NOT DESIGNATED FOR PUBLICATION

No. 112,573

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

DANIEL BARLETT,
Appellant.

MEMORANDUM OPINION

Appeal from Wyandotte District Court; MICHAEL A. RUSSELL, judge. Opinion filed May 13, 2016. Affirmed.

Samuel Schirer, of Kansas Appellate Defender Office, for appellant.

Sheryl L. Lidtke, chief deputy district attorney, *Jerome A. Gorman*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before ARNOLD-BURGER, P.J., GREEN and LEBEN, JJ.

Per Curiam: When Daniel Barlett's musical group broke up, tensions between him and the group's cofounder, Chad Ford, ran high. One morning, men from each side of this dispute fought outside the Kansas City, Kansas, municipal courthouse, and the altercation bubbled over into a low-speed car chase. After Barlett and a cousin joined the chase, gunfire was exchanged, with Barlett's cousin shooting and killing Ford. The State charged Barlett with felony murder and criminal discharge of a firearm under an aiding and abetting theory, and the jury convicted him of the latter offense. Barlett appeals. Finding no trial error, we affirm his conviction.

FACTUAL AND PROCEDURAL HISTORY

Due to a longstanding dispute between Barlett and Ford that had recently erupted again, Ford confronted Barlett's friend, Stephen Carson, at the Kansas City, Kansas, municipal courthouse and either threatened him or said "'I got something for you.'" Ford's wife, Teresa, ushered Ford out of the courtroom. When she finished her court business, Teresa found Ford outside with his friend, William Castle, planning to confront Carson. Ford's friend, Ross Farber arrived a short while later, and as the three men stood outside, they spotted Carson in Joey Uziel's car.

An altercation broke out, with Ford and Farber trying to drag Carson out of the car. The men were yelling at each other. After a short time, Uziel sped off, driving to a nearby parking lot. There, Carson called Barlett, explaining that they had been outnumbered by Ford's group and needed help because someone had a gun. Carson saw bulges in both Ford's and Castle's waistbands, but he never saw either man pull out a weapon. Based on Carson's report, Barlett suggested they meet up somewhere. He left his house with his friend Mikey McKeehan in the passenger seat. Because Barlett warned him that the other men may be armed, McKeehan took his handgun. Teresa called her niece and told her that Barlett and McKeehan had "'just left armed to go get [Ford].'"

Meanwhile, Ford, Castle, and Farber climbed into Castle's car. Farber brought two guns with him. Although the exact order of events is unclear, at some point during or after this parking lot meet-up, Castle spotted Uziel's vehicle and gave chase.

As the two cars drove down the road, Carson spotted Barlett's vehicle approaching them from the opposite direction. Barlett passed, swung around, and drove up behind Castle, creating a three-way car chase, with Uziel's car carrying Carson at the front of the pack, followed by Ford in Castle's car, and finally Barlett with McKeehan as his passenger. But when the cars approached a Y-shaped intersection, Uziel (with Carson in

the passenger seat) lost his pursuers by driving to the left while they headed right, leaving Barlett (with McKeehan armed in the passenger seat) in pursuit of Castle (with Ford and Farber in the car and two guns). Farber provided Ford a gun while they drove. At that time, both Carson and other witnesses in the area heard gunshots.

Although accounts of the gunfight differ, everyone involved agrees Ford, now in the lead car, leaned out the front passenger side window with a gun and, a short time later, slumped back into the vehicle. He died from a gunshot to the right eye from McKeehan's gun. Who fired first was disputed. McKeehan claimed that Ford fired first, prompting Barlett to advise him "'Do it'"—meaning shoot Ford. McKeehan struck Ford with one of his last shots. Castle remembered hearing "gunshots coming from behind" just as Uziel's car left the chase. But both Castle and Farber claimed that all the gunshots originated from Barlett's vehicle, as they did not think Ford ever shot at the other car—although Farber admitted he had previously said otherwise.

Although Barlett never testified at trial, his statements to police echoed McKeehan's: Ford leaned out the window and fired first, and McKeehan returned fire. Barlett explained to police, however, that he and McKeehan accidentally happened upon the two cars while on an errand and that Ford shot directly at Barlett's vehicle. According to Barlett, McKeehan returned fire with a gun that Barlett did not know about.

Ford dropped his revolver after being shot and McKeehan stopped and collected it from the site of the shooting. McKeehan threw out the three spent casings as they drove, and Barlett later disposed of the remaining rounds. After the shooting, Barlett instructed McKeehan to hide or get rid of the guns.

The shell casings recovered from the site of the shooting matched a 9-millimeter handgun, not the revolver that Farber passed to Ford. Ammunition of the same caliber and consistent with the casings was discovered in the house where Barlett and McKeehan

lived. After McKeehan turned himself in, a 9-millimeter handgun was recovered from his backpack. DNA on the trigger of that handgun matched McKeehan, and casings recovered from the shooting site also matched that gun. In contrast, the doctor who performed the autopsy testified that he found no indicators on Ford's hand indicating Ford fired a gun. However, Ford's DNA was found on the trigger of the revolver.

Based on these events, the State charged Barlett with felony murder and criminal discharge of a firearm at an occupied vehicle. The case proceeded to jury trial but ended in a mistrial after Barlett's attorney fell ill. After the second trial, the jury convicted Barlett of criminal discharge of a firearm but was unable to reach a verdict on the felony murder charge. Barlett later pled guilty to voluntary manslaughter. The district court sentenced him to a total of 106 months' imprisonment, and he timely appealed. This appeal follows the second trial. He raises issues of instructional error, prosecutorial misconduct, failure to grant a mistrial and cumulative error. The State contends that Barlett has no right to appeal his conviction at all. We will address each argument in turn, beginning with the State's allegation which goes to our ability to consider Barlett's case.

ANALYSIS

Barlett has the right to appeal his conviction for criminal discharge of a firearm.

The State contends that Barlett waived his right to appeal his conviction for criminal discharge of a firearm. The State appears to reason that because the district court considered Barlett's voluntary manslaughter plea when granting him favorable sentences for both convictions, the criminal discharge of a firearm conviction must stand.

During the plea hearing, Barlett clearly waived his right to appeal from the voluntary manslaughter conviction. However, nothing in either the plea agreement or that hearing suggests he also waived his right to appeal from his criminal discharge

conviction. In fact, at the sentencing hearing, the district court expressly advised Barlett of his appellate rights with no mention of waiver. And while the district court definitely considered Barlett's willingness to admit his involvement in the shooting when sentencing him, that consideration alone is a far cry from a "'knowing and voluntary waiver by the defendant of his statutory right to appeal.'" *State v. Patton*, 287 Kan. 200, 226, 195 P.3d 753 (2008). In short, the State's contention that Barlett somehow surrendered all of his appellate rights by pleading guilty to voluntary manslaughter is unpersuasive.

The district court committed no instructional error.

At trial, Barlett requested that the district court instruct the jury on self-defense (his primary theory of defense) and also that the court add language about mere association to the aiding and abetting instruction. The district court denied both requests. On appeal, Barlett argues that the district court erred in failing to include these instructions. He also contends for the first time that the district court needed to instruct the jury on the definition of intentional conduct, as intent is an essential element of aiding and abetting. We will examine each alleged error in turn after setting out our standard of review.

Standard of review

To resolve jury instruction challenges, this court engages in a four-step analysis. First, the court considers the reviewability and preservation of the instructional issue, exercising unlimited review. Second, and still engaging in unlimited review, the court determines whether the requested instruction was legally appropriate. Third, viewing the evidence in the light most favorable to the requesting party, the court must determine whether sufficient evidence supported the instruction. And if the court finds error in the first three steps, it must finally ask whether the error was harmless under the test set out

in *State v. Ward*, 292 Kan. 541, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594 (2012). *State v. Woods*, 301 Kan. 852, 876, 348 P.3d 583 (2015).

While Barlett's arguments concern the district court's failure to deliver certain instructions to the jury, the record reflects (and he concedes on appeal) that he only requested two of the three instructions at issue in this appeal. Because slightly different standards apply to instructions not requested by the objecting party, we will first discuss the requested instructions before moving onto the unrequested one.

Requested instruction: self-defense

At trial, Barlett requested that the district court instruct the jury on self-defense, as the evidence at trial suggested that McKeehan only fired on Ford to defend himself. But based on our Kansas law and the facts of the case, the district court determined that Barlett was not entitled to such an instruction.

Our Kansas statutes provide that an individual is justified to use force against another when he or she "reasonably believes that such use of force is necessary to defend [himself or herself] or a third person against [another's] imminent use of unlawful force." K.S.A. 2015 Supp. 21-5222(a). Deadly force is similarly justified provided that the individual reasonably believes that "deadly force is necessary to prevent imminent death or great bodily harm." K.S.A. 2015 Supp. 21-5222(b). That said, that justification is not available to an individual who "[i]s attempting to commit, committing or escaping from the commission of a forcible felony." K.S.A. 2015 Supp. 21-5226(a).

In *State v. Bell*, 276 Kan. 785, 793, 80 P.3d 367 (2003), *disapproved on other grounds by State v. Anderson*, 287 Kan. 325, 197 P.3d 409 (2008), our Kansas Supreme Court determined that "[c]riminal discharge of a weapon at an occupied vehicle . . . is considered a forcible felony." As such, the defendant—also charged with felony murder

in facts very similar to those here—was statutorily barred from receiving the self-defense instruction. 276 Kan. at 793. And although Barlett points to dissenting opinions that criticize this holding, nothing indicates that the Supreme Court is abandoning this position. See *State v. Phillips*, 295 Kan. 929, 939-40, 287 P.3d 245 (2012); *State v. Kirkpatrick*, 286 Kan. 329, 336, 184 P.3d 247 (2008), *disapproved on other grounds by State v. Sampson*, 297 Kan. 288, 301 P.3d 276 (2013). Absent such indication, this court is duty-bound to follow our Supreme Court precedent. *State v. Belone*, 51 Kan. App. 2d 179, 211, 343 P.3d 128, *rev. denied* 302 Kan. ___ (September 14, 2015).

We do pause to note that we find Chief Justice Nuss' dissent in *Kirkpatrick* to be compelling. To conclude that regardless of the facts of a particular case a self-defense instruction is barred in the case of any forcible felony leads to "absurd results, contravene[s] the intent of the legislature, and fail[s] to address contrary decisions of this court" even though it may be a straightforward reading of the statutory language. 286 Kan. at 358-59. K.S.A. 2015 Supp. 21-5226(a) appears to be designed "to bar self-defense only if the accused is *already* otherwise committing a forcible felony." See 286 Kan. at 361-62; see also *State v. Purdy*, 228 Kan. 264, 272-73, 615 P.2d 131 (1980) (during residential burglary, occupant retrieves handgun and is shot by burglar; self-defense denied); *State v. Marks*, 226 Kan. 704, 712-13, 602 P.2d 1344 (1979) (during armed robbery of service station, proprietor strikes defendant with cane and is shot; self-defense denied).

But Chief Justice Nuss has not won over his colleagues with this argument. And as indicated, we are bound to follow Supreme Court precedent. Like the district court, we can find no way to distinguish the Supreme Court's holding in *Bell* from the facts and circumstances of this case. Accordingly, the district court correctly concluded that Barlett was not legally entitled to a self-defense instruction, as K.S.A. 2015 Supp. 21-5226(a) expressly prohibited that defense.

Requested instruction: additional "mere association" language

Barlett also requested that the district court add "mere association" language to the proposed aiding and abetting instruction. Specifically, Barlett wanted the instruction to clarify that

> "mere association with the principles who actually commit the crime or mere presence in the vicinity of the crime is insufficient to establish guilt as an aider or [abettor]. To be guilty of aiding and abetting in the commission of the crime, the defendant must willfully associate himself with the unlawful venture and willfully participate in it as he would something he wishes to bring about."

He argued that recent Kansas Supreme Court cases established that it was "the better practice" to include this sort of language in cases where the defendant claimed to only be associated with the criminal act instead of an active participant. Although the State did not object to this addition, the district court decided to simply use the pattern instruction without any changes.

Barlett correctly states that this instruction is legally appropriate. After all, the proposed addition reflects recent Kansas caselaw on the subject. See *State v. Llamas*, 298 Kan. 246, 259-60, 311 P.3d 399 (2013). In fact, the pattern jury instruction that the district court ultimately employed includes optional language similar to what Barlett requested. See PIK Crim. 4th 52.140. And as the Notes on Use for the instruction observe, our Supreme Court has previously held that including this additional language is "the 'better practice' . . . when the defense is based on the theory that [the] defendant was merely present and did not actively aid the crime." PIK Crim. 4th 52.140; see *Llamas*, 298 Kan. at 260.

But here, Barlett's theory of the case revolved around Ford being the aggressor, not about his lack of involvement in the shooting. In closing, Barlett's counsel focused

extensively on how Ford and his companions behaved up to and during the car chase. He emphasized the testimony and evidence suggesting that Ford fired on Barlett and McKeehan first. Much of Barlett's questioning at trial also concerned the bad blood between Ford and Barlett, Ford's aggression toward Barlett's friends the day of his death, and whether Ford fired the gun. Twice, briefly, Barlett's attorney suggested during closing that Barlett was merely associated with McKeehan's crime. But both times, counsel enveloped that assertion in the idea that McKeehan only fired to protect himself and Barlett. In short, Barlett's theory of the case really focused on self-defense, not his tenuous association with the crime.

But even if a jury could find that Barlett was merely an associate of McKeehan until such time as shots were fired, making the instruction factually appropriate, our Supreme Court has repeatedly held that failing to include the requested language is not error. See *State v. Hilt*, 299 Kan. 176, 185, 322 P.3d 367 (2014); *Llamas*, 298 Kan. at 261. After all, even without the additional language, the instruction requires the jury to find that the defendant acted intentionally in order to convict him of aiding and abetting. *State v. Edwards*, 291 Kan. 532, 552, 243 P.3d 683 (2010). Nothing in the instruction precludes a defense of mere association, and the additional language is not "indispensable to a jury's understanding of a case." *Hilt*, 299 Kan. at 185; *Llamas*, 298 Kan. at 261. And while the court in *Hilt* suggested that failure to include the additional language "may imperil convictions in future similar cases," it appears that our Kansas appellate courts have yet to reverse a conviction based on failure to include mere association language in the aiding and abetting instruction. 299 Kan. at 185-86; see *State v. Williams*, 299 Kan. 1039, 1046-47, 329 P.3d 420 (2014) (declining to reverse); *State v. Littlejohn*, 298 Kan. 632, 650, 316 P.3d 136 (2014) (same). As previously mentioned, this court is duty-bound to follow Supreme Court precedent. *Belone*, 51 Kan. App. 2d at 211.

Because Barlett's theory of the case only tangentially referenced his lack of involvement, it is unlikely that including the optional language was necessary. But even

if those references render this addition appropriate, the jury instruction as given still correctly stated the law. As such, reversing on this ground is unwarranted.

Unrequested instruction: intentional conduct

For the first time on appeal, Barlett argues that the district court erred by not including an instruction on intentional conduct. According to Barlett, the district court needed to include this instruction because aiding and abetting require that he either "advise[], counsel[], or procure[]" McKeehan to shoot Ford or intentionally aid him in the crime. He argues that because intent is an essential element of aiding and abetting, any failure to instruct on his intent is constitutional error.

Importantly, Barlett never requested this instruction at trial. A party cannot claim instructional error unless he or she either objects to the error or the error is determined to be clearly erroneous. K.S.A. 2015 Supp. 22-3414(3); *State v. Smyser*, 297 Kan. 199, 204, 299 P.3d 309 (2013). When determining whether an instruction is clearly erroneous, this court engages in a two-step analysis. First, the court considers whether any error occurred, which requires employing an unlimited review of the entire record to determine whether the instruction was legally and factually appropriate. Second, if the court finds error, it must assess whether it is firmly convinced that the jury would have reached a different verdict without the error. *State v. Clay*, 300 Kan. 401, 408, 329 P.3d 484 (2014).

In support of his position, Barlett points to two cases in which this court found error in the district court's failure to instruct on intentional conduct. In one, the defendant was charged with aggravated assault of a law enforcement officer, an offense that required the defendant intentionally place the officer in reasonable apprehension of immediate bodily harm. *State v. Eichman*, 26 Kan. App. 2d 527, 529-31, 989 P.2d 795, *rev. denied* 268 Kan. 890 (1999). In the other, the defendant was charged with battery of

a law enforcement officer, which also required an intentional act. *State v. Campbell*, 30 Kan. App. 2d 70, 72-73, 39 P.3d 97, *rev. denied* 273 Kan. 1037 (2002).

But aiding and abetting is not an offense or even a part of an offense. See *State v. Betancourt*, 299 Kan. 131, 139, 322 P.3d 353 (2014) (considering aiding and abetting "an assignment of criminal responsibility, rather than . . . a distinct element of a crime"). Instead, it constitutes a means of assigning criminal responsibility to an individual who, while not the actual actor, "advises, hires, counsels, or procures" the actor to commit the crime or "intentionally aids" that actor in carrying out the crime. K.S.A. 2015 Supp. 21-5210(a). Additionally, both *Eichman* and *Campbell* concerned situations in which finding intentional conduct was a prerequisite to conviction. See *Campbell*, 30 Kan. App. 2d at 72-73; *Eichman*, 26 Kan. App. 2d at 529-31. Here, the instruction at trial allowed the jury multiple avenues to holding Barlett responsible for the shooting: he could intentionally aid McKeehan, yes, but he could also provide McKeehan advice or counsel. See K.S.A. 2015 Supp. 21-5210(a). In other words, Barlett's intent is not finally determinative in whether he can be convicted under an aiding and abetting theory.

More importantly, any error on this front is clearly harmless. For one, this court determined in *Eichman* that failing to instruction on intentional conduct—an essential element of the offense—did not constitute clear error. 26 Kan. App. 2d at 531. And while the court reversed in *Campbell*, that decision relied on a broader error instructional issues, not simply the missing intent element. 30 Kan. App. 2d at 74-75. Moreover, while Barlett suggests that the technical definition of intentional conduct is unintuitive to a jury, an examination of the statute proves otherwise. Specifically, our Kansas statutes provide that an individual acts intentionally when it is his or her "conscious objective or desire to engage in the conduct or cause the result." K.S.A. 2015 Supp. 21-5202(h). And in noncriminal contexts, the word *intentional* is usually defined as "done by intention or design," with the word *intention* meaning "a determination to act in a certain way" or "what one intends to bring about." Webster's Ninth New Collegiate Dictionary 629 (9th

ed. 1991). In other words, under the common definition, someone acts intentionally when they act with determination or design to behave a certain way or bring about a certain result. As a practical matter, this definition fits with the one from our Kansas statutes. After all, acting with determination and design is similar to acting with a conscious desire, and both understandings preclude accidental and reckless conduct. In short, it is unlikely that including the technical definition from the statutes would have enhanced the jury's understanding of the word intent. See *Eichman*, 26 Kan. App. 2d at 531 (declining to find clear error where the defendant failed to "show how a layperson's understanding of intent is different from the definition of intent described in" the statute).

Notably, the record supports that Barlett either advised, counseled, or intentionally aided McKeehan. He purposefully followed Castle's vehicle by executing a U-turn and kept up the car chase even after Uziel pulled off at the Y-intersection. He continued to pursue Castle even after Ford began firing on his vehicle. And, most importantly, McKeehan testified that Barlett told him to "'[d]o it.'" Between keeping his car close enough to Castle's that McKeehan could successfully fire on it and instructing McKeehan to shoot, a jury could easily find that he either advised or intentionally aided McKeehan.

In short, this court cannot be firmly convinced that inclusion of an instruction on intentional conduct would have returned a different result. As with the other jury instruction issues, this court should find no error and affirm Barlett's conviction.

The prosecutor did not misstate the law in closing argument.

Next, Barlett argues that the State committed prosecutorial misconduct during closing argument by misstating the law of aiding and abetting liability. Appellate review of prosecutorial misconduct involves a two-step analysis. First, the court must determine whether the prosecutor's comments fell outside the wide latitude granted to prosecutors. If the comments were improper, the court then must determine whether the comments

prejudiced the jury against the defendant and denied him or her a fair trial. *State v. Roeder*, 300 Kan. 901, 932-33, 336 P.3d 831 (2014), *cert. denied* 135 S. Ct. 2316 (2015).

Barlett points to a number of times in the State's closing where he contends the State omitted the requirement of intent while discussing his assistance in the crime. For example, he highlights a rhetorical question in which the State asked, "Did the defendant do things that made it possible for McKeehan to shoot at [Castle's] Blazer?" At another point, while summarizing the driving decisions Barlett made—including turning around to follow Castle—the State again asked, "Did [those decisions] enable McKeehan to be able to then fire his gun at [Ford] and the rest of them in the black Blazer? Of course it did." According to Barlett, these statements suggest to the jury that any sort of enabling action on his part, regardless of his intent, constituted aiding and abetting.

Obviously, a prosecutor's misstatement of the law "can deny a defendant a fair trial when 'the facts are such that the jury could have been confused or misled by the statement.'" *State v. Williams*, 299 Kan. 509, 543-44, 324 P.3d 1078 (2014). But because isolating a prosecutor's comments during closing arguments "can frequently be misleading as to the message the prosecutor was conveying to the jury," reading the challenged statements in context is important. *State v. Naputi*, 293 Kan. 55, 59, 260 P.3d 86 (2011). Moreover, challenged statements must also be considered "in conjunction with the instructions given at trial." *State v. Burnett*, 293 Kan. 840, 851, 270 P.3d 1115 (2012).

In this case, the statements Barlett highlights are unobjectionable when placed in the broader context of the State's closing argument. When beginning the discussion on whether Barlett aided and abetted McKeehan, the prosecutor clearly explained that Barlett had to "intentionally aid[] another to commit the crime." The State then walked the jury through the events leading up to Ford's death by focusing on the repeated, purposeful decisions Barlett made throughout the day. For instance, when discussing Barlett's decision to help Carson after the fight at the courthouse, the State said, "He had

a choice that morning. He could have told Carson no on the phone. He could have said, 'That's your feud, you handle it, dude. . . .' But he didn't do that." In fact, the State referred to Barlett's actions as *choices* six times and called them *deliberate* another six times. And even when the prosecutor failed to directly couple a word like *assist* or *enable* with the required intent, it linked that action to a purposeful choice by Barlett. For example:

> "The defendant made a deliberate U-turn in the middle of 47th Street to follow [Castle's vehicle]. Now, do you think that that helped McKeehan? Do you think that that made it possible for McKeehan then to get behind them with his loaded gun and fire upon them? Of course it did. He wasn't in front of them. He was directly behind them at that point in time. He was now pursuing them from behind. Again, he made a choice to do that."

In other words, when considered in context, the comments Barlett challenges are simply part of a larger scheme in which the State emphasized the voluntary, deliberate nature of his actions by employing other words synonymous with intent. Nothing about the closing argument appears likely to confuse or mislead the jury, and at no time did the State obviate or eliminate the intent requirement. See *Naputi*, 293 Kan. at 60-61 (finding misconduct where prosecutor implied that the defendant's sexual intent could be inferred from the mere act of lewd fondling). Additionally, the district court properly instructed the jury on aiding and abetting, including the prerequisite intent. In short, the jury was well aware throughout and after closing argument that Barlett had to intentionally, not accidentally, aid McKeehan in committing the crime.

To conclude, the prosecutor did not misstate the law in closing argument. Instead, she simply highlighted the intent requirement by using different words with the same basic meaning. Because she never stepped outside the wide latitude afforded prosecutors, Barlett's conviction should be affirmed.

The district court did not abuse its discretion in refusing to grant a mistrial.

Next, Barlett argues that the district court erred when it refused to grant a mistrial during jury deliberations. According to K.S.A. 22-3423(1)(c), the district court can order a mistrial when "[p]rejudicial conduct . . . makes it impossible to proceed with the trial without injustice to either the defendant or the prosecution." When considering a motion for mistrial under this section, the district court must determine two things: (1) whether "there was some fundamental failure of the proceeding," and (2) whether continuing the trial in light of that fundamental failure will result in injustice. *State v. McCullough*, 293 Kan. 970, 980, 270 P.3d 1142 (2012). If the failure cannot be "removed or mitigated by an admonition, jury instruction, or other action" and results in an injustice, the court must declare a mistrial. 293 Kan. at 980.

When considering the district court's decision on appeal, this court reviews both of these inquiries under an abuse of discretion standard, reversing in situations where the district court either (1) acted in an arbitrary, fanciful, or unreasonable manner, (2) committed an error of law, or (3) committed an error of fact. 293 Kan. at 980-81.

Here, Barlett's motion for mistrial arose during deliberations, when the jury asked for a device to replay the video of Barlett's police interview. To ensure that the jury only watched the part that successfully played during the State's case-in-chief, the district court decided to replay the video in the courtroom. But technological issues persisted, and the video failed about 8 minutes in. Ultimately, the State successfully replayed all but about 10 minutes of what the jury originally watched.

Reasoning that these technological issues interfered with the jury's deliberation process, Barlett requested a mistrial. The State objected, arguing that Barlett suffered no prejudice because the replay excluded only a small portion of the video. The State also pointed out that the jury had access to the transcript of the interview. Ultimately, the

district court found no prejudice to Barlett and denied the motion for mistrial, as the jury had the full transcript of the video available for review.

On appeal, Barlett contends that this 10-minute playback error created a fundamental failure by violating K.S.A. 22-3420(3). The version of the statute in effect at the time of his trial reads in relevant part:

> "After the jury has retired for deliberation, if they desire to be informed as to any part of the law or evidence arising in the case, they may request the officer to conduct them to the court, where the information on the point of the law shall be given, or the evidence shall be read or exhibited to them in the presence of the defendant . . . ." K.S.A. 22-3420(3).

But what Barlett overlooks in crafting this argument is that our Kansas legislature amended this statute effective July 2014. The new version now provides: "In the court's discretion, upon the jury's retiring for deliberation, the jury *may* take any admitted exhibits into the jury room, where they *may* review them without further permission from the court. If necessary, the court *may* provide equipment to facilitate review." (Emphasis added.) K.S.A. 2015 Supp. 22-3420(c). And although this amendment occurred after Barlett's trial, it creates a procedural rule and applies retroactively. K.S.A. 2015 Supp. 22-3420(f); *State v. Watt*, No. 112,266, 2015 WL 6112017, at *7-8 (Kan. App. 2015) (unpublished opinion), *petition for rev. filed* November 5, 2015. In other words, the mandate Barlett reads into the previous version of the statute—namely, that the absolute right of the jury to review the evidence—now plainly lies within the discretion of the district court.

Applying the previous version of the statute actually leads to the same result. After all, "[w]hether there are reasonable grounds for the jury's request for the evidence" and "whether certain parts of the testimony may be read . . . are all questions for determination of the trial judge." *State v. Wolfe*, 194 Kan. 697, 700, 401 P.2d 917 (1965).

Instead of the position Barlett advocates, K.S.A. 22-3420 created only "a mandatory duty . . . to respond to a jury's request for further information," thereby leaving "the manner and extent" of any response to the district court's discretion. *State v. Boyd*, 257 Kan. 82, 87, 891 P.2d 358 (1995). The district court's decision to essentially abandon attempts to replay the full video after the 10-minute error, although not ideal, fits within this discretionary framework.

At trial, Barlett never objected to the accuracy of the video transcript, and he never moved for a mistrial when the video failed during the State's case-in-chief. Instead, he focused solely on the prejudicial effect of switching from the video to a cold transcript. But he fails to renew this argument on appeal, and he never suggests that admission of the transcript into evidence violates either the rules of evidence or his statutory and constitutional rights. His sole issue regarding the video is that the 10-minute playback failure during deliberations constitutes grounds for a mistrial and only because that failure violates K.S.A. 22-3420(3). But as previously explained, no statutory violation occurred. More importantly, the jury reviewed a significant portion of the video as played at trial and retained a copy of the transcript for further review. With all that in mind, the district court's determination that the playback did not rise to the level of a fundamental failing is not an abuse of discretion.

Because there was no trial error, there was no cumulative error.

Barlett last argues that the cumulative effect of the errors asserted in his other two issues deprived him of a fair trial. Cumulative error warrants reversal when the totality of circumstances substantially prejudiced the defendant and denied him or her a fair trial. *State v. Williams*, 299 Kan. 1039, 1050, 329 P.3d 420 (2014). That said, the doctrine will not apply if there are no errors supporting reversal. 299 Kan. at 1050. As previously explained, Barlett's arguments on appeal do not reveal any error by the district court. As

such, there are no errors to accumulate, and Barlett's argument on this point must fail. Barlett's conviction is affirmed.

Affirmed.