IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 121,204

STATE OF KANSAS,
Appellee,

v.

MICHAEL STEVEN MARTINEZ,
Appellant.

SYLLABUS BY THE COURT

1.

While courts generally have authority to determine whether a statute is unconstitutional, this power of judicial review is not unlimited. The separation of powers doctrine embodied in the Kansas constitutional framework requires the court exercise judicial review only when the constitutional challenge is presented in an actual case or controversy between the parties. Under this case-or-controversy requirement, parties must show (among other factors) that they have standing. Standing is the right to make a legal claim. To have such a right, a party generally must show an injury in fact; absent that injury, courts lack authority to entertain the party's claim. In this respect, standing is both a requirement for a case-or-controversy, i.e., justiciability, and a component of this court's subject matter jurisdiction.

2.

To have an injury in fact sufficient to raise a constitutional challenge to a statute, a party must show that the statute affected the party's rights. A party has standing to challenge the constitutionality of a statute only when it directly affects the party's rights.

3.

A jury instruction is legally inappropriate if it fails to accurately state the applicable law.

4.

An appellate court reviews an unpreserved instructional error for clear error. Under that standard, the party asserting error has the burden to firmly convince the appellate court that the jury would have reached a different verdict if the instructional error had not occurred.

5.

When reviewing the sufficiency of the evidence supporting a conviction, an appellate court reviews all the evidence in a light most favorable to the prosecution and decides whether a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. The court does not reweigh evidence, resolve evidentiary conflicts, or reassess witness credibility.

6.

The invited-error doctrine precludes a party who has led the district court into error from complaining of that error on appeal. In determining whether the invited-error doctrine applies, appellate courts must carefully consider the party's actions and the context in which those actions occurred to determine whether that party in fact induced the district court to make the alleged error.

7.

An appellate court reviews a district court's response to a question submitted by the jury during deliberations for abuse of discretion. A district court's response constitutes an abuse of discretion when it is objectively unreasonable or when the response includes an error of law or fact.

8.

A lesser included offense instruction is factually appropriate if an appellate court would uphold a conviction for the lesser offense in the face of a challenge to the sufficiency of the evidence.

9.

The effect of separate trial errors may require reversal of a defendant's conviction when the totality of the circumstances establishes that the defendant was substantially prejudiced by the errors and denied a fair trial. In assessing the cumulative effect of the errors, appellate courts examine the errors in the context of the entire record, considering how the trial judge dealt with the errors as they arose; the nature and number of errors and their interrelationship, if any; and the overall strength of the evidence. If any of the errors being aggregated are constitutional, their effect must be harmless beyond a reasonable doubt.

Review of the judgment of the Court of Appeals in an unpublished opinion filed September 24, 2021. Appeal from Finney District Court; ROBERT J. FREDERICK, judge. Opinion filed April 14, 2023. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Randall L. Hodgkinson, of Kansas Appellate Defender Office, was on the briefs for appellant.

Brian R. Sherwood, assistant county attorney, *Susan Lynn Hillier Richmeier*, county attorney, and *Derek Schmidt*, attorney general, were on the briefs for appellee.

The opinion of the court was delivered by

WALL, J.: Like three other cases decided this day, this appeal raises a constitutional challenge to the face of K.S.A. 2022 Supp. 21-5705(e)(2). See *State v.*

Bentley, 317 Kan. ___ (No. 123,185, this day decided); *State v. Slusser*, 317 Kan. ___ (No. 121,460, this day decided); *State v. Strong*, 317 Kan. ___ (No. 121,865, this day decided). That statute creates a mandatory (albeit rebuttable) presumption regarding a defendant's intent to distribute a controlled substance. Specifically, under the statute, a jury must presume that a defendant who possessed at least 3.5 grams of methamphetamine did so with the intent to distribute it, unless the defendant can rebut the presumption with affirmative evidence to the contrary. See *State v. Holder*, 314 Kan. 799, 805, 502 P.3d 1039 (2022).

In *Slusser* and *Strong*, defendants argued the statute violated their federal due-process rights. They claimed that the mandatory rebuttable presumption in the statute shifts the burden of proof on the element of intent to the defendant because it requires the jury to presume the defendants' intent to distribute once the State has proved possession of at least 3.5 grams of methamphetamine.

Michael Martinez, who was convicted of possession of methamphetamine with the intent to distribute, raises a similar argument, but he takes a slightly different approach. Martinez argues the statutory presumption violates his federal due-process rights under *Leary v. United States*, 395 U.S. 6, 35-36, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969), because there is no "rational connection" between possession of 3.5 grams of methamphetamine and an intent to distribute it.

For reasons explained in this opinion, we lack jurisdiction to address Martinez' constitutional challenge to the face of the statute. Granted, courts generally have authority to determine whether a statute is unconstitutional. But the power of judicial review is not unlimited. The separation of powers doctrine embodied in the Kansas constitutional framework requires the court exercise review only when the issues are presented in an actual case or controversy between the parties. Under this case-or-controversy

requirement, parties must show (among other factors) that they have standing. A party has standing to challenge the constitutionality of a statute only when it adversely impacts the party's rights. Thus, standing is both a requirement for a case or controversy, i.e., justiciability, and a component of this court's subject matter jurisdiction.

At Martinez' trial, rather than instructing the jury on K.S.A. 2022 Supp. 21-5705(e)(2)'s mandatory rebuttable presumption, the district court provided a "permissive inference" instruction founded on PIK Crim. 4th 57.022 (2013 Supp.). This permissive-inference instruction informed the jury that it could (but was not required to) infer that Martinez intended to distribute methamphetamine if the evidence showed he possessed at least 3.5 grams. Because the mandatory presumption in K.S.A. 2022 Supp. 21-5705(e)(2) was not applied to Martinez, the statute could not have adversely impacted his rights. Thus, he lacks standing to challenge its constitutionality, depriving our court of subject matter jurisdiction over the issue.

But Martinez raises several other justiciable issues. He claims his conviction for possession of methamphetamine with intent to distribute is supported by insufficient evidence. He contends the district court erred in formulating its response to a question from the jury. Martinez also argues there were several errors in the district court's jury instructions that contributed to his conviction for possession of methamphetamine with intent to distribute. And he claims the cumulative effect of these trial errors warrants reversal of this conviction.

For reasons explained in this opinion, we hold that Martinez' conviction for possession of methamphetamine with intent to distribute is supported by sufficient evidence and the district court did not abuse its discretion in its answer to the jury's question. But there were multiple errors in the jury instructions given at Martinez' trial. Even so, upon review of the record evidence, we are not firmly convinced that the jury would have reached a different verdict without the jury-instruction errors. In other words,

the errors do not warrant reversal of Martinez' convictions. And even when these errors are considered in the aggregate, we are convinced beyond reasonable doubt that they are harmless. Thus, we affirm the decision of the Court of Appeals panel upholding Martinez' convictions.

FACTS AND PROCEDURAL BACKGROUND

This case arose from events that occurred in a residential area east of Garden City in November 2017. Two Finney County Sheriff's deputies out on patrol began following an SUV that had recently left a suspected drug house. The SUV made several quick turns and pulled into the driveway of a house. Martinez and another man, Monyai Lampkin, went to the front door and asked for directions from the resident, who would later provide officers with a video of the encounter recorded on his home-surveillance system. In the video, Martinez is wearing a stocking cap and a jacket with a distinctive shoulder patch.

Martinez and Lampkin returned to the car and drove off. The deputies lost sight of the SUV but later encountered Martinez and Lampkin exiting a yard. The men fled on foot when they spotted the deputies. They were eventually apprehended. In a nearby yard, responding officers recovered the jacket that Martinez had been wearing. In one of the pockets, officers discovered a plastic bag containing 111 grams of what turned out to be large shards of methamphetamine. One of the deputies also found a small container of marijuana in the SUV.

The State charged Martinez with possession of more than 100 grams of methamphetamine with the intent to distribute, tampering with evidence, criminal trespass, and possession of marijuana. At a three-day trial in January 2019, a former DEA agent working as an investigator for the Finney County Sheriff's Office testified that the weight, street value, and composition of the methamphetamine found in Martinez' coat suggested that it was meant for distribution rather than personal use. Martinez testified in

his own defense. He acknowledged that the marijuana was his, but he denied any connection to the methamphetamine. Martinez suggested that Lampkin had put the methamphetamine in the jacket without his knowledge.

The jury convicted Martinez on the four charges. The district court imposed a controlling sentence of more than 16 years in prison. Martinez raised six issues on appeal to the Court of Appeals, but a panel of that court rejected each of his arguments and affirmed his convictions. *State v. Martinez*, No. 121,204, 2021 WL 4352387, at *7 (Kan. App. 2021) (unpublished opinion).

Martinez asked our court to review five of the six issues he had raised before the panel—he did not contest the panel's holding on his prosecutorial-error challenge. See Supreme Court Rule 8.03(b)(6)(C)(i) (2022 Kan. S. Ct. R. at 56) (issues not presented in the petition for review are not properly before the Kansas Supreme Court). We granted Martinez' petition, placed the case on the summary calendar, and ordered supplemental briefing on two issues. First, we directed the parties to address our recent holdings in *Holder* and *State v. Valdez*, 316 Kan. 1, 512 P.3d 1125 (2022). Although we decided those cases while Martinez' petition for review was pending, neither Martinez nor the State cited them in a Rule 6.09 letter. See Supreme Court Rule 6.09(a)(3) (2022 Kan. S. Ct. R. at 41) ("After a petition for review is filed but before the petition has been ruled on, a party may advise the court, by letter, of citation to persuasive or controlling authority that was published or filed after the petition for review was filed."). Second, we directed the parties to address whether Martinez has standing to challenge the constitutionality of K.S.A. 2022 Supp. 21-5705(e)(2) on its face.

Because neither party requested oral argument, we decide this summary-calendar case based on the petition for review and the briefs. See Supreme Court Rule 7.01(c)(4)

(2022 Kan. S. Ct. R. at 42) ("When a case is placed on the summary calendar, it is deemed submitted to the court without oral argument unless a party's motion for oral argument is granted.").

ANALYSIS

Martinez has raised five issues before our court. First, he challenges the constitutionality of K.S.A. 2022 Supp. 21-5705(e)(2) and argues the jury instruction derived from that statute was erroneously given to the jury. Second, he claims insufficient evidence supports his conviction for possession with the intent to distribute. Third, he argues the district court's response to a question the jury submitted during deliberations was legally inappropriate. Fourth, he contends the district court should have instructed the jury on simple possession of methamphetamine, a less serious drug charge. And fifth, Martinez argues the cumulative impact of these errors requires us to reverse his convictions, even if those errors are harmless when viewed in isolation.

We address these issues below and conclude that none warrant reversal of Martinez' convictions.

I. *Martinez' Constitutional Challenge to K.S.A. 2022 Supp. 21-5705(e)(2) and His Challenge to the Jury Instruction Derived from that Statute Do Not Warrant Relief*

According to the panel, Martinez raised only a constitutional challenge to K.S.A. 2020 Supp. 21-5705(e)(2)'s rebuttable presumption, not an instructional challenge to the permissive-inference instruction given during his trial: "More to the point, however, Martinez does not attack the instruction. He challenges the propriety of the statutory presumption in K.S.A. 2020 Supp. 21-5705(e)(2)." *Martinez*, 2021 WL 4352387, at *4. The State agrees with the panel. Martinez does not.

Thus, we must first address the scope of Martinez' challenge on appeal. For reasons discussed below, we conclude that Martinez raised both a constitutional challenge to the mandatory rebuttable presumption in the statute and an instructional challenge to the permissive-inference jury instruction.

A. *Martinez Preserved Both a Constitutional Challenge to the Statutory Presumption in K.S.A. 2022 Supp. 21-5705(e)(2) and an Instructional Challenge to the Permissive-Inference Instruction Given at Trial*

To determine whether Martinez challenged both the mandatory rebuttable presumption in the statute and the permissive-inference instruction on constitutional grounds, it helps to understand the distinction between the statute and the instruction given at trial. Under K.S.A. 2022 Supp. 21-5705(e)(2), "there shall be a rebuttable presumption of an intent to distribute if any person possesses . . . 3.5 grams or more of heroin or methamphetamine." As we explained in *Holder*, a rebuttable presumption "'requires the jury to find the presumed element unless the accused persuades the jury otherwise.'" 314 Kan. at 805 (quoting *State v. Harkness*, 252 Kan. 510, Syl. ¶ 13, 847 P.2d 1191 [1993]). In other words, K.S.A. 2022 Supp. 21-5705(e)(2) requires the jury to presume an intent to distribute if a defendant possessed at least 3.5 grams of methamphetamine, unless the defendant rebuts that presumption with affirmative evidence to the contrary (for example, by presenting evidence that the defendant possessed the substance for personal use).

But the district court did not instruct the jury on the mandatory rebuttable presumption in K.S.A. 2022 Supp. 21-5705(e)(2). Instead, the district court provided a "permissive inference" instruction based on PIK Crim. 4th 57.022. Whereas a mandatory presumption *requires* a jury to presume a fact, a permissive inference does not. It instead "suggest[s] to the jury 'a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion.'" *Holder*, 314 Kan. at 805 (quoting *Francis v. Franklin*, 471 U.S. 307, 314, 105 S. Ct. 1965, 85 L. Ed. 2d 344

[1985]). The permissive-inference instruction here informed the jury that it could (but was not required to) infer Martinez intended to distribute methamphetamine, if the evidence showed he possessed at least 3.5 grams of the substance:

> "Under Kansas law, if you find the defendant possessed 3.5 grams or more of methamphetamine, you may infer that the defendant possessed with intent to distribute. You may consider this inference along with all the other evidence in the case. You may accept or reject it in determining whether the State has met the burden of proving the intent of the defendant. This burden never shifts to the defendant."

Apart from the introductory phrase, the instruction matched PIK Crim. 4th 57.022. That pattern instruction cites K.S.A. 2022 Supp. 21-5705(e) as its legal authority.

A review of Martinez' appellate brief confirms that he challenges not only the constitutionality of the statutory mandatory presumption but also the permissive-inference instruction given at trial. First, the brief acknowledges Martinez did not object to the instruction below, but he argues that appellate courts may always consider a claim of instructional error for the first time on appeal under K.S.A. 2022 Supp. 22-3414. Then, the brief identifies the applicable standard of review as clear error, the standard of review applied to unpreserved jury-instruction challenges. See K.S.A. 2022 Supp. 22-3414(3). On the merits, Martinez' brief argues the permissive-inference instruction deviated from the statute and was not rationally connected to the State's evidence at trial.

Based on these arguments, Martinez adequately briefed a challenge to the permissive-inference instruction. And such a challenge may be raised for the first time on appeal. *State v. Hilyard*, 316 Kan. 326, 333, 515 P.3d 267 (2022). Moreover, the arguments Martinez raised on appeal mirrored the arguments defendant raised in *Valdez*. And there, we held that the Court of Appeals erred by failing to construe the defendant's

argument as both an instructional and constitutional challenge. See *Valdez,* 316 Kan. at 6-8. Having confirmed that Martinez raised both challenges, we now address each challenge in turn.

B. *Martinez Lacks Standing to Challenge the Constitutionality of K.S.A. 2022 Supp. 21-5705(e)(2) on Its Face*

In his appellate brief, Martinez argued that K.S.A. 2022 Supp. 21-5705(e)(2) is facially unconstitutional because it fails the "rational connection" standard as set out by the United States Supreme Court in *Leary*. Under that standard, a presumption in a criminal case violates a defendant's federal due-process rights "unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." 395 U.S. at 36; see also *Tot v. United States,* 319 U.S. 463, 467-68, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943) ("[A] statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.").

According to Martinez, it cannot be said that K.S.A. 2022 Supp. 21-5705(e)(2)'s presumed fact—that the defendant has an intent to distribute—is more likely than not to flow from the proved fact—that the defendant possessed at least 3.5 grams of methamphetamine. The panel did not address that argument, reasoning that "whatever legal shortcomings there might be with K.S.A. 2020 Supp. 21-5705(e)(2) as a presumption of intent, they amount to debatable academic points . . . because the jury was never instructed on—and, therefore, could not have considered—the statutory presumption." *Martinez,* 2021 WL 4352387, at *3. In essence, the panel held that Martinez lacked standing to raise his constitutional challenge (although the panel did not use that language). Thus, before addressing the merits of Martinez' constitutional challenge, we must first consider the threshold issue of whether he has standing to raise this legal claim.

While courts generally have authority to determine whether a statute is unconstitutional, this power of judicial review is not unlimited. The separation of powers doctrine embodied in the Kansas constitutional framework requires the court exercise judicial review only when the constitutional challenge is presented in an actual case or controversy between the parties. *Gannon v. State*, 298 Kan. 1107, 1119, 319 P.3d 1196 (2014). Under this case-or-controversy requirement, parties must show (among other factors) that they have standing. Standing is the "'right to make a legal claim.'" 298 Kan. at 1121. To have such a right, a party generally must show an "'injury in fact'"; absent that injury, courts lack authority to entertain the party's claim. See 298 Kan. 1122-23 (Standing is "a component of subject matter jurisdiction."); see also *In re A.A.-F.*, 310 Kan. 125, 135, 444 P.3d 938 (2019) ("Kansas courts have authority—in other words, the judicial power—to hear only those matters over which they have jurisdiction."). In this respect, standing is both a requirement for a case-or-controversy, i.e., justiciability, and a component of this court's subject matter jurisdiction. *Gannon*, 298 Kan. at 1122-23.

To establish an injury in fact sufficient to raise a constitutional challenge to a statute, a party must show that the statute affected the party's rights. *State v. Coman*, 294 Kan. 84, Syl. ¶ 3, 273 P.3d 701 (2012); see *Ulster County Court v. Allen*, 442 U.S. 140, 154-55, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979) ("A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights."). A party cannot establish standing by arguing that a statute would be unconstitutional if applied to third parties in a hypothetical situation. *Coman*, 294 Kan. 84, Syl. ¶ 3.

In our order granting Martinez' petition for review, we instructed the parties to provide supplemental briefing on whether Martinez has standing to challenge the constitutionality of K.S.A. 2022 Supp. 21-5705(e)(2). And we directed the parties to *Ulster*.

In *Ulster*, the Court was tasked with determining whether defendants had standing to bring a facial challenge to the constitutionality of a statutory presumption (as opposed to standing to challenge the statutory presumption as applied). The *Ulster* Court explained that inferences and presumptions may broadly be divided into two categories—permissive and mandatory—and this categorization generally determines how a court will review any constitutional challenge. See 442 U.S. at 156-60. A permissive presumption or inference leaves the fact-finder free to accept or reject the inference and does not shift the burden of proof, so such an evidentiary device violates due process "only if, *under the facts of the case*, there is no rational way the [fact-finder] could make the connection permitted by the inference." (Emphasis added.) 442 U.S. at 157. Consequently, this evidentiary device is traditionally reviewed on an as-applied basis. 442 U.S. at 157, 162-63 ("Our cases considering the validity of permissive statutory presumptions such as the one involved here have rested on an evaluation of the presumption as applied to the record before the Court. None suggests that a court should pass on the constitutionality of this kind of statute 'on its face.'").

Mandatory presumptions, however, compel the fact-finder to reach a presumed conclusion based on a predicate fact (at least until the defendant produces evidence to rebut the presumption). 442 U.S. at 157. Because the fact-finder "may not reject [a mandatory presumption] based on an independent evaluation of the particular facts presented by the State, the analysis of the presumption's constitutional validity is logically divorced from those facts." 442 U.S. at 159. Thus, mandatory presumptions are generally reviewed on their face. 442 U.S. at 157-58.

The *Ulster* Court also explained that "[i]n deciding what type of inference or presumption is involved in a case, the jury instructions will generally be controlling, although their interpretation may require recourse to the statute involved and the cases decided under it." 442 U.S. at 157 n.16.

Here, Martinez challenges the mandatory rebuttable presumption in K.S.A. 2022 Supp. 21-5705(e)(2) on its face. But Martinez would have standing to bring a facial challenge to K.S.A. 2022 Supp. 21-5705(e)(2) only if the statute's mandatory presumption was applied to him through the jury instructions. As Martinez concedes in his supplemental brief, the district court instructed the jury on a permissive inference, not the mandatory presumption in K.S.A. 2022 Supp. 21-5705(e)(2). Because the statute's mandatory presumption was never applied to Martinez, he lacks standing to challenge the constitutionality of K.S.A. 2022 Supp. 21-5705(e)(2) on its face. In turn, we lack subject matter jurisdiction over his facial constitutional challenge to the statute.

C. *The Permissive-Inference Instruction Was Legally Inappropriate But Does Not Require Reversal of Martinez' Conviction*

Martinez raises two challenges to the permissive-inference instruction given at his trial. First, Martinez contends that the instruction is legally inappropriate because it deviates from K.S.A. 2022 Supp. 21-5705(e)(2)'s mandatory presumption. Second, Martinez contends the instruction also violated his federal due-process rights because it fails the "rational connection" test as applied to the evidence presented at trial. In other words, he argues there was no rational connection between the State's evidence at trial and the threshold amount triggering the instruction's permissive inference. See 442 U.S. at 155 (when challenge involves a permissive inference, courts apply rational-connection standard to the facts of the case). And Martinez has standing to bring this constitutional challenge because the permissive inference was applied in his case through the challenged instruction. See 442 U.S. at 155, 157 n.16.

The panel did not address these arguments because it concluded that Martinez did not raise an instructional challenge. But as we explained above, the panel erred in reaching that conclusion. Thus, we must address the merits of Martinez' instructional challenges.

We review claims of instructional error in multiple steps. We first consider jurisdiction and whether the issue is preserved. Then we consider whether the instruction was both legally and factually appropriate. Finally, we review any error for harmlessness, using different standards depending on whether the claim has been preserved. If a defendant failed to object to the instruction at trial, then we will reverse only for clear error. Under the clear-error standard, the defendant has the burden to firmly convince us that the jury would have reached a different verdict if the instructional error had not occurred. *State v. Crosby*, 312 Kan. 630, 639, 479 P.3d 167 (2021). Martinez concedes that he did not object to the permissive-inference instruction at trial. Thus, we review any error in that instruction for clear error.

As to his first challenge to the permissive-inference instruction, Martinez is correct that the instruction was legally inappropriate under our recent decisions in *Valdez* and *Holder*. Jury instructions "must always fairly and accurately state the applicable law." *State v. Plummer*, 295 Kan. 156, 161, 283 P.3d 202 (2012). But as we explained in *Holder* and *Valdez*, the permissive-inference instruction *deviates* from the applicable law. While K.S.A. 2022 Supp. 21-5705(e)(2)'s mandatory presumption *requires* the jury to find the presumed fact (the intent to distribute) based on evidence supporting the predicate fact (possession of at least 3.5 grams of methamphetamine), the instruction's permissive inference informs the jury that it "may accept or reject" the presumed fact. See *Holder*, 314 Kan. at 804-05; *Valdez*, 316 Kan. at 8-9. And because the permissive-inference instruction deviates from the mandatory presumption in the statute, it is not legally appropriate.

Of course, jurors may still draw reasonable inferences about a defendant's intent to distribute based on the trial evidence, and, if that inference is reasonably grounded in the evidence, prosecutors may encourage them to do so. Nothing in this opinion, or in *Holder* and *Valdez*, should be taken to suggest otherwise. See, e.g., *Holder*, 314 Kan. at 806

("[A] defendant's possession of a large quantity of narcotics certainly may support an inference that the defendant intended to distribute the narcotic."). Even so, because the permissive-inference instruction does not incorporate the mandatory presumption in K.S.A. 2022 Supp. 21-5705(e)(2), it is an incomplete statement of the law. Thus, the instruction is legally inappropriate because it does not "fairly and accurately state the applicable law." *Plummer*, 295 Kan. at 161.

Because we have concluded that the permissive-inference instruction was legally inappropriate for failing to state the applicable law, we need not decide whether the instruction was also unconstitutional under *Leary*'s rational-connection test. As we noted when the defendant raised the same argument in *Valdez*, the crux of the challenge is that the permissive-inference instruction relieved the State of its burden to prove every element of the intent-to-distribute charge beyond a reasonable doubt. 316 Kan. at 6-7 (citing *Ulster*, 442 U.S. at 157). Even if we agreed with Martinez, we would apply the same clear-error standard of review that we do for other unpreserved instructional challenges, and Martinez would still have the burden to firmly convince us that the jury would have reached a different verdict had the permissive-inference instruction not been given. See, e.g., *State v. Cameron*, 300 Kan. 384, 395, 329 P.3d 1158 (2014) (applying "a clearly erroneous standard of review" to reject the defendant's argument, raised for the first time on appeal, that a jury instruction "unconstitutionally shifted the burden to him to prove that he was not guilty"). Because reaching the merits of the due-process challenge to the instruction would not affect our reversibility analysis, we simply presume without deciding that Martinez has also established this error and proceed to our clear-error review. See *Butler v. Shawnee Mission School District Board of Education*, 314 Kan. 553, 574, 502 P.3d 89 (2022) (courts should refrain from "deciding constitutional questions unless it is necessary to do so").

Upon review of the entire record, Martinez has not firmly convinced us that the verdict would have changed had the permissive-inference instruction not been given. If

the district court had given a legally appropriate instruction that mirrored K.S.A. 2022 Supp. 21-5705(e)(2)'s mandatory presumption, we are not convinced the verdict would have changed because the instruction would have *required* the jury to find that Martinez intended to distribute the methamphetamine found in his jacket. In other words, such an instruction would have been more prejudicial to Martinez than the one given.

If, on the other hand, the district court had not instructed the jury on the permissive inference or the mandatory presumption in the statute, the uncontroverted trial evidence still firmly established Martinez' intent to distribute. The sheriff's investigator testified that the amount of methamphetamine seized was worth about $2,400, a value indicative of drug distribution, and the quantity was many dozen times greater than the amount a personal user would typically possess. He also explained that large shards of methamphetamine, like the ones recovered from the bag inside Martinez' jacket, generally are possessed by distributors, who then break the large crystals down and sell them to individual users. Further, as the panel noted, Martinez did not seek to controvert that testimony. And his defense at trial "rested on denying any knowing possession of the 111 grams of methamphetamine at all and not on whether it was for personal use rather than commercial distribution." *Martinez*, 2021 WL 4352387, at *3. We therefore hold that Martinez has not met his burden to show clear error warranting the reversal of his conviction for possession of methamphetamine with intent to distribute.

II. *Sufficient Evidence Supports Martinez' Conviction for Possession of Methamphetamine with the Intent to Distribute, and that Conviction Is Not the Product of Impermissible Inference Stacking*

Martinez next argues there was insufficient evidence to support his conviction for possession of methamphetamine with the intent to distribute. Our standard of review is well established: we will not overturn a conviction when, after reviewing all the evidence in a light most favorable to the prosecution, we are convinced that a rational

fact-finder could have found the defendant guilty beyond a reasonable doubt. When making that determination, we do not reweigh evidence, resolve evidentiary conflicts, or reassess witness credibility. *State v. Chandler*, 307 Kan. 657, 668, 414 P.3d 713 (2018).

The State charged Martinez with one count of unlawful possession of more than 100 grams of methamphetamine with the intent to distribute, in violation of K.S.A. 2017 Supp. 21-5705(a)(1) and (d)(3). To find Martinez guilty of that offense, the jury had to find beyond a reasonable doubt that Martinez (1) possessed at least 100 grams of methamphetamine and (2) intended to distribute the drug. The district court properly instructed the jury on those elements.

The State presented circumstantial evidence in support of both elements. See *State v. Thach*, 305 Kan. 72, 84, 378 P.3d 522 (2016) ("[C]ircumstantial evidence may sustain even the most serious convictions and . . . may be used to show intent."). On the first element, the State presented circumstantial evidence that Martinez possessed at least 100 grams of methamphetamine: a bag with about 111 grams of methamphetamine was found in the pocket of a jacket that Martinez discarded while fleeing from police. On the second element, the State relied on the undisputed testimony of the Finney County Sheriff's investigator to establish Martinez' intent to distribute the controlled substance. As noted in our clear-error analysis in the previous section, the investigator testified that the quantity, street value, and composition of the methamphetamine signified a commercial supply. When that evidence is viewed in a light most favorable to the prosecution, a rational fact-finder could have found beyond a reasonable doubt that Martinez possessed more than 100 grams of methamphetamine with the intent to distribute.

But Martinez insists that such a conclusion necessarily relied on impermissible inference stacking. See *State v. Banks*, 306 Kan. 854, 859, 397 P.3d 1195 (2017) (The State may draw reasonable inferences from the facts presented at trial but may not ask the

jury to make a presumption based on another presumption.). We disagree. As the panel aptly put it, "each element was proved through a separate line of circumstantial evidence grounded in the trial testimony and exhibits." *Martinez*, 2021 WL 4352387, at *5. Martinez' possession of the methamphetamine was established by the fact that it was found in his discarded jacket. His intent to distribute the methamphetamine was established by independent circumstantial evidence—testimony that the quantity, value, and composition of the methamphetamine reflected a commercial supply. The circumstantial evidence supporting Martinez' conviction did not require the jury to arrive at its conviction by improperly stacking one inference upon another. See *Valdez*, 316 Kan. at 12 (Defendant's conviction was not founded on improper inference stacking where the State presented circumstantial evidence in support of the possession element and other circumstantial evidence in support of the intent to distribute element.).

III. *The District Court Did Not Abuse Its Discretion when It Responded to a Question the Jury Submitted During Deliberations*

Martinez next challenges what he characterizes as an instruction given by the district court during deliberations. A few hours after the jury began deliberating, it sent a note stating, "We are at 10 and 2 any sugges[t]ions?" The district court did not speak with the presiding juror or gather more information about whether continued deliberations could be fruitful. Instead, with the agreement of the parties, the court sent a written response stating, "Members of the jury, all I can do is encourage you to continue your deliberations." After another hour of deliberating, the jury returned its verdict.

Martinez contends the district court's response was an *Allen* instruction. An *Allen* instruction is a supplemental instruction given to the jury and designed to encourage a divided jury to agree on a verdict. See *Allen v. United States*, 164 U.S. 492, 501-02, 17 S. Ct. 154, 41 L. Ed. 528 (1896). Because *Allen* instructions can exert undue influence

on the jury, we have "a long and justified history of disapproving *Allen*-type jury instructions," especially when "given to the jury during deadlocked deliberations." *State v. Tahah*, 302 Kan. 783, 794, 358 P.3d 819 (2015).

But the panel held that the invited-error doctrine precluded it from reaching the merits of Martinez' argument. *Martinez*, 2021 WL 4352387, at *6. It noted that the district court "met with the lawyers and Martinez outside the presence of the jury to discuss the question posed" and that "Martinez' lawyer discussed and endorsed the approach the district court took in responding and approved the content of the written answer to the jury." 2021 WL 4352387, at *6. According to the panel, "[w]hen the lawyer for a defendant participates in formulating and then approves the answer the district court provides in response to a question from jurors, the invited error rule precludes raising the adequacy of the response as a point for reversal on appeal." 2021 WL 4352387, at *6.

But Martinez insists the record shows his attorney had no hand in formulating the response. In other words, Martinez contends he merely acquiesced, but did not affirmatively induce, the district court's response to the jury's question. We agree.

The transcript shows the district court formulated the response on its own and Martinez' attorney simply did not object to it:

> "THE COURT: Let the record reflect that this Court is now back in session and on the record with regard to Case No. 17 CR 548, with this portion of this jury trial occurring outside of the presence of the jury, with Mr. Sherwood continuing to appear on behalf of the State of Kansas, with Mr. Martinez continuing to appear in person together with his counsel, Ms. Lobmeyer.
>
> "At 3:09 p.m. this afternoon I received the following written question from the jury: 'We are at 10 and 2. Any suggestions?'
>
> "I don't know whether they are talking about one count or multiple counts. I don't know what I can possibly do other than encourage them to continue to deliberate. I could

tell them that if they've reached an agreement on some counts and not all the counts, that they could enter verdicts as to those counts, but I think before I ever got to that point I would want them to tell me that they are at a complete impasse, and then I could inquire of them in court with you all present whether or not this is an issue with regard to one count, two counts, three counts, or four counts.

"Give me your input, Mr. Sherwood.

"MR. SHERWOOD: That sounds fine, Judge.

"MS. LOBMEYER: That would be fine.

"THE COURT: So my response at this point is going to be all I can do at this point in time is encourage you to continue your deliberations with regard to this case; correct?

"MR. SHERWOOD: Right.

"MS. LOBMEYER: Yes.

"THE COURT: All right. We'll be in recess for just a few minutes to get this typed up, and then we'll be back on the record, so don't anybody leave. All right?

"(There was a short pause and continued with the defendant and counsel present.)

"THE COURT: Picking up where we left off, the question I was given at 3:09 is, 'We are at 10 and 2. Any suggestions?'

"My response, 'Members of the jury, all I can do is encourage you to continue your deliberations.'

"Acceptable, Mr. Sherwood?

"MR. SHERWOOD: Yes.

"THE COURT: Ms. Lobmeyer?

"MS. LOBMEYER: Yes.

"THE COURT: Then we will be in recess until further notice."

In *State v. Douglas*, 313 Kan. 704, 708, 490 P.3d 34 (2021), we recently harmonized our caselaw addressing the invited-error doctrine in the context of jury instructions. See *State v. Roberts*, 314 Kan. 835, 846, 503 P.3d 227 (2022). We clarified that "the doctrine's application turns on whether the instruction would have been given—or omitted—but for an affirmative request to the court for that outcome later challenged on appeal." *Douglas*, 313 Kan. at 708. Thus, "[t]he ultimate question is whether the record reflects the defense's action *in fact induced* the court to make the claimed error."

313 Kan. at 708. Mere acquiescence to a district court instruction does not warrant the application of the invited-error doctrine. See 313 Kan. at 709. The same rationale applies equally when assessing the doctrine's applicability to a district court's response to a jury question.

The record here reflects that Martinez' attorney merely acquiesced to the district court's formulation of the response. Defense counsel's conduct did not induce the content of the district court's written response to the jury's question. The panel therefore erred by invoking the invited-error doctrine.

Even so, Martinez' argument fails on the merits. We review a district court's response to a jury-submitted question for an abuse of discretion. *State v. Walker*, 308 Kan. 409, 423-24, 421 P.3d 700 (2018). A district court's response constitutes an abuse of discretion when it is objectively unreasonable or when the response includes an error of law or fact. 308 Kan. at 423.

We see no error of law or fact in the district court's response, nor do we find it objectively unreasonable. The district court followed the procedures set out in K.S.A. 2022 Supp. 22-3420(d) for responding to a jury question submitted during deliberations, and Martinez does not suggest otherwise. The jury asked the question only a few hours into deliberations. And the district court's response merely encouraged the jury to keep deliberating. Martinez cites no authority suggesting this response constitutes an improper *Allen* instruction. And the response did not include language from the *Allen* instruction found in the Pattern Jury Instructions for Kansas. See *State v. Makthepharak*, 276 Kan. 563, 569, 78 P.3d 412 (2003) (citing several cases disapproving of use of PIK Crim. 3d 68.12 after deliberations have begun based on finding that instruction could exert undue pressure on jury to reach a verdict). Nor did the response include any of the language that Kansas courts have found objectionable, such as "another trial would be a burden on both sides," or "like all cases this case must be decided some time." See, e.g., *State v. Salts*,

288 Kan. 263, 264-65, 200 P.3d 464 (2009) (court held it was error to instruct deadlocked jury that "'[*a*]*nother trial would be a burden on both sides*'"); *State v. Anthony*, 282 Kan. 201, 216, 145 P.3d 1 (2006) (citing series of cases in which court disapproved instruction given after deliberations that "'all cases . . . must be decided sometime'"). For these reasons, we hold that the district court did not abuse its discretion in formulating its response to the jury question.

IV. *The District Court Should Have Instructed the Jury on Simple Possession of Methamphetamine But this Error Does Not Warrant Reversal*

Martinez raises one final claim of instructional error. He argues the district court erred by not instructing the jury on simple possession of methamphetamine under K.S.A. 2022 Supp. 21-5706(a). Simple possession is a lesser included offense of the crime the State charged him with—possession with intent to distribute methamphetamine under K.S.A. 2022 Supp. 21-5705(a)(1) and (d)(3). Like his other instructional-error claims, Martinez raises this issue for the first time on appeal.

Because Martinez did not request the instruction, we employ the same multi-step standard of review we have already described: we first consider jurisdiction and preservation, then decide whether the instruction would have been legally and factually appropriate, and finally determine whether reversal is warranted under the clear-error standard. *Valdez*, 316 Kan. at 6. That said, when the party's objection is based on an omitted instruction, rather than error in the instructions given, we must also consider whether the instructions given by the district court, considered as a whole, accurately stated the applicable law and were not reasonably likely to mislead the jury. *State v. Shields*, 315 Kan. 814, 820, 511 P.3d 931 (2022). If so, then the district court did not err by failing to give the omitted instruction, even if that instruction would have been legally and factually appropriate. 315 Kan. at 820. In other words, we are mindful that a party is not entitled to *every* factually and legally appropriate instruction.

The Court of Appeals panel held that the district court did not err by omitting the instruction. The panel concluded that the instruction would have been legally appropriate because simple possession is a lesser included crime of possession with intent to distribute. *Martinez*, 2021 WL 4352387, at *5. The State concedes that point. See *State v. Gentry*, 310 Kan. 715, 721, 449 P.3d 429 (2019) ("'An instruction on a lesser included crime is legally appropriate.'"). But the panel held that the simple-possession instruction would not have been factually appropriate because the undisputed testimony of the sheriff's investigator about the weight, value, and composition of the methamphetamine would not have reasonably justified a conviction for simple possession. *Martinez*, 2021 WL 4352387, at *5.

In other words, in deciding whether an instruction on simple possession would have been factually appropriate, the panel considered whether the evidence at trial was more likely to support a conviction for the lesser offense rather than the greater offense of possession with intent to distribute. But we have rejected this standard for determining the factual appropriateness of a lesser included offense instruction. See *State v. Berkstresser*, 316 Kan. 597, 603, 520 P.3d 718 (2022). Rather than focusing on the evidence supporting the greater offense, we have held that a lesser included offense instruction is factually appropriate if the court would uphold a conviction for the lesser offense in the face of a challenge to the sufficiency of the evidence. 316 Kan. at 604.

Here, there is circumstantial evidence that Martinez possessed roughly 111 grams of methamphetamine. This evidence is sufficient to support a conviction for simple possession of methamphetamine. See *State v. Scheuerman*, 314 Kan. 583, 592, 502 P.3d 502 (2022) ("[W]here the undisputed evidence establishes the possession of a *greater* quantity of contraband than a charged crime encompasses, that evidence is sufficient to establish the possession of the amount contemplated by the charged crime."). Thus, a simple-possession instruction would have been factually appropriate.

But as we noted above, a district court's failure to provide a legally and factually appropriate instruction does not always constitute error. If the district court's instructions, considered as a whole, accurately stated the applicable law and were not reasonably likely to mislead the jury, then the omission of an instruction is not erroneous—even if the omitted instruction would have been legally and factually appropriate. *Shields*, 315 Kan. at 820. But the instructions here gave an incomplete account of the applicable law. Under K.S.A. 2022 Supp. 22-3414(3), a district court must instruct the jury on "any" lesser included crime "[i]n cases where there is some evidence which would reasonably justify a conviction" on that lesser charge. Here, there was sufficient evidence to support a conviction on the lesser included offense, meaning the evidence would have reasonably justified a conviction for simple possession of methamphetamine. Thus, the district court erred by failing to instruct the jury on that lesser offense. In turn, the panel erred by concluding that the omission of that instruction was proper.

Even so, we again conclude that reversal is not warranted under the clear-error standard. Given the undisputed testimony of the sheriff's investigator, Martinez has not firmly convinced us that, if faced with a simple-possession instruction, the jury would not have convicted him of possession of methamphetamine with the intent to distribute. See *Valdez*, 316 Kan. at 17 (no clear error for failing to instruct on lesser included offense when strong weight of evidence showed the defendant possessed requisite amount with the intent to distribute it).

V. *The Cumulative Effect of the Trial Errors Did Not Deny Martinez a Fair Trial*

Finally, Martinez argues the cumulative impact of the trial errors requires reversal, even if such errors are harmless in isolation. The effect of separate trial errors may require reversal of a defendant's conviction when the totality of the circumstances establish that the defendant was substantially prejudiced by the errors and denied a fair

trial. *State v. Hirsh*, 310 Kan. 321, 345, 446 P.3d 472 (2019). In assessing the cumulative effect of the trial errors, appellate courts examine the errors in the context of the entire record, considering how the trial judge dealt with the errors as they arose; the nature and number of errors and their interrelationship, if any; and the overall strength of the evidence. 310 Kan. at 345-46. If any of the errors being aggregated are constitutional, their effect must be harmless beyond a reasonable doubt. *State v. Robinson*, 306 Kan. 1012, 1034, 399 P.3d 194 (2017). Under that constitutional harmless-error standard, reversal is warranted unless the State shows "'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.'" *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016).

We have identified two instructional errors in Martinez' trial. First, the district court should have instructed the jury on simple possession of methamphetamine. Second, the permissive-inference instruction was legally inappropriate because it deviated from K.S.A. 2022 Supp. 21-5705(e)(2)'s mandatory presumption. We also presumed without deciding that the permissive-inference instruction was not rationally connected to the trial evidence, which would violate Martinez' federal due-process rights under *Leary*. Because we presumed that the permissive-inference instruction violated Martinez' due-process rights, we will also presume that the constitutional harmless-error standard applies.

Even under that heightened standard, we conclude that the cumulative effect of the trial errors is no greater than when analyzed independently—in other words, the whole is no greater than the sum of its parts. Granted, the trial errors are related in that they all touch on Martinez' intent to distribute the methamphetamine. But had the district court given a jury instruction that matched K.S.A. 2022 Supp. 21-5705(e)(2)'s mandatory presumption, rather than the permissive-inference instruction given, the likelihood of Martinez' conviction would have been even greater. Such an instruction would have required the jury to find an intent to distribute. Also, as we have repeatedly emphasized,

the trial testimony establishing Martinez' intent to distribute is compelling and undisputed. We are therefore convinced that there is no reasonable possibility the jury-instruction errors contributed to the guilty verdicts.

CONCLUSION

For the reasons outlined above, we affirm the panel's decision upholding Martinez' convictions, though in some instances under a different rationale than the panel employed. Judgment of the Court of Appeals is affirmed. Judgment of the district court is affirmed.

* * *

STEGALL, J., concurring: I concur in the result based on the rationale expressed in my concurrence in *State v. Strong*, 317 Kan. __, __ P.3d __ (No. 121,865, this day decided).

LUCKERT, C.J., joins the foregoing concurrence.