IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 123,185

STATE OF KANSAS,
Appellee,

v.

CORY WAYNE BENTLEY,
Appellant.

SYLLABUS BY THE COURT

1.

A district court must obtain a constitutionally sufficient jury trial waiver before a defendant stipulates to an element of a charged crime.

2.

A district court's failure to obtain a constitutionally sufficient jury trial waiver before a defendant stipulates to an element of a charged crime is reviewed for constitutional harmless error.

3.

When there is no indication a defendant objected to a guilt-based defense, a court considers whether counsel's decision to utilize such a defense was deficient performance and prejudicial under the circumstances. There is no general requirement that counsel first obtain express approval from the defendant.

4.

Possession of a larger amount of methamphetamine that could establish guilt under K.S.A. 2022 Supp. 21-5705(d)(3)(C) does not preclude guilt for possessing a smaller amount under K.S.A. 2022 Supp. 21-5705(d)(3)(A) or (B).

5.

An instruction permitting the jury to infer a defendant intended to distribute drugs based on a certain amount of drugs in the defendant's possession is not legally appropriate because it does not reflect the mandatory rebuttable presumption in K.S.A. 2022 Supp. 21-5705(e).

6.

In a prosecution under K.S.A. 8-262, for driving while one's license is suspended, the State must offer proof that a copy of the order of suspension, or written notice of that action, was mailed to the last known address of the licensee according to the division's records. The State does not have to prove the licensee actually received the notice, had actual knowledge of the revocation, or had specific intent to drive while the license was suspended.

7.

When a defendant has actual knowledge that his or her license has been suspended, the State is not required to present direct evidence that there has been compliance with K.S.A. 8-255(d).

Review of the judgment of the Court of Appeals in an unpublished opinion filed April 29, 2022. Appeal from Sedgwick District Court; BRUCE C. BROWN, judge. Opinion filed April 14, 2023. Judgment of the Court of Appeals affirming in part and reversing in part the district court is affirmed in part and

reversed in part. Judgment of the district court is affirmed in part, reversed in part, and remanded with directions.

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

Matt J. Maloney, assistant district attorney, argued the cause, and *Marc Bennett,* district attorney, and *Derek Schmidt,* attorney general, were with him on the brief for appellee.

The opinion of the court was delivered by

ROSEN, J.: A jury convicted Cory Wayne Bentley of two counts of possessing firearms by a felon, one count of possessing methamphetamine with intent to distribute, one count of driving with a suspended license, and a traffic infraction. The Court of Appeals reversed the firearms convictions and affirmed the other convictions. Bentley did not appeal his traffic infraction. This court granted the State's petition for review of the firearms reversal and Bentley's cross-petition for review of the other convictions.

For reasons we set out below, we affirm the firearm and methamphetamine convictions and reverse the suspended license conviction.

FACTUAL AND PROCEDURAL BACKGROUND

On September 5, 2018, Wichita police officer Nicholas Long received an alert to be on the lookout for a car suspected of being involved in a drive-by shooting. That morning, Long and his partner, David Inkelaar, located the unoccupied car in a hotel parking lot. They watched the car and saw a man leave the motel and drive the car out of the parking lot. The officers followed the car and observed several traffic infractions,

including improper lane changes and failure to maintain lane positioning. The car then came to a complete stop in the roadway.

Long and Inkelaar approached the car and asked for the driver's identification. The driver told them he did not have a license or other photo identification; instead, he gave the officers his Kansas Department of Corrections number. The driver then identified himself as Cory Bentley.

Inkelaar contacted the police department communications division and determined Bentley's license was suspended and he had two outstanding city bench warrants. The officers then handcuffed Bentley and placed him under arrest. As they prepared to search Bentley after they walked him back to the patrol vehicles, he informed them he had a pistol and dope in his pocket. Long then found a gun and two bags containing a white crystalline powder in Bentley's pockets. The bags were later determined to contain respectively 7.13 grams and 20.57 grams of methamphetamine.

While standing outside the police vehicles, Bentley told a third officer at the scene, Steven Thornton, that he should tell Long and Inkelaar that another firearm was located under the seat of his car. A vehicle search turned up the weapon under the seat. The search also turned up five small empty Ziplock baggies in the car's center console and floorboards.

After Bentley was taken to the city police offices, Detective Daniel Weidner interrogated him. The interview lasted about three hours, including breaks during which Weidner left the room. Weidner informed Bentley of his *Miranda* rights, and Bentley agreed to speak with him without a lawyer present. Bentley told Weidner he had won $900 at a casino and was able to buy a larger quantity of drugs. Bentley said he planned

to use the contents of the smaller bag that day. He said he planned to share some of the other bag in order to stay with various people. Bentley's exact words were that he would have "to break the house off," a phrase that Weidner understood from his experience and training to mean to break off a smaller piece of something and give it in exchange for housing or shelter.

The State charged Bentley with possessing methamphetamine with the intent to distribute at least 3.5 grams but less than 100 grams; two counts of unlawful possession of a firearm; unlawful control over stolen property; driving while his license was canceled, suspended, or revoked; and failing to drive within a single lane. The State subsequently dismissed the stolen property count. Bentley signed a written stipulation that he had previously been convicted of a felony and that he was not in possession of a firearm at the time he committed the prior crime. Bentley's stipulation to a prior felony conviction is an element of the unlawful firearm charges.

A jury found Bentley guilty of possession of 3.5 to less than 100 grams of methamphetamine with intent to distribute; two counts of criminal possession of a weapon by a convicted felon; driving while his license was suspended or canceled; and failing to maintain a single lane. He was sentenced to a high guideline sentence of 137 months for the methamphetamine count, a high guideline sentence of 9 months for each of the weapons counts, a 6-month jail sentence and $100 fine for driving with a suspended license, and a $75 fine for failing to maintain a single lane. The sentences all ran consecutive to each other, for a controlling sentence of 155 months in prison and a consecutive 6-month jail term.

Bentley filed a timely notice of appeal. The Court of Appeals reversed the convictions for illegal possession of firearms and affirmed the remaining convictions.

State v. Bentley, No. 123,185, 2022 WL 1278482 (Kan. App. 2022) (unpublished opinion). Bentley did not challenge the lane-violation conviction. This court granted both the State's petition for review and Bentley's cross-petition.

ANALYSIS

Did Bentley voluntarily participate in the interrogation by Weidner?

Soon after his arrest, Bentley signed a waiver of his *Miranda* rights and submitted to an interrogation by the police. He made several statements that were used against him at trial. In particular, he told Detective Weidner that he "gotta break the house" in order to have a place to spend the night. Weidner interpreted this statement to mean that Bentley would break off a piece of methamphetamine crystal to use as a quid pro quo for temporary shelter.

During the interrogation, Bentley was shackled to a table. He wept frequently and spoke many of his answers under his breath, especially in the early stages of the interrogation. He argues on appeal that his mental state was so unstable that he was incapable of making voluntary statements. The State contends that, despite a pretrial motion to suppress, Bentley failed to preserve the issue at trial. In the alternative, the State asks this court to uphold the district court's finding that the interrogation was voluntary. The Court of Appeals held the issue was sufficiently preserved for appellate review but agreed with the district court that Bentley's statements during the interrogation were voluntary. We agree with the findings of the courts below.

As a preliminary matter, the State contends Bentley failed to preserve the core of the arguments he makes on appeal for two reasons. First, Bentley's only argument to the

trial court regarding the voluntariness of his interrogation statements was that he was under the influence of methamphetamine at the time. Second, Bentley failed to assert concerns about the voluntariness during the presentation of evidence. The Court of Appeals considered Bentley's various motions and objections collectively and concluded the issue was sufficiently preserved to allow appellate review.

Bentley filed a couple of pretrial motions seeking to suppress the statements he made during his postarrest interrogation. One was a "Motion to Suppress Illegally Seized Evidence Pursuant to K.S.A. 22-3216 and Motion to Suppress Confession or Admission Pursuant to K.S.A. 22-3215," which primarily argued that the vehicle stop and subsequent arrest was illegal. He also filed a pretrial motion to determine the voluntariness of his statements under *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964).

The district court conducted an evidentiary hearing addressing both motions and a subsequent hearing where counsel argued their positions. Bentley's counsel argued Bentley was "still high on methamphetamine, because that is likely the state that he's in" at the time of the interrogation. His counsel added that "to believe that Mr. Bentley is making knowing, intelligent, voluntary and free choices to waive his *Miranda* rights and then having this conversation, when he's probably still high on methamphetamine, I think that stretches the imagination." He raised additional arguments about the lawfulness of the stop and seizure. After making extensive findings, the court held the interrogation was voluntary and denied the motion to suppress.

At trial, Bentley requested and was granted a standing objection to admission of evidence from the interrogation based on "the stop seizure interrogation." Generally, any pretrial objection to the admission or exclusion of evidence must be preserved by

contemporaneously objecting at trial, which can be accomplished through a standing objection. See *State v. Richard*, 300 Kan. 715, 721, 333 P.3d 179 (2014).

The State argues Bentley improperly relies on objections that were based on something other than the arguments he makes on appeal. But Bentley framed part of his suppression motion on lack of voluntariness under *Jackson v. Denno*, 378 U.S. 368, and, in ruling on the motions, the district court meticulously addressed the question of whether Bentley's statements were voluntary. To be sure, Bentley's argument at the suppression hearing seemed limited to the unsubstantiated assertion that he was "high" on methamphetamine at the time of the interrogation, but the court went beyond that claim in making its ruling.

The Court of Appeals determined that Bentley's objections sufficed to preserve the issue:

> "Bentley's counsel objected—rather obliquely—'to evidence of the stop seizure interrogation.' From this, we take it that Bentley was renewing his pretrial objections to the validity of the stop, the validity of his subsequent arrest, and the admissibility of evidence obtained through police interrogation thereafter. The objection was overruled, but the court gave Bentley a standing objection to such testimony.
>
> "Under these circumstances, we find that Bentley's counsel preserved his pretrial objections to the admission of Bentley's statements to the police during his interrogation, which included all the factors relating to voluntariness enumerated in *Davis*, which were addressed by counsel and by the court in its ruling on the suppression motion, not just the issue of whether Bentley was high on drugs at the time of the interrogation." *Bentley*, 2022 WL 1278482, at *4.

We agree with the analysis by the Court of Appeals. Bentley's preservation of the issue was not a model of clarity or directness, but it was adequate for appellate review.

We turn now to the merits of Bentley's assertion that he lacked the state of mind necessary to make voluntary statements to Weidner during the interrogation.

The district court was able to review the videorecording of the interrogation, which the Court of Appeals and we likewise do. At a hearing on the motions to dismiss, the district court also heard Weidner's testimony and referred to that testimony in making its findings.

When reviewing a decision ruling on a motion to suppress statements to police, this court applies a dual standard. The court reviews the factual underpinnings of the decision under a substantial competent evidence standard. The ultimate legal conclusion drawn from those facts is reviewed de novo. The appellate court does not reweigh the evidence, assess the credibility of the witnesses, or resolve conflicting evidence. *State v. Dern*, 303 Kan. 384, 392, 362 P.3d 566 (2015).

Pursuant to the Fifth Amendment to the United States Constitution, "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ." Under this provision, the State may not introduce statements a defendant made during a custodial investigation unless those statements were freely and voluntarily given. *State v. Galloway*, 311 Kan. 238, 245, 459 P.3d 195 (2020).

The State may introduce a defendant's previous statements if the judge finds the defendant was conscious and capable of understanding what he said and did. The State is not permitted to induce the defendant to make the statement under compulsion or by

prolonged interrogation under such circumstances as to render the statement involuntary. The State may not use threats or promises concerning action to be taken by a public official with reference to the crime that would likely cause the defendant to make such a statement falsely. *State v. Garcia*, 297 Kan. 182, 189, 301 P.3d 658 (2013).

The State has the burden to prove the voluntariness of a confession by a preponderance of the evidence—that the statement was the product of the defendant's free and independent will. *State v. Mattox*, 305 Kan. 1015, 1042, 390 P.3d 514 (2017). The courts look at the totality of the circumstances surrounding a confession and determine its voluntariness by considering the following nonexclusive factors: (1) the defendant's mental condition; (2) the manner and duration of the interrogation; (3) the ability of the defendant to communicate on request with the outside world; (4) the defendant's age, intellect, and background; (5) the fairness of the officers in conducting the interrogation; and (6) the defendant's fluency with the English language. *State v. Woods*, 301 Kan. 852, 867, 348 P.3d 583 (2015); see *Mattox*, 305 Kan. at 1042-43.

> "'These factors are not to be weighed against one another with those favorable to a free and voluntary confession offsetting those tending to the contrary. Instead, the situation surrounding the giving of a confession may dissipate the import of an individual factor that might otherwise have a coercive effect. Even after analyzing such dilution, if any, a single factor or a combination of factors considered together may inevitably lead to a conclusion that under the totality of circumstances a suspect's will was overborne and the confession was not therefore a free and voluntary act.' [Citation omitted.]" *Mattox*, 305 Kan. at 1043.

We reject Bentley's request to review the issue de novo because the district court made findings of fact related to the circumstances of the interrogation. And those findings were founded on the recording of the interrogation and the testimony of Detective

Weidner and other officers. We therefore give deference to the district court's factual findings, examining whether substantial competent evidence supported them, even as we exercise unlimited review of the legal conclusions to be drawn from those findings.

Both the district court and the Court of Appeals examined in detail the six nonexclusive factors set out in *Woods* and *Mattox*. We have reviewed the records of the motions hearings, the recording of the interrogation, the factual findings, and the analysis on which both those courts based their conclusions that Bentley's statements were voluntary. The discussion by the Court of Appeals in affirming the district court is thorough and persuasive. We see no reason to repeat it here but incorporate it by reference into this opinion. See *Bentley*, 2022 WL 1278482, at *5. We conclude the district court did not err in finding Bentley's statements were voluntary and admissible at trial.

Should this court overrule State v. Johnson *and hold no jury trial waiver is required before a defendant stipulates to an element of a crime?*

The State charged Bentley with two counts of criminal possession of a weapon by a convicted felon. Bentley stipulated to one element of these charges. The Court of Appeals reversed those convictions in accordance with *State v. Johnson*, 310 Kan. 909, 453 P.3d 281 (2019), because the district court failed to obtain a jury trial waiver of the stipulated-to element before accepting the stipulation. Judge Gardner concurred. She agreed the analysis correctly followed *Johnson* but urged this court to overrule *Johnson* or to hold the error should be reviewed for harmlessness. The State argues this court should adopt the reasoning in Judge Gardner's concurrence.

"'The Sixth Amendment to the United States Constitution and Sections 5 and 10 of the Kansas Constitution Bill of Rights guarantee a criminal defendant the right to a jury trial.'" *State v. Redick*, 307 Kan. 797, 803, 414 P.3d 1207 (2018). This guarantee includes a right to "'a jury determination that [the defendant] is guilty of every element of the crime with which [the defendant] is charged, beyond a reasonable doubt.'" *Johnson*, 310 Kan. at 918 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 [2000]). A defendant may waive the right to have a jury decide their guilt, but a court must first obtain a constitutionally sufficient waiver. A waiver is sufficient only if the court advises the defendant of their right to a jury trial, and the defendant then personally waives that right in writing or in open court on the record. *State v. Harris*, 311 Kan. 371, 376, 461 P.3d 48 (2020) (citing *State v. Irving*, 216 Kan. 588, 590, 533 P.2d 1225 [1975]). If a court bypasses a jury without an effective waiver, the court unconstitutionally denies the right to jury trial. See *Irving*, 216 Kan. at 590 ("in the absence of an effective waiver, [a] defendant [is] entitled to a trial by jury").

Long-standing caselaw has required sufficient jury trial waivers before a defendant proceeds to a bench trial or pleads guilty. See *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969) (waiver of constitutional right to jury trial before guilty plea will not be presumed on silent record); *Irving*, 216 Kan. at 590 (vacating conviction after court failed to secure valid jury trial waiver before bench trial).

In *Johnson*, we clarified that sufficient waivers are required with equal force before a defendant stipulates to an element of a crime. 310 Kan. at 918-19. We reasoned that an elemental stipulation eliminates jury consideration of that element, so a jury waiver is necessary. 310 Kan. at 918-19. Because we remanded the case to the Court of Appeals for consideration of other issues, we did not consider whether the error was subject to harmless error review. 310 Kan. at 919. But the Court of Appeals has been

interpreting *Johnson* to require reversal whenever a district court fails to obtain on the record a jury trial waiver before a defendant stipulates to any element of a crime. *State v. Portillo-Ventura*, No. 122,229, 2022 WL 569362, at *11 (Kan. App. 2022) (unpublished opinion); *State v. Ramos*, No. 122,657, 2021 WL 1826884, at *2 (Kan. App. 2021) (unpublished opinion); *State v. Lax*, No. 121,540, 2020 WL 7409957, at *8 (Kan. App. 2020) (unpublished opinion).

The State urges us to overturn our holding in *Johnson*.

Under the doctrine of stare decisis, "'once a point of law has been established by a court, it will generally be followed by the same court and all courts of lower rank in subsequent cases when the same legal issue is raised.'" *State v. Sherman*, 305 Kan. 88, 107-08, 378 P.3d 1060 (2016) (quoting *Simmons v. Porter*, 298 Kan. 299, 304, 312 P.3d 345 [2013]). But this court will overturn precedent "if it is '"clearly convinced [the rule of law] was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent."'" *McCullough v. Wilson*, 308 Kan. 1025, 1036, 426 P.3d 494 (2018) (quoting *Simmons*, 298 Kan. at 304).

Bentley argues this court should not overturn *Johnson* because the State failed to offer any argument in its briefing regarding whether more good than harm will come from overturning *Johnson*. He also argues that, even if this court addresses the issue, the State cannot show more good than harm would come from overturning this precedent. Bentley claims that lower courts have easily been adjusting to this "minimal procedural requirement," and there is no evidence it has "impeded the ability of defendants" to offer elemental stipulations. Bentley claims requiring a waiver has great benefit because it reduces collateral litigation and increases confidence in the validity of a jury trial waiver.

We agree with Bentley. When the State failed to brief the first requirement of overturning precedent, it abandoned its claim that we overrule *Johnson*. See *State v. Funk*, 301 Kan. 925, 933, 349 P.3d 1230 (2015) (issue not adequately briefed is deemed abandoned). Consequently, *Johnson* stands, and a district court must obtain a constitutionally sufficient jury trial waiver before a defendant stipulates to an element of a charged crime.

Next, the State argues that if *Johnson* stands, the error should be reviewed for harmlessness. We agree.

Whether an error may be reviewed for harmlessness is a question of law subject to plenary review. *Johnson*, 310 Kan. at 913.

Some constitutional errors may be reviewed for harmlessness. *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). Others are deemed "structural" and require automatic reversal of a conviction. 527 U.S. at 8. An error is structural when it constitutes "'a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" 527 U.S. at 8 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 [1991]).

Generally, the deprivation of the right to a jury trial is "unquestionably" structural error. *Sullivan v. Louisiana*, 508 U.S. 275, 282, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). This is because the right reflects "'a profound judgment about the way in which law should be enforced and justice administered'" and its deprivation produces "consequences that are necessarily unquantifiable and indeterminate." 508 U.S. at 281-82 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155, 88 S. Ct. 1444, 20 L. Ed. 2d 491 [1968]).

And this court, along with others, generally treats the denial of the jury trial right through the failure to obtain a sufficient jury trial waiver as a structural error. See, e.g., *Harris*, 311 Kan. at 377; *Irving*, 216 Kan. at 590; see also *United States v. Shorty*, 741 F.3d 961, 969 (9th Cir. 2013) (insufficient jury trial waiver structural error); *Miller v. Dormire*, 310 F.3d 600, 604 (8th Cir. 2002) (same); *United States v. Perez*, 356 Fed. Appx. 770, 773 (5th Cir. 2009) (unpublished opinion) (same). But see *United States v. Williams*, 559 F.3d 607, 614 (7th Cir. 2009) (failure to advise defendant of right to jury trial not structural error). Other jurisdictions have explained the error is structural because it "affect[s] the basic framework" of a defendant's trial. *United States v. Duarte-Higareda*, 113 F.3d 1000, 1003 (9th Cir. 1997); *Perez*, 356 Fed. Appx. 770, 773 (same); *State v. Le Noble*, 216 Ariz. 180, 184-85, 164 P.3d 686 (Ct. App. 2007) (same).

This court is now asked to decide whether the failure to obtain a jury trial waiver before an elemental stipulation—rather than before a bench trial or guilty plea—also constitutes structural error. We conclude it is not structural, because a failed waiver before a stipulation to less than all elements of the charged crime does not constitute "a defect affecting the framework within which the trial proceeds." *Neder*, 527 U.S. at 8. Rather, it affected only one aspect of the process while maintaining the general framework of a jury trial.

The error here is akin to a court's failure to submit an element of the charged crime to the jury. The United States Supreme Court and this court have held that this kind of error is subject to harmlessness review. In *Neder*, the trial court erroneously decided an element of a crime itself instead of submitting the element to the jury. 527 U.S. at 7. The Supreme Court recognized its earlier observation in *Sullivan* that harmless error review is meaningless without a jury verdict. But it concluded this is not necessarily the case when

the court simply fails to secure a verdict on *some* elements of the crime, rather than all of them. Important to the Court's reasoning was that the element the jury had not been permitted to consider was not contested by the defendant and would not be contested if the conviction were vacated and a new trial ordered. The Court opined: "We do not think the Sixth Amendment requires us . . . to reach such a result." *Neder*, 527 U.S. at 15. The Court then concluded the error was harmless because "the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error." *Neder*, 527 U.S. at 17.

This court adopted the *Neder* reasoning to apply harmless error analysis when a trial court fails to submit an uncontested element to the jury. See *State v. Carr*, 314 Kan. 744, Syl. ¶ 12, 502 P.3d 511 [2022]; *State v. Reyna*, 290 Kan. 666, 681, 234 P.3d 761 (2010), *overruled on other grounds by State v. Dunn*, 304 Kan. 773, 375 P.3d 332 (2016).

Today, we extend the *Neder* reasoning to cases in which the district court failed to obtain a constitutionally sufficient jury trial waiver before a defendant stipulated to some elements of a charged crime. In such cases, the error should be reviewed under the constitutional harmless error standard. We move to that analysis.

A constitutional error is harmless only if the party benefitting from the error demonstrates "beyond a reasonable doubt the error will not or did not affect the trial's outcome in light of the entire record, i.e., when there is no reasonable possibility the error contributed to the verdict." *State v. Corey*, 304 Kan. 721, 731-32, 374 P.3d 654 (2016).

The State and Judge Gardner's concurrence argue the error did not affect the trial's outcome. They assert that the elements to which Bentley stipulated to—prior convictions—"were facially valid or easy to verify," and "would not have furnished even

a colorable defense, as the decision to stipulate itself reflected." *Bentley*, 2022 WL 1278482, at *21 (Gardner, J., concurring).

While compelling, the State and Judge Gardner's concurrence ignore the fact that there was no evidence other than the stipulation that would have allowed the jury in this trial to find Bentley guilty of having prior convictions. Thus, if the failure to secure a constitutionally sufficient jury trial waiver led to the stipulation, then it clearly affected the verdict, because the jury had to rely on that stipulation to find that the State proved that element of the crime.

But we think it is appropriate to view the harmlessness inquiry here through a more focused lens. We have concluded the stipulation effectively decided the stipulated-to elements for the jury, thereby paving the way for a guilty verdict. Thus, it is logical to consider whether the error here led to the stipulation. In other words, we will review whether there is a reasonable possibility the failure to inform Bentley of his right to jury trial led to his decision to enter the stipulation.

The Supreme Court of California takes the same approach when it considers whether a statutory violation of a jury trial waiver amounted to harmless error. See *People v. Sivongxxay*, 3 Cal. 5th 151, 171, 180, 219 Cal. Rptr. 3d 265, 396 P.3d 424 (2017) (reviewing statutory violation of jury trial waiver to see whether there was "a reasonable probability that defendant would have demanded a jury trial" absent the error and finding violation harmless because defendant had personally entered knowing and intelligent jury trial waiver without uncertainty or confusion, and evidence against the defendant was overwhelming).

And such an inquiry would track the harmless error analysis federal courts apply when the trial court fails to advise the defendant at a plea hearing that the defendant has no right to withdraw a guilty plea if the court does not follow the State's sentencing recommendation, as is required by Rule 11 of the Federal Rules of Criminal Procedure. See *United States v. Dominguez Benitez*, 542 U.S. 74, 83, 124 S. Ct. 2333, 159 L. Ed. 2d 157 (2004) (courts should consider whether the defendant has shown "a reasonable probability that, but for the error, he would not have entered the plea" in reviewing a Rule 11 error). The Supreme Court advised in *Dominguez Benitez* that evidence relevant to whether a defendant would still have pled guilty absent a Rule 11 error included any representations the defendant or counsel made regarding the topic, the overall strength of the case against them, and any possible defenses. 542 U.S. at 85.

The facts to which Judge Gardner's concurrence points suggest Bentley would have offered a stipulation even if the court had advised him of his right to jury trial—that these were easily provable elements and Bentley would have had no defense had the State offered evidence to establish these elements. And there was no suggestion Bentley meant to defend his case based on these elements. A section from the record further supports such a conclusion. During the hearing on a motion for new trial based on a claim of ineffective assistance of counsel, newly appointed counsel had the following exchange with Bentley's trial counsel:

> "Q: I believe that the basis of that—of that part of his motion was the fact that you and Ms. Schauf made a stipulation for the second charge, which was possession of a weapon by a criminal. Would that be a fair statement?
>
> "A. We probably did make a stipulation to try and keep Mr. Bentley's criminal history out of the knowledge of the jury.

"Q. And that stipulation was—you presented that to Mr. Bentley?

"A. I believe I did.

"Q. And had his agreement to publish it?

"A. I believe I did. I think he would have thought that was just as good an idea as I would to keep knowledge from the jury of his prior criminal history, yes, sir."

On cross-examination, the State had the following exchange with trial counsel:

"Q. And along those same lines, the stipulation that was entered into— . . . Did you go over that with Mr. Bentley?

"A. His signature's right here on the bottom left, underneath my signature, and he and I would have had possession of that document at the same time and we would have signed it at the same time, I think.

"Q. Okay. So was it your strategy to keep from the jury specifically what Mr. Bentley had been convicted of in the past?

"A. Yes.

"Q. And in fact, you had filed a pre-trial motion asking the Court to limine out any reference to the defendant's criminal history, absent what was contained in this stipulation?

"A. Yes."

This testimony supports the State's claim that Bentley would have elected to stipulate to this element of the crimes even if he had been informed of his right to submit them to a jury on the State's evidence. We conclude beyond a reasonable doubt that the error did not affect Bentley's decision to enter the stipulation and, consequently, the error did not affect the trial's outcome. We affirm Bentley's convictions for possession of a firearm.

Did the district court and Court of Appeals err in holding trial counsel was not ineffective in pursuing a guilt-based defense?

After the jury convicted Bentley, he moved for a new trial, arguing his counsel had been ineffective. The district court denied the motion and the Court of Appeals affirmed. Before this court, Bentley maintains his claim that his trial counsel was ineffective because it pursued a guilt-based defense without Bentley's express approval. We affirm the Court of Appeals.

"The Sixth Amendment to the United States Constitution guarantees the right to effective assistance of counsel . . . ." *Balbirnie v. State*, 311 Kan. 893, 897, 468 P.3d 334 (2020). "If trial counsel fails to provide effective assistance, a defendant may be entitled to a new trial." *State v. Dinkel*, 314 Kan. 146, 148, 495 P.3d 402 (2021). To evaluate a claim of ineffective assistance, courts apply a two-step test. They first consider whether the defendant has shown "'counsel's representation fell below an objective standard of reasonableness.'" *Balbirnie*, 311 Kan. at 897 (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 [1984]). If the defendant makes this showing, they must next establish that "the deficient performance prejudiced the defense." *Balbirnie*, 311 Kan. at 897.

This court uses a mixed standard of review to assess a district court's conclusions regarding ineffective assistance of counsel. It considers whether substantial competent evidence supports the court's factual findings. It reviews the court's conclusions of law de novo. *Balbirnie*, 311 Kan. at 897-98.

After the jury found him guilty, Bentley argued that trial counsel had been generally incompetent. The court appointed new counsel and held a hearing on the motion. During the hearing, Bentley had the following exchange with his counsel:

> "[Defense counsel:] Can you tell me any other incidents—inferences that [trial counsel] might have done to the Court that would make you believe he was ineffective?
>
> "[Bentley:] I believe it was his opening statement.
>
> "Q. What did he say?
>
> "A. He not only told them that I possessed drugs in the opening statement, told them that I had everything I needed to use the drugs and that wasn't even—simply wasn't even the case.
>
> "Q. So his theory of the case was that you were a drug user and not a drug seller?
>
> "A. Yes, I believe that's the defense he was going for, but he did not even—he just—yeah, he didn't do me right.
>
> "Q. What do you mean, he didn't do none of that?
>
> "A. He did a terrible job of even trying to present it as such. He said I had the drugs, he said I had everything to use the drugs and knowing that that wasn't the case, that I didn't possess any paraphernalia to use the drug.

"Q. Based on this opening statement you think he was ineffective?

"A. Yes.

"Q. And due to that you're asking the Court for a new trial?

"A. Yes."

The court denied Bentley's motion. It held trial counsel had not been deficient. The court noted this was a difficult case, given the defendant's admission the methamphetamine was his, and the issue came down to "was this individual possession for personal use or was this for distribution . . . [a]nd Mr. Smartt hit that issue and argued it from—and marshaled the evidence before the jury to the best of his ability." The court further ruled that even if counsel's performance had been deficient, there was no reasonable possibility the jury would have reached a different result without the deficiency.

On appeal, Bentley argued trial counsel had been ineffective by pursuing a guilt-based defense without Bentley's express approval when he admitted Bentley possessed methamphetamine for personal use but did not intend to distribute it. In support, Bentley cited *McCoy v. Louisiana*, 584 U.S. ___, 138 S. Ct. 1500, 200 L. Ed. 2d 821 (2018), and *State v. Carter*, 270 Kan. 426, 14 P.3d 1138 (2000).

In *McCoy*, the State charged the defendant with three counts of premeditated first-degree murder. The defendant maintained he had not committed the murders and "adamantly objected to any admission of guilt." *McCoy*, 138 S. Ct. at 1505. But his counsel concluded admitting guilt was the best way to avoid the death penalty and, even

though "the defendant vociferously insisted that he did not engage in the charged acts," told the jury the defendant was guilty. *McCoy*, 138 S. Ct. at 1505. The Supreme Court reversed the eventual death verdict. It held "the defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." *McCoy*, 138 S. Ct. at 1505.

In *Carter*, the State charged the defendant with premeditated first-degree murder and felony murder in the alternative. After the jury had been selected and sworn in, Carter told the court he did not want to proceed to trial because he disagreed with defense counsel's strategy, which was to concede guilt of felony murder but argue there had been no premeditation. Carter maintained his complete innocence. The district court denied Carter's request to appoint new counsel and proceeded to trial over Carter's strong objection. This court reversed the conviction. It reasoned defense counsel had been ineffective when it pursued "a guilt-based defense against Carter's wishes." 270 Kan. at 441. The court held this violated Carter's Sixth Amendment right to counsel and denied him a fair trial. Because this "was a breakdown in our adversarial system of justice," the court presumed prejudice. 270 Kan. at 441.

The panel here observed a key difference between the cited cases and Bentley's: in *McCoy* and *Carter*, the defendants had voiced objections to a guilt-based defense, and the courts had held a lawyer may not pursue the defense over that objection. In contrast, Bentley offered no objection.

Before this court, Bentley argues the panel erred by concluding a lawyer may pursue a guilt-based defense unless the defendant "vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt." He insists

a lawyer is per se ineffective if the lawyer proceeds with a guilt-based defense without a defendant's express approval.

Bentley misconstrues the panel's holding. It did not set a new requirement that a lawyer may pursue a guilt-based defense unless a defendant "vociferously insist[s]" they did not commit the charged acts and "adamantly object[s]" to such a defense. The panel used this language to describe the distinguishing factor in *McCoy*. The panel's holding was narrower. It concluded Bentley had failed to establish counsel's performance was deficient because he made no showing "trial counsel abandoned Bentley or took any actions against his wishes." *Bentley*, 2022 WL 1278482, at *12.

We conclude the panel's ruling was in line with *McCoy* and *Carter*. Both cases held that a lawyer errs by pursuing a guilt-based defense that was clearly contrary to the defendant's claims of innocence. They do not stand for the notion that a lawyer must obtain express authorization before pursuing such a defense, as Bentley claims. See *Harris v. State*, 358 Ga. App. 802, 808, 856 S.E.2d 378 (2021) (nothing in *McCoy* "requires counsel to obtain the express consent of a defendant prior to conceding guilt"). And Bentley has neither shown nor alleged that trial counsel disregarded an express directive from Bentley.

Thus, to succeed on his claim, Bentley must convince us we should extend the reasoning of *McCoy* and *Carter* to adopt his contention that a lawyer may not proceed with a guilt-based defense unless they first obtain a defendant's express approval. Bentley argues this logically follows from the notion expressed in *McCoy* that "it is the client's decision whether to use a guilt-based defense." Bentley also cites *Johnson*, 310 Kan. 909, in support of his position. He argues that using a guilt-based defense removes the admitted-to elements from the jury and, in this way, it is the same as an elemental

stipulation. Because, under *Johnson*, a district court must obtain a knowing and valid waiver of the right to jury trial before accepting an elemental stipulation, Bentley argues, a lawyer must obtain something similar—express agreement—from a defendant before pursuing a guilt-based defense.

A United States Supreme Court case published before *McCoy* cuts against Bentley's position. In the capital case *Florida v. Nixon*, 543 U.S. 175, 178, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004), trial counsel proposed a guilt-based defense as the best strategy to avoid the death penalty. The defendant was unresponsive to counsel's attempts to explain the defense, so counsel proceeded. The Florida Supreme Court overturned the conviction, reasoning a guilt-based defense is "'the functional equivalent of a guilty plea'" and thus requires the defendant's "'affirmative, explicit acceptance.'" 543 U.S. at 188 (quoting *Nixon v. Singletary*, 758 So. 2d 618, 624 [Fla. 2000]).

The United States Supreme Court reversed. It ruled the Florida Supreme Court erred in equating a guilt-based defense to a guilty plea. The Court explained a guilty plea is "'a stipulation that no proof by the prosecution need be advanced.'" 543 U.S. at 188. In contrast, when the defendant pursues a guilt-based defense, the State is still "obliged to present during the guilt phase competent, admissible evidence establishing the essential elements of the crimes . . . ." 543 U.S. at 188 (quoting *Boykin v. Alabama*, 395 U.S. 238, 243 and n.4, 89 S. Ct. 1709, 23 L. Ed. 2d 274 [1969]). The defense also maintains "the right to cross-examine witnesses for the prosecution and could endeavor . . . to exclude prejudicial evidence. . . . In addition, in the event of errors in the trial or jury instructions, a concession of guilt would not hinder the defendant's right to appeal." *Nixon*, 543 U.S. at 188. The Court ruled that, rather than presuming deficient performance and applying a presumption of prejudice, the Florida Supreme Court should have applied the standard set forth in *Strickland*, 466 U.S. 668, and considered whether counsel's concession strategy

was unreasonable and prejudicial. The Supreme Court concluded it was not, explaining "in a capital case . . . when counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent." 543 U.S. at 192.

Bentley did not face a capital case, and there is no evidence he was nonresponsive to his counsel's guilt-based defense suggestions. But *Nixon* is instructive. It supports the notion that a guilt-based defense does not require explicit approval. The State still had to submit its evidence, and Bentley had the chance to challenge and test that evidence. Thus, the guilt-based defense did not remove the question from the jury or relieve the State from its burden of proof. Because a guilt-based defense does not erode these rights, we need not adopt a rule to safeguard those rights by requiring informed and express authorization before counsel pursues a guilt-based defense.

Bentley has failed to show the panel erred. It did not adopt a new rule requiring a defendant "vociferously insist" against a guilt-based defense, and its decision was in line with *McCoy* and *Carter*. And Bentley has not persuasively argued this court should extend the reasoning in *McCoy* and *Carter* to require express approval from a defendant before a lawyer may pursue a guilt-based defense. Rather, when there is no indication the defendant objected to a guilt-based defense, we will continue to consider generally whether counsel's decision to utilize such a defense was deficient performance and prejudicial under the circumstances. Bentley does not argue that counsel was deficient for pursuing such a defense in the absence of a rule requiring express approval. Consequently, we affirm the panel's ruling that trial counsel was not ineffective.

Did the district court err when it gave no lesser included instructions for possession of methamphetamine with intent to sell?

Bentley contends that, although he had in his possession two baggies containing 7.13 grams and 20.57 grams of methamphetamine, the trial court erred when it instructed the jury only on possession with intent to distribute between 3.5 and 100 grams of the drug, a level 2 felony. He argues that, even though he did not request alternate instructions, the court should have instructed on lesser degrees of possession: possession with intent to distribute less than a gram and possession with intent to distribute between 1 and 3.5 grams, which are level 4 and level 3 felonies respectively. The Court of Appeals held that instructions on the lesser offenses were legally appropriate but were not supported by the facts. We conclude that the Court of Appeals was wrong in finding the lesser instructions factually inappropriate, but we decline to reverse the conviction on this basis.

When reviewing a claim that a district court has committed an error by failing to issue a jury instruction, this court engages in a four-step analysis:

First, the court considers the reviewability of the issue from both jurisdiction and preservation viewpoints, exercising an unlimited standard of review; next, the court applies an unlimited review to determine whether the instruction was legally appropriate; then, the court determines whether there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, that would have supported the instruction; and, finally, if the district court erred, the appellate court must determine whether the error was harmless, utilizing the test and degree of certainty set forth in *State v. Ward*, 292 Kan. 541, 565, 256 P.3d 801 (2011). *State v. Timley*, 311 Kan. 944, 954, 469 P.3d 54 (2020).

If there was instructional error but the defendant did not object to the district court's jury instructions—as was the case here—the reviewing court applies the clear error standard required by K.S.A. 2022 Supp. 22-3414(3). Under that standard, the reviewing court determines whether it is firmly convinced that the jury would have reached a different verdict had the instruction error not occurred. The defendant has the burden to establish reversibility, and, when examining whether the defendant has met that burden, the reviewing court makes a de novo determination based on the entire record. *Timley*, 311 Kan. at 955.

K.S.A. 2022 Supp. 21-5705(d)(3) states that possessing with the intent to distribute material containing any quantity of methamphetamine is a:

> "(A) Drug severity level 4 felony if the quantity of the material was less than 1 gram;
>
> "(B) drug severity level 3 felony if the quantity of the material was at least 1 gram but less than 3.5 grams;
>
> "(C) drug severity level 2 felony if the quantity of the material was at least 3.5 grams but less than 100 grams; and
>
> "(D) drug severity level 1 felony if the quantity of the material was 100 grams or more."

K.S.A. 2022 Supp. 21-5109(b)(1) states that a defendant may be convicted of either the crime charged or a lesser included crime. A lesser included crime is a "lesser degree of the same crime." By these statutory provisions, the lesser included severity levels would have been legally appropriate for Bentley's jury to consider. See *State v. Valdez*, 316 Kan. 1, 15-16, 512 P.3d 1125 (2022); *State v. Scheuerman*, 314 Kan. 583,

592, 502 P.3d 502, *cert. denied* 143 S. Ct. 403 (2022). This was the conclusion of the Court of Appeals, and we agree.

The next question is whether the evidence produced at trial warranted lesser included instructions. The Court of Appeals concluded that the instructions were not factually appropriate, but we disagree.

This court considered a similar set of facts in *Valdez*, where the defendant had a bag containing 1 gram of methamphetamine in his pocket and a bag containing about 14 grams of methamphetamine in a bag in the defendant's living room. 316 Kan. at 2-3. We held that instructions on lesser included offenses would have been factually appropriate because the jury could have concluded that the defendant possessed and intended to distribute only the 1-gram packet. 316 Kan. at 16-17.

One device this court has used for analyzing the propriety of a lesser included instruction is a sufficiency of the evidence test. When there is at least some evidence supporting convictions for lesser crimes, this court will not reverse a verdict for insufficient evidence. See *State v. Haberlein*, 296 Kan. 195, 204, 290 P.3d 640 (2012). In such an instance, the instruction for a lesser included offence is factually appropriate. 296 Kan. at 204.

In *Scheuerman*, 314 Kan. 583, this court held that an individual who is guilty of possessing a large amount of methamphetamine may also be guilty of possessing a smaller amount. The amounts are not mutually exclusive: a person who possesses 100 grams of methamphetamine with intent to distribute can be convicted of possession of 1 gram with intent to distribute. 314 Kan. at 590. In the present case, if the jury had convicted for possession with intent to sell less than 1 gram, this court would not have

reversed for lack of evidence—after all, the evidence was the same for possession with intent to sell more than 3.5 grams. The facts therefore supported lesser included offense instructions, and it was error not to give the instructions.

But Bentley did not request those instructions. His appeal is therefore subject to review for clear error. As noted earlier, this means that the court must determine whether it is firmly convinced that the jury would have reached a different verdict had the lesser included felony instructions been given. Bentley has the burden to establish reversibility, and, when examining whether he has met that burden, this court makes a de novo determination based on the entire record. See *Timley*, 311 Kan. at 955.

In *Valdez*, evidence was plentiful that the defendant intended to distribute the larger quantities found in his home: a message indicating he was looking for buyers, a digital scale with drug residue, empty baggies, and multiple baggies containing methamphetamine. The court concluded that "the evidence strongly shows Valdez possessed more than 3.5 grams of methamphetamine and intended to distribute it. We hold clear error is not demonstrated. His arguments for reversal are speculative and insufficient to carry his burden." 316 Kan. at 17.

In the present case, there were several indications that Bentley intended to distribute at least some of the methamphetamine. He told the interrogating officer he intended to "break the house off," possibly meaning he intended to break off portions of the crystals in exchange for places to stay. He also had small, unused baggies in his car. Weidner testified that methamphetamine users typically consume from a quarter gram to a gram a day. This would translate into between 20 and 82 doses in Bentley's larger bag, a large amount for personal use.

Although the lesser included instructions *might* have resulted in conviction of a lesser degree of the felony, that is not the standard for finding clear error. We are not firmly convinced that the jury *would* have reached a different verdict if the instructions had been given. For this reason, we find no clear error and affirm the conviction.

Did the district court clearly err when it gave an inference of intent to distribute instruction?

The State charged Bentley with possession of methamphetamine with intent to distribute between 3.5 and 100 grams. The district court gave a pattern instruction to the jury that permitted it to infer Bentley intended to distribute methamphetamine if he possessed 3.5 grams or more of methamphetamine. Bentley argues this instruction was legally erroneous because it does not accurately reflect the law and because it is arbitrary and thus violates due process.

This court uses a four-part framework when reviewing instructional errors. First, it exercises unlimited review in considering jurisdiction and whether the issue was preserved. Second, it considers de novo whether the instruction was legally appropriate. Third, it determines whether the instruction was factually appropriate. Fourth, it addresses any error for harmlessness, utilizing different standards depending on whether the error has been preserved. *Valdez*, 316 Kan. at 6.

Bentley acknowledges he did not object to this instruction in district court. He argues the second prong of instructional error review: that the instruction was not legally appropriate and amounted to clear error.

The court provided the following instruction:

> "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 the 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."

This instruction describes a *permissive* inference. But it is based on the following statutory provision, which describes a *mandatory* rebuttable presumption:

> "(e) In any prosecution under this section, there shall be a rebuttable presumption of an intent to distribute if any person possesses the following quantities of controlled substances or analogs thereof:
>
> (1) 450 grams or more of marijuana;
>
> (2) 3.5 grams or more of heroin or methamphetamine;
>
> (3) 100 dosage units or more containing a controlled substance; or
>
> (4) 100 grams or more of any other controlled substance." K.S.A. 2022 Supp. 21-5705(e)(2).

In the Court of Appeals, Bentley argued the instruction was legally erroneous because the amount that triggered the inference of intent to distribute was arbitrary and thus violated the Due Process Clause. See *County Court of Ulster Cty., v. Allen*, 442 U.S. 140, 157, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979) (although jury may infer elemental fact from proof of predicate fact, the inference violates due process if "there is no rational way the trier could make the connection permitted by the inference").

The panel did not address Bentley's argument that the permissive inference instruction was arbitrary. It held K.S.A. 2020 Supp. 21-5705(e)(2) was "facially

constitutional" because it did not describe a mandatory presumption. *Bentley*, 2022 WL 1278482, at *15; see *Francis v. Franklin*, 471 U.S. 307, 317, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985) (mandatory presumptions constitutionally problematic because they threaten to relieve the State of its burden of proof). It further held the instruction was legally appropriate because it followed the PIK instruction and "informed the jury that the presumption was permissive . . . rather than mandatory." *Bentley*, 2022 WL 1278482, at *15.

Before this court, Bentley maintains his argument that the instruction, although not mandatory, was nonetheless unconstitutional because the triggering amount was arbitrary. He further argues that the instruction was legally inappropriate because it describes a permissive inference while the applicable law describes a mandatory presumption.

Bentley is correct that the instruction was legally inappropriate. Jury instructions "must always fairly and accurately state the applicable law." *State v. Plummer*, 295 Kan. 156, 161, 283 P.3d 202 (2012). As we observed in *Holder*, 314 Kan. 799, and *Valdez*, 316 Kan. 1, and reiterate today in *State v. Martinez*, 317 Kan. ___ (No. 121,204, this day decided), *State v. Slusser*, 317 Kan. ___ (No. 121,460, this day decided), and *State v. Strong*, 317 Kan. ___ (No. 121,865, this day decided), the law applicable here *requires* a jury presume a defendant intended to distribute methamphetamine if it finds the defendant possessed 3.5 grams of methamphetamine. K.S.A. 2022 Supp. 21-5705(e)(2). This conclusion is supported by a plain language interpretation of K.S.A. 2022 Supp. 21-5705(e). See *Strong*, 317 Kan. at ___ (No. 121,865, this day decided). The panel erred by interpreting the statute to provide for a permissive inference rather than a mandatory presumption and assessing its facial constitutionality based on this error. Because the statute provides for a mandatory presumption, the permissive inference instruction in this

case deviated from that law by permitting the jury to accept or reject such an inference. Consequently, the instruction was not legally appropriate.

Because we hold that the instruction was legally inappropriate, we need not consider Bentley's alternate claim that the permissive-inference instruction was legally inappropriate because the triggering amount was arbitrary and thus violated due process. Even if he is correct, the same clear error standard of review would apply here. *Martinez,* 317 Kan. ___, slip op. at 16. Thus, we move directly to harmless error review.

An error is clear if this court is "firmly convinced the trial's result would have been different without the error." *Valdez,* 316 Kan. at 9.

In *Valdez*, this court held the instructional error was not clear because the State presented ample evidence Valdez intended to distribute. This included evidence of a far greater quantity than necessary to trigger the inference, empty plastic baggies, a digital scale, and testimony from a detective Valdez had sent a text asking if anyone was looking for drugs. *Valdez,* 316 Kan. at 9-10. In *Holder,* the error was not clear because there a co-defendant testified she worked with Holder to distribute marijuana and officers found 44 pounds of marijuana but no paraphernalia that might have suggested personal use. *Holder*, 314 Kan. at 807.

In this case, there was evidence of intent to distribute beyond the permissive inference. Bentley had a large quantity of methamphetamine—nearly 28 grams—and he told the interviewing detective he was going to have to "break the house off" of his 20.57 gram bag of methamphetamine. The detective testified he understood that to mean Bentley was going to share some of the methamphetamine in exchange for a place to stay. And there were plastic baggies in Bentley's vehicle. Based on this evidence, we are

not firmly convinced the jury result would have been different had the court not given the permissive inference instruction. We affirm Bentley's possession with intent to distribute conviction.

Did the evidence support the suspended license conviction?

Bentley argues the State failed to present evidence of a necessary element of the crime of driving while his license was suspended. We agree.

When the sufficiency of the evidence is challenged in a criminal case, this court reviews the evidence in a light most favorable to the State to determine whether a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. The court does not reweigh evidence, resolve conflicts in the evidence, or pass on the credibility of witnesses. Furthermore, there is no distinction between direct and circumstantial evidence in terms of probative value. *State v. Aguirre*, 313 Kan. 189, 209, 485 P.3d 576 (2021). A verdict may be supported by circumstantial evidence, if such evidence provides a basis for a reasonable inference by the fact-finder regarding the fact in issue. *State v. Logsdon*, 304 Kan. 3, 25, 371 P.3d 836 (2016).

In *State v. Jones*, 231 Kan. 366, Syl., 644 P.2d 464 (1982), this court held that, in order to obtain a conviction for driving with a suspended license, the State must prove that it complied with K.S.A. 8-255(d), requiring that the Division of Vehicles "immediately notify the person in writing" when suspending a person's driving privileges:

> "In a prosecution under K.S.A. 1981 Supp. 8-262, for driving while one's license is suspended, it is incumbent upon the State to offer proof that a copy of the order of suspension, or written notice of that action, has been mailed to the last known address of

> the licensee according to the division's records. The State need not prove that the licensee actually received the notice, had actual knowledge of the revocation, or had specific intent to drive while the license was suspended."

Once the State has complied with the mailing requirement of K.S.A. 8-255, "the presumption of receipt arises and is not rebuttable." *Jones*, 231 Kan. at 368.

In addition, "[w]hen a defendant has actual knowledge that his or her license has been suspended," the State is not required to present direct evidence that there has been compliance with K.S.A. 8-255(d). *State v. Campbell*, 24 Kan. App. 2d 553, 556, 948 P.2d 684 (1997). See *State v. Thomas*, 266 Kan. 265, Syl., 970 P.2d 986 (1998).

In the present case, the State made no attempt to demonstrate that the Division of Vehicles ever mailed Bentley notice that his license was suspended. The State instead sought to demonstrate Bentley had actual knowledge his license was suspended.

The only evidence in the record relating to Bentley's knowledge consisted of this testimony by Officer Long:

> "Q. Did you ask him for his driver's license?
>
> "A. Yes.
>
> "Q. And did he tell you he didn't have one?
>
> "A. Correct.
>
> . . . .

"Q. And your assumption that he had a suspended driver's license, was that, in part, based upon the fact that he wasn't able to—or he told you he didn't have a license?

"A. Correct."

In closing argument, the prosecutor explained to the jury:

"Was the defendant driving without [*sic*] a suspended license? Well, you heard on the Axon video, when Officer Long asked him for his license, he said he didn't have one, tried to give him a KDOC number. . . . And *it's clear he knew* [*his license was suspended*], *because he said I don't have one* and tried to give them a KDOC number instead." (Emphasis added.)

Was this testimony sufficient to prove Bentley knew his license was suspended? It demonstrated that Bentley knew he was driving without having a valid license on his person. But Long's testimony was highly ambiguous regarding knowledge of a *suspended* license. Because the evidence proved nothing other than that Bentley did not have a valid license with him, it does not, by itself, show he was not carrying the license because he knew it was suspended. Even in hindsight, given the full record, we have no way of knowing whether Bentley knew his license was suspended.

We do not see proving notice to be an onerous burden on the State. Surely it cannot be difficult to obtain from the Division of Vehicles a showing that it mailed or attempted to mail a defendant a notice of suspension. Or the law enforcement officers could have simply asked Bentley whether he knew his license was suspended. If he answered yes, then no further proof would have been needed.

Because the evidence presented in this case did not suffice to prove an essential element of the crime, we reverse the conviction for driving with a suspended license.

We reverse the portion of the Court of Appeals decision that reversed the firearms convictions and affirm those convictions. We reverse the portion of the Court of Appeals decision that affirmed the driving with a suspended license conviction and reverse that conviction. We affirm the conviction for possessing methamphetamine with intent to distribute. Remanded for resentencing.

Judgment of the Court of Appeals affirming in part and reversing in part the district court is affirmed in part and reversed in part. Judgment of the district court is affirmed in part, reversed in part, and remanded with directions.

* * *

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.