prosecutor's errant reference to Anthony's burglary was very prejudicial. And she argues that if the prosecutor had not mentioned Anthony's burglary guilty plea, the jury may not have convicted her of aiding and abetting a burglary, aiding and abetting a theft, and criminal damage to property because the evidence supporting her guilt was weak and circumstantial.

The prosecutor's errant reference to Anthony's burglary guilty plea was prejudicial. It certainly suggested that Martin was guilty by association with Anthony. It suggested that Martin was guilty merely because she was in an SUV outside Karafelis' shop with a man who had pleaded guilty to burglarizing Karafelis' shop. Also, as previously discussed, the prosecutor's statement about Anthony having pleaded guilty to burglary in



the same courtroom that the jury was about to decide Martin's guilt or innocence was a flagrant suggestion that the jury could find Martin guilty based on Anthony's burglary guilty plea.

Despite this obvious prejudice, the State persuasively argues that the prosecutor's errant reference to Anthony's burglary guilty plea was harmless beyond a reasonable doubt. The prosecutor made the errant reference to Anthony's guilty plea just once. The reference occurred very early in Martin's trial during the State's opening argument. The district court ultimately instructed the jury that attorneys' arguments are not evidence. As ordered by the district court, the State never offered evidence that Anthony pleaded guilty to burglary. Additionally, Martin's trial counsel explicitly requested that the district court not cure the prosecutor's error by admonishing the jury to disregard the prejudicial comment. Nevertheless, Martin now complains on appeal that she suffered prejudice specifically because the prosecutor's errant reference was "unchecked," because the district judge did not give the jury a special limiting instruction, and because the district judge did nothing to correct the error before the jury at Martin's request.

Then are we to deduce from Martin's complaints that she was denied a fair trial because of the prosecutor's prejudicial comment during her opening statement and because "no limiting instruction was given or appropriate under *Woods*," the prosecutorial error could not be cured? Assuredly not: On one hand, she argues that she was denied a fair trial because of the prejudicial comment. And, on the other hand, she seems to argue that because the prosecutor's prejudicial comment was "unchecked," that because the comment was not entered into evidence, and that because the district judge did not give the jury a special limiting instruction, the prosecutorial error could not be cured. Nevertheless, the fact remains that Martin waived, through her trial counsel, her right to have the district judge cure or mitigate the prosecutorial error through a jury admonition or through a jury limiting instruction or both.

And once Martin waived her right to have the district judge cure or mitigate the prosecutorial error through a jury admonition or through a jury limiting instruction or both, any argument she now makes that the prosecutorial error could not be cured or mitigated rings hollow. Indeed, Martin here invited any error resulting from the district court's failure to admonish the jury or give the jury a limiting instruction. See *State v. Stoll*, 312 Kan. 726, 735, 480 P.3d 158 (2021) (a party cannot invite an error and then complain about that error on appeal).

Most importantly, as argued by the State, the evidence supporting Martin's guilt was overwhelming. At Martin's trial, the State admitted the photos of the tattooed woman taken by VanDruff's trail cameras around 3 a.m. on June 28, 2021, and the photos Deputy Sprang took of Martin's tattoos during her August 14, 2021 interview. Martin never objected to the admission of these photos. Deputy Sprang testified that a female appearing in the trail camera photos had a sun tattoo on her back and a skull and crossbones tattoo on her left calf. VanDruff and Deputy Smith testified that the person in the photos was carrying something that might have been bolt cutters. Deputy Sprang testified that when he interviewed and photographed Martin, he saw that Martin had a sun tattoo on her back and a skull and crossbones tattoo on her left calf. He also testified that he immediately recognized Anthony as one man shown in the trail camera photos. Meanwhile, Martin presented a reasonable doubt defense. During her closing arguments, she asserted that the photos from the trail camera that the State admitted into evidence were too blurry to identify anyone beyond a reasonable doubt. She argued that the trail camera photos were so blurry that the woman in the photos might be Bigfoot.

Although Martin contends that the jury's quick verdict stemmed from the prosecutor's statement about Anthony's burglary conviction during the State's opening arguments, Martin ignores that this photographic evidence was damning. If anything, the jury's quick verdict proves that the State's evidence supporting Martin's guilt was overwhelming. The jury's quick verdict shows that the jury thought there was no

reasonable possibility that anyone other than Martin was the tattooed woman photographed by VanDruff's trail cameras around 3 a.m. on June 28, 2021, outside Karafelis' shop carrying bolt cutters.

To summarize, although the prosecutor infringed on Martin's right to a fair trial by referencing Anthony's burglary guilty plea during the State's opening arguments, the State has established that this error was harmless under *Chapman's* constitutional harmless error test. The prosecutor made this errant reference to Anthony's burglary guilty plea just once during the State's opening arguments in a case where there was photographic evidence of Martin committing a burglary with Anthony. So, under the unique facts of this case, there is no reasonable possibility that the prosecutor's errant reference to Anthony's burglary guilty plea had any bearing on the jury's decision to convict Martin of aiding and abetting a burglary, aiding and abetting a theft, and criminal damage to property. As a result, we affirm Martin's convictions.

Affirmed.