CHAPTER 8
Standards and Scope of Appellate Review

I. INTRODUCTION

Whether drafting a brief or analyzing the best issues to raise in an appeal, it is helpful to walk through the issue in the same way that an appellate court analyzes a case. An appellate court's analysis typically follows a three-step process: "(1) determining whether the appellate court can or should review the issue, *i.e.*, whether there is a lack of appellate jurisdiction or a failure to preserve the issue for appeal; (2) considering the merits of the claim to determine whether error occurred below; and (3) assessing whether the error requires reversal, *i.e.*, whether the error can be deemed harmless." *State v. Williams*, 295 Kan. 506, 510, 286 P.3d 195 (2012). Courts refer to these three steps as reviewability, standard of review, and reversibility. See *Williams*, 295 Kan. at 515-16.

This chapter provides a brief discussion of each step. However, it does not cover the gamut of all their exceptions or nuances. Instead, this chapter seeks to provide practitioners with a basic understanding of each step. Naturally, the chapter begins with a discussion of the first step—reviewability.

II. REVIEWABILITY

Before an appellate court can consider the merits of an appeal, it must first determine that it may review the issues raised by the appellant. Typically, the reviewability inquiry concerns whether the appellate court has jurisdiction to hear the appeal and whether the issues raised were properly preserved in the trial court. *Williams*, 295 Kan. at 510, 515. This Part focuses on the latter question, and also notes a few common mistakes that can render reviewable and potentially meritorious arguments unsuccessful.

> **PRACTICE NOTE:** It is important to remember that jurisdiction and preservation are distinct concepts. Often, the two are blurred together. Nonetheless, they remain distinct concepts and should be treated as such.

§ 8.1 Error Preservation

Under Kansas Supreme Court Rule 6.02(a)(5), an appellant must point to the specific location in the record where she raised the issue being appealed and where the court ruled on that issue. In requiring these citations, the court has codified a standard prudential rule: if an issue was not raised in the trial court, it cannot be raised on appeal. See *Ruhland v. Elliot*, 302 Kan. 405, 417, 353 P.3d 1124 (2015); *State v. Williams*, 298 Kan. 1075, 1085-86, 319 P.3d 528 (2014). This rule is often referred to as preservation or, more specifically, error preservation. The rationale behind error preservation is simple: a trial court cannot wrongly decide an issue that was never before it. See *State v. Williams*, 275 Kan. 284, 288, 64 P.3d 353 (2003).

Still, like any other legal tenet, this rule has exceptions. For instance, appellate courts may consider an issue that was not properly preserved when: (1) the newly asserted claim involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) consideration of the claim is necessary to serve the ends of justice or to prevent the denial of fundamental rights; or (3) the district court is right for the wrong

reason. *In re Estate of Broderick*, 286 Kan. 1071, 1082, 191 P.3d 284 (2008); see also *State v. Godfrey*, 301 Kan. 1041, 1043, 350 P.3d 1068 (2015) (holding that these three exceptions apply to constitutional issues not raised before the trial court in criminal cases).

But practitioners should beware. If they intend to raise an issue for the first time on appeal, they must discuss why the court should hear it. Failure to identify an applicable exception likely will result in the appellate court refusing to hear the issue. *Godfrey*, 301 Kan. at 1043-44.

Also, some issues that are not properly preserved may be considered on appeal without falling into one of the three categories just mentioned. For example, an appellant may raise the issue of a trial court's failure to give a jury instruction for the first time on appeal if that failure constitutes clear error. K.S.A. 22-3414(3); *State v. Williams*, 295 Kan. 506, 515, 286 P.3d 195 (2012). As always, researching each appeal's particular issues is wise.

One final note on preservation: at times, it is debatable whether an issue was actually raised in the trial court. In such circumstances, a lower court's decision on whether an issue was properly preserved is subject to unlimited review. *State v. Daniel*, 307 Kan. 428, 430, 410 P.3d 877 (2018).

§ 8.2 Other Mistakes Affecting Reviewability

Though failure to preserve an issue is a leading reason many issues are not heard on appeal, a few other scenarios can lead an appellate court to refuse to entertain a potentially meritorious issue or argument. Four of the most common scenarios are discussed here.

Acquiescence

If a party "voluntarily complies with a judgment by assuming the burdens or accepting the benefits of the judgment contested on appeal," then the doctrine of acquiescence holds that the appellate court does not have jurisdiction to hear her appeal. *Alliance Mortgage Co. v. Pastine*, 281 Kan. 1266, 1271, 136 P.3d

457 (2006). However, exceptions to this rule exist and should be consulted before rejecting a potentially viable appellate issue.

Whether a party has acquiesced to a judgment is subject to unlimited review. *Alliance Mortgage Co. v. Pastine,* 281 Kan. at 1271.

Invited Error

Typically, a party "cannot complain on appeal about a claimed error that was invited." *State v. Sasser*, 305 Kan. 1231, 1235, 391 P.3d 698 (2017); see also *Water Dist. No. 1 of Johnson Co. v. Prairie Center Dev.*, 304 Kan. 603, 618, 375 P.3d 304 (2016). This rule is often called the invited error doctrine. When it applies, appellate courts will refuse to consider the party's claim of error. *State v. Brown*, 306 Kan. 1145, 1166, 401 P.3d 611 (2017). But, the invited error doctrine will not prevent a court from hearing claims of structural, constitutional error, *Sasser*, 305 Kan. at 1235, or jurisdictional error, *In re Tax Appeal of Professional Engineering Consultants*, 281 Kan. 633, 639, 134 P.3d 661 (2006). See also *State v. McCarley*, 287 Kan. 167, 174-76, 195 P.3d 230 (2008) (holding that the invited error doctrine does not apply to the question of whether a criminal sentence is illegal).

What exactly constitutes inviting an error is open to some debate. There is no bright-line rule that clearly defines what actions constitute inviting an error. *Sasser*, 305 Kan. at 1235. But a few rules of thumb exist, though their usefulness may be questionable. For instance, courts agree that, in the context of jury instructions, the doctrine only applies "when the party fails to object and invites the error, unless the error is structural." *State v. Logsdon*, 304 Kan. 3, 31, 371 P.3d 836 (2016). And courts also agree that the doctrine applies when a party "actively pursues what is later argued to be an error." *Sasser*, 305 Kan. at 1235. What that means will vary case by case. Beyond these two rules, however, little definition or guidance exists. Looking for a case featuring similar facts is likely the best method for arguing that the invited error doctrine does not apply.

Whether the invited error doctrine applies is subject to unlimited review. *Sasser*, 305 Kan. at 1235.

Abandoned Points

Even if properly preserved in the trial court, an "issue not briefed by an appellant is deemed waived and abandoned." *State v. Arnett*, 307 Kan. 648, Syl. ¶ 1, 413 P.3d 787 (2018); see also *Bd. of Cherokee County Comm'rs v. Kansas Racing & Gaming Comm'n*, 306 Kan. 298, 323, 393 P.3d 601 (2017). This includes issues or points raised "'only incidentally in a brief but not argued there.' [Citation omitted.]" *Russell v. May*, 306 Kan. 1058, 1089, 400 P.3d 647 (2017). So, "an argument that is not supported with pertinent authority is deemed waived and abandoned." *Friedman v. Kansas State Bd. of Healing Arts*, 296 Kan. 636, 645, 294 P.3d 287 (2013). For example, in *Russell*, the Kansas Supreme Court held that "conclusory statements, unsupported by legal citation, are inadequately briefed" and therefore considered abandoned. *Russell*, 306 Kan. at 1089.

Failure to Designate a Record

Appellate courts may decline to consider an issue or argument if the party asserting it fails to designate a record. *Friedman*, 296 Kan. at 644; *State v. Kettler*, 299 Kan. 448, 465, 325 P.3d 1075 (2014). Put more plainly, when "facts are necessary to an argument, the record must supply those facts and a party relying on those facts must provide an appellate court with a specific citation to the point in the record where the fact can be verified." *Friedman*, 296 Kan. at 644 (citing Rule 6.02[a][4]).

III. STANDARD OF REVIEW GENERALLY

In step two of their analytical process, appellate courts consider the appeal's merits. Their decision "is driven by the applicable standard of review." *State v. Williams*, 295 Kan. 506, 510, 286 P.3d 195 (2012). The applicable standard of review thus is crucial to any appeal.

The Kansas Supreme Court Rules highlight the standard of review's importance by requiring both parties to include it in their briefs. Under Rule 6.02(a)(5), an appellant must begin

each issue with a citation to the appropriate standard of review. And under Rule 6.03(a)(4), an appellee must either concur in the appellant's citation or offer additional authority.

This Part explains what a standard of review is, conceptually, then provides a brief discussion of how the standard of review may (or should) impact appellate strategy.

§ 8.3 What is a "Standard of Review"?

The phrase "standard of review" references the standard used by appellate courts to determine the deference due a lower court, jury, or agency. The applicable standard of review thus "establishes the 'framework by which a reviewing court determines whether the trial court erred.' [Citation omitted.]" *Williams*, 295 Kan. at 510.

Though it may seem a bit unnecessary to include this definition, understanding what a standard of review is will assist in the important task of separating it from the reversibility standard when analyzing a case for appeal, drafting an appellate brief, or arguing before an appellate court. After all, the standard of review and the reversibility standard are two separate concepts. *State v. Plummer*, 295 Kan. 156, 160, 283 P.3d 202 (2012). An appellate court only considers whether an error warrants reversal *after* it determines that error occurred under the applicable standard of review. *Williams*, 295 Kan. at 510-11 (discussing the blurred distinction between standard of review and harmless error).

§ 8.4 Strategic and Practical Considerations

In appellate courts, "the resolution of many cases turns not so much on the facts of the case as the standard of review." Patrick Hughes, *Kansas Appellate Advocacy: An Inside View of Common-Sense Strategy*, 66 J.K.B.A. 26, 30 (February/March 1997). Indeed, "failure to properly address the applicable standard of review may cause an advocate to lose an otherwise winnable case." 66 J.K.B.A. at 30. As a result, "the rules prescribing the appropriate standard of review are of critical importance in selecting the issues to be appealed." 66 J.K.B.A. at 30. "Similarly, the rules prescribing when an error that has been identified under

the standard of review requires reversal must also be considered in selecting the issues worth appealing." 66 J.K.B.A. at 30.

When thinking through these important issues, a few general principles apply. First, appellants are more likely to succeed and obtain relief when the issues on appeal present purely legal questions than when they concern questions left to the trial court's discretion. 66 J.K.B.A. at 30. This is so because—as explained more fully in Part IV—appellate courts owe the trial court less deference when reviewing legal questions than they do when reviewing discretionary questions. Second, the converse, naturally, is true for appellees. Appellees are more likely to be successful if they can frame the issues in a way that affords the greatest amount of deference possible to the trial court.

Finally, where a standard of reversibility applies, appellants should steer clear of issues that fall under the harmless error test. 66 J.K.B.A. at 30. Under this test, as explained in Part VI, appellate courts will disregard merely "technical errors" that do not appear to have prejudicially affected the substantial rights of the complaining party if the record as a whole shows that "substantial justice" has been done by the judgment. *State v. Gilliland*, 294 Kan. 519, 541, 276 P.3d 165 (2012). Satisfying this standard is often difficult to achieve, especially where the claimed error does not implicate the federal constitution. See *State v. Moyer*, 306 Kan. 342, 359, 410 P.3d 71 (2017).

In practice, these general principles serve as a useful tool but often the lines between the different standards of review are blurred and overlaid with reversibility standards that serve to further complicate the analysis. It is not uncommon to see several layers of review applied to a single issue or to see a case where it is unclear whether the appellate court is reviewing a question of law or a question of fact. This fluidity requires practitioners to make strategic decisions about how to frame the standard of review.

Understanding the building blocks of the various standards of review will enable practitioners to make these strategic decisions more easily.

IV. BASIC STANDARDS OF REVIEW

There are three categories around which the basic standards of review are built: (1) questions of law, (2) questions left to the trial court's discretion, and (3) questions of fact. Andrea Cataland and Kip Nelson, *Shaping Appellate Practice: Using Standards of Review to Prevail on Appeal*, 59 DRI for the Defense 35 (2017). Each of these categories is considered, in turn, below.

§ 8.5 Legal Questions: Unlimited Review

Questions of law are subject to unlimited review. *State v. Moyer*, 306 Kan. 342, 359, 410 P.3d 71 (2017). Under this standard, the appellate court is not bound by the lower court's decision. See *Prairie Land Elec. Co-op v. Kansas Elec. Power Co-op*, 299 Kan. 360, 366, 323 P.3d 1270 (2014). The standard is also referred to as "de novo review" or "plenary review."

Examples of when the unlimited review standard applies include:

- statutory interpretation, *Lozano v. Alvarez*, 306 Kan. 421, 423, 394 P.3d 862 (2017);
- contract interpretation, *Prairie Land Elec. Co-op*, 299 Kan. at 366;
- whether a legal duty exists, *Russell v. May*, 306 Kan. 1058, 1069, 400 P.3d 647 (2017);
- whether a criminal sentence is illegal within the meaning of K.S.A. 22-3504, *State v. Cotton*, 306 Kan. 156, 158, 392 P.3d 116 (2017); and
- whether jurisdiction exists, *Graham v. Herring*, 297 Kan. 847, 855, 305 P.3d 585 (2013).

§ 8.6 Questions Left to the Trial Court's Discretion: Abuse of Discretion Review

Certain questions are within the trial court's discretion. For example, the decision whether to run sentences concurrently "fall[s] within the sound discretion of sentencing courts." *State*

v. Brune, 307 Kan. 370, 371, 409 P.3d 862 (2018). The same is true of motions for new trial. *State v. DeWeese*, 305 Kan. 699, 709, 387 P.3d 809 (2017); *Miller v. Johnson*, 295 Kan. 636, 684, 289 P.3d 1098 (2012). Such decisions are typically reviewed under the abuse of discretion standard. Under this standard, an appellate court will reverse the trial court's decision only if its decision was an abuse of discretion. *Brune*, 307 Kan. at 372.

A trial court "abuses its discretion if its decision is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact." *Brune*, 307 Kan. at 372. This standard can be met in many ways. A trial court bases its decision on an error of law when it fails to properly consider the factors of a test meant to guide its discretionary decision. *In re Adoption of B.G.J.*, 281 Kan. 552, 563-64, 133 P.3d 1 (2006). And its decision is fanciful or unreasonable where no reasonable person would adopt the trial court's position. *Consolver v. Hotze*, 306 Kan. 561, 568-69, 395 P.3d 405 (2017).

When deciding whether a trial court abused its discretion, appellate courts do not reweigh the evidence or assess witness credibility. *State v. DeAnda*, 307 Kan. 500, 503, 411 P.3d 330 (2018). And, the party claiming an abuse of discretion bears the burden to establish that the abuse occurred. *DeWeese*, 305 Kan. at 710.

Examples of when the abuse of discretion standard applies include:

- whether hearsay is admissible under a statutory exception, *State v. Jones*, 306 Kan. 948, 957, 398 P.3d 856 (2017); and
- whether to allow or disallow a claim for punitive damages, *McElhaney v. Thomas*, 307 Kan. 45, 57, 405 P.3d 1214 (2017).

Whether to admit evidence used to be part of this list. However, as discussed in § 8.10, Kansas appellate courts now review some evidentiary rulings under a multi-step standard of review where the abuse of discretion standard applies to some steps of the analysis and a de novo standard applies to others. *State v. Shadden*, 290 Kan. 803, 817, 235 P.3d 436 (2010).

§ 8.7 Questions of Fact

Appellate courts review fact questions under different standards depending on who the factfinder was. When the trial court acts as factfinder, appellate courts generally apply the substantial competent evidence standard. When a jury acts as factfinder, appellate courts apply a sufficiency of the evidence standard. These standards are very similar, but just different enough to warrant separate discussion. Accordingly, they are discussed, in turn, below.

The Court as Factfinder: Substantial Competent Evidence

When a court's factual findings are challenged, appellate courts apply the substantial competent evidence standard. *Gannon v. State*, 305 Kan. 850, 881, 390 P.3d 461 (2017); *Schoenholz v. Hinzman*, 295 Kan. 786, 792, 289 P.3d 1155 (2012). "'Substantial evidence is such legal and relevant evidence as a reasonable person might accept as sufficient to support a conclusion.' [Citation omitted.]" *Gannon*, 305 Kan. at 881. In determining whether substantial competent evidence supports the district court's findings, appellate courts disregard any conflicting evidence or other inferences that might be drawn from the evidence. And, they do not reweigh the evidence or assess the credibility of witnesses. *Gannon*, 305 Kan. at 881.

Often, the appellate court is asked to review not just the trial court's factual findings, but also its legal conclusions based on those findings. In such cases, courts apply the substantial competent evidence standard to the trial court's factual findings, and review the conclusions of law based on those findings under the de novo standard. *Gannon*, 305 Kan. at 1176.

This two-part inquiry is often used to review mixed questions of law and fact. For example, when "'asked to review the violation of a defendant's Fifth Amendment right against self-incrimination, [the appellate] court reviews the district court's factual findings using a substantial competent evidence standard, but the ultimate legal conclusion is reviewed as a question of law using an unlimited standard of review.' [Citations omitted.]" *State v. Delacruz*, 307 Kan. 523, 533, 411 P.3d 1207 (2018). The same

is true of a trial court's decision to suppress evidence. *State v. Lewis*, 54 Kan. App. 2d 263, 270, 399 P.3d 250 (2017), *rev. denied* 307 Kan. __ (Dec. 22, 2017).

However, whether a conviction resulting from a bench trial should be affirmed is reviewed under the same standard as if the conviction had resulted from a jury trial. The conviction thus is reviewed under the sufficiency of the evidence standard, discussed below. *State v. Frye*, 294 Kan. 364, 374-75, 277 P.3d 1091 (2012).

The Jury as Factfinder: Sufficiency of the Evidence

The sufficiency of the evidence standard is applied in cases resolved by a jury trial. Though the standard is the same regardless of the type of case, it is stated differently in civil and criminal cases.

In civil cases, when the sufficiency of evidence is challenged, "an appellate court does not reweigh the evidence or pass on the credibility of the witnesses. If the evidence, when considered in the light most favorable to the prevailing party, supports the verdict, the appellate court should not intervene." *Unruh v. Purina Mills*, 289 Kan. 1185, 1195, 221 P.3d 1130 (2009).

In criminal cases, when the sufficiency of evidence is challenged, the appellate court looks "'at all the evidence in a light most favorable to the prosecution and [determines] whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt.' In doing so, the appellate court generally will 'not reweigh evidence, resolve evidentiary conflicts, or make witness credibility determinations.' [Citations omitted.]" *State v. Gonzalez*, 307 Kan. 575, 586, 412 P.3d 968 (2018). This standard also applies to juvenile offender adjudications, *In re B.M.B.*, 264 Kan. 417, 433, 955 P.2d 1302 (1998), and civil commitment proceedings, *In re Care & Treatment of Hay*, 263 Kan. 822, 842, 953 P.2d 666 (1998).

V. STANDARD OF REVIEW: SPECIFIC EXAMPLES

This Part provides a few examples of how the basic standards of review are applied in practice and identifies a few areas of law where other, less common standards are used, such as when an appellate court reviews negative factual findings. The list presented here is far from exhaustive. It is only meant to provide a helpful starting place for case-specific research.

§ 8.8 When a Party Failed to Meet Its Burden of Proof: Arbitrary Disregard or Extrinsic Consideration

When a trial court finds that a party has not met her burden of proof, a special standard of review applies. This is so because the court's decision is considered to be a negative factual finding (or a negative finding of fact). *Wiles v. American Family Life Assurance Co.*, 302 Kan. 66, 79, 350 P.3d 1071 (2015). Appellate courts review negative factual findings "to determine whether there was an 'arbitrary disregard of undisputed evidence or some extrinsic consideration such as bias, passion, or prejudice.'" *Wiles*, 302 Kan. at 79-80 (quoting *Hall v. Dillon Companies, Inc.*, 286 Kan. 777, 781, 189 P.3d 508 [2008]). If so, then the trial court erred.

Examples of cases utilizing this standard include:

- an insurance company failed to prove that a loss fell within its policy's exclusionary clause, *Wiles*, 302 Kan. at 79-80;
- a party failed to prove that his ex-wife was cohabitating with another man, I*n re Marriage of Kuzanek*, 279 Kan. 156, 160, 105 P.3d 1253 (2005); and
- a party failed to prove that it was entitled to attorney fees following trial, *Midwest Asphalt Coating v. Chelsea Plaza Homes*, 45 Kan. App. 2d 119, 125, 243 P.3d 1106 (2010).

§ 8.9 Facts Undisputed or Decided on Documents Only

When the trial court decided the issues on appeal based only on documents and stipulated facts, the appellate court exercises unlimited review. *In re Marriage of Stephenson & Papineau*, 302 Kan. 851, 854, 358 P.3d 86 (2015); *State v. Darrow*, 304 Kan. 710, 715, 374 P.3d 673 (2016); *Heiman v. Parrish*, 262 Kan. 926, 927, 942 P.2d 631 (1997). However, if there is "conflicting written testimony and the [appellate] court is called upon to disregard the testimony of one witness and accept as true the testimony of the other," unlimited review is improper and, instead, the appropriate standard of review is "whether the findings of the district court are supported by substantial competent evidence." *In re Adoption of Baby Boy B.*, 254 Kan. 454, Syl. ¶ 2, 866 P.2d 1029 (1994).

§ 8.10 Admissibility of Evidence

"Appellate courts apply a multistep analysis of decisions to admit or exclude evidence. Under this multistep analysis, the first question is relevance." *State v. Robinson*, 306 Kan. 431, 435, 394 P.3d 868 (2017). That is, whether the evidence is probative and material. "On appeal, the question of whether evidence is probative is judged under an abuse of discretion standard; materiality is judged under a de novo standard." *Robinson*, 306 Kan. at 435 (citing *State v. Shadden*, 290 Kan. 803, 817, 235 P.3d 436 [2010]).

This multi-step analysis does not apply to every evidentiary ruling. As mentioned in § 8.6, whether to admit hearsay under a statutory exception remains subject to the abuse of discretion standard. So, it is imperative that practitioners research the standard applicable to their particular evidence issues when preparing an appeal.

§ 8.11 Jury Instructions

The standard of review for jury instruction issues varies depending on whether the instruction in question was requested or objected to during trial. However, thanks to a quirky criminal procedure rule (K.S.A. 22-3414) that has been applied to civil cases, the same three-step analysis applies regardless of whether

the issue was preserved. Some cases refer to this analysis as including four steps. The analysis is nonetheless the same.

In the first step, appellate courts "consider the reviewability of the issue from both jurisdiction and preservation viewpoints, exercising an unlimited standard of review." *State v. Dominguez*, 299 Kan. 567, 573, 328 P.3d 1094 (2014) (quoting *State v. Plummer*, 295 Kan. 156, Syl. ¶ 1, 283 P.3d 202 [2012]); see also *Siruta v. Siruta*, 301 Kan. 757, 771-72, 348 P.3d 549 (2015) (applying criminal jury instruction appeal rules in a civil appeal). If the appellate court has jurisdiction, then in the first step it simply notes whether the jury instruction issue on appeal was preserved. *Dominguez*, 299 Kan. at 573. Whether the issue was preserved does not impact the first step because K.S.A. 22-3414 provides appellate review for certain jury instruction issues even if they are not preserved. See *State v. Williams*, 295 Kan. 506, 515-16, 286 P.3d 195 (2012). So, if it has jurisdiction, the appellate court simply moves on to the second step.

In the second step, the appellate court determines whether the trial court erred. "In determining if there was error in giving or failing to give a jury instruction, an appellate court must examine whether the instruction was legally and factually appropriate. The appellate court utilizes an unlimited standard of review to analyze the legal question of whether the instruction fairly and accurately states the applicable law." *Dominguez*, 299 Kan. at 573-74. To determine whether the instruction was factually appropriate, the appellate court considers whether "there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, to support a factual basis for the instruction." *Dominguez*, 299 Kan. at 574. Where the challenged instruction was actually given by the trial court, the appellate court must view the instructions as a whole when determining whether error occurred. *Siruta v. Siruta*, 301 Kan. 757, 775, 348 P.3d 549 (2015). If, under these standards, the appellate court finds that the trial court erred, it moves on to the third step.

In the third and final step, the appellate court conducts a reversibility inquiry. Here is where preservation, or the lack

thereof, impacts the appellate court's analysis. If the issue was preserved—*i.e.*, the complaining party objected at trial—the appellate court conducts a harmless error inquiry. If the issue was not preserved—*i.e.*, the complaining party did not object at trial—the appellate court conducts a clear error inquiry. *Dominguez*, 299 Kan. at 574.

Under the harmless error standard, discussed in § 8.20 below, the appellate court will reverse the trial court's decision "'if there is a reasonable probability that the error will or did affect the outcome of the trial in light of the entire record.' [Citation omitted.]" *Siruta*, 301 Kan. at 772.

Under the clear error standard, discussed in § 8.19 below, the appellate court "will only reverse the district court if an error occurred" and it is "'firmly convinced that the jury would have reached a different verdict had the instruction error not occurred.' [Citations omitted.]" *State v. McLinn*, 307 Kan. 307, 318, 409 P.3d 1 (2018). "The assessment of whether an instructional error is clearly erroneous requires a review of the entire record and a de novo determination." *Dominguez*, 299 Kan. at 574. The burden to meet this standard remains on the complaining party; whereas, the burden would shift to the party benefiting from the error when the harmless error inquiry applies. *Dominguez*, 299 Kan. at 574.

§ 8.12 Ineffective Assistance of Counsel

"'Allegations of ineffective assistance of counsel, whether based on claims of deficient performance or on a conflict of interest, involve mixed questions of fact and law.' [Citation omitted.]" *State v. Williams*, 299 Kan. 1039, 1047-48, 329 P.3d 420 (2014). Thus, appellate courts review the trial court's factual findings for substantial competent evidence and the legal conclusions based on those facts de novo. *Williams*, 299 Kan. at 1047-48.

§ 8.13 Motions to Dismiss – Civil

A "district court's decision to grant a motion to dismiss is reviewed de novo." *Lozano v. Alvarez*, 306 Kan. 421, 423, 394

P.3d 862 (2017). When conducting this review, appellate courts apply the same dismissal standard as the trial court. Specifically, "'an appellate court must accept the facts alleged by the plaintiff as true, along with any inferences that can reasonably be drawn therefrom'" and, if "those facts and inferences state a claim based on [the] plaintiff's theory or any other possible theory, [a] dismissal by the district court must be reversed. [Citation omitted.]" *Platt v. Kansas State University*, 305 Kan. 122, 126, 379 P.3d 362 (2016).

§ 8.14 Summary Judgment

Appellate courts "review the district court's denial of a motion for summary judgment de novo, viewing the facts in the light most favorable to the party opposing summary judgment." *Siruta v. Siruta*, 301 Kan. 757, 766, 348 P.3d 549 (2015). In doing so, they apply the same summary judgment standard as the trial court. *Patterson v. Cowley Co.*, 307 Kan. 616, 621, 413 P.3d 432 (2018).

This familiar standard provides: "'Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The district court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case.' [Citation omitted.]" *O'Brien v. Leegin Creative Leather Products, Inc.*, 294 Kan. 318, 330, 277 P.3d 1062 (2012).

On appeal, as in the trial court, where "reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied." *Patterson*, 307 Kan. at 621.

§ 8.15 Motions for Judgment as a Matter of Law

"On appeal from a motion for judgment as a matter of law, appellate courts apply the same standard as did the district court and review the motion de novo." *Russell v. May*, 306 Kan. 1058, 1067, 400 P.3d 647 (2017). "[A] motion for judgment as a matter of law must be denied when evidence exists upon which a jury could properly find a verdict for the nonmoving party." *Smith v. Kansas Gas Service Co.*, 285 Kan. 33, 40, 169 P.3d 1052 (2007). In evaluating whether the appellant has met this standard, the court must "'resolve all facts and inferences reasonably to be drawn from the evidence in favor of the party against whom the ruling is sought. Where reasonable minds could reach different conclusions based on the evidence, the motion must be denied.' [Citation omitted.]" *Russell*, 306 Kan. at 1067.

§ 8.16 Motions to Dismiss – Criminal

In the rare scenario where the State appeals a trial court's decision to dismiss an indictment, appellate courts will most likely exercise unlimited review. This is so because the State's appeal of the dismissal "involves the construction of a written instrument, which is a question of law over which [appellate courts] have unlimited review." *State v. Wright*, 259 Kan. 117, 121, 911 P.2d 166 (1996).

§ 8.17 Motions to Arrest Judgment

Under K.S.A. 22-3502, a criminal defendant may challenge the sufficiency of the charging document or the court's jurisdiction to issue the charging document after trial. In 2016, the Kansas Supreme Court issued its opinion in *State v. Dunn*, 304 Kan. 773, 375 P.3d 332 (2016) and overruled years' of precedent about how appellate courts should handle appeals of motions to arrest judgment.

In *Dunn*, the court explained that "charging documents do not bestow or confer subject matter jurisdiction on state courts to adjudicate criminal cases." *Dunn*, 304 Kan. at 811. Thus, to ward off a jurisdictional challenge under K.S.A. 22-3502, the charging documents "need only show that a case has been filed in the

correct court," that "the court has territorial jurisdiction over the crime alleged," and allege facts that would constitute a Kansas crime. *Dunn*, 304 Kan. at 811. But truly jurisdictional challenges to a charging document are rare. Instead, most challenges are to the document's sufficiency.

To be sufficient, a charging document must allege "facts that would establish the defendant's commission of a crime recognized in Kansas." *Dunn*, 304 Kan. at 811-12. "Because all crimes are statutorily defined, this is a statute-informed inquiry. The legislature's definition of the crime charged must be compared to the State's factual allegations of the defendant's intention and action. If those factual allegations, proved beyond a reasonable doubt, would justify a verdict of guilty, then the charging document is statutorily sufficient." *Dunn*, 304 Kan. at 812.

In light of these holdings in *Dunn*, the following rules now apply to appeals concerning the sufficiency of a charging document:

- *Reviewability* — The usual preservation rules apply, meaning challenges to a charging document's sufficiency "should be raised in the district court in the first instance" and if they are not, then "defendants will be tasked with demonstrating on appeal that an exception to the usual preservation rule should be applied." *Dunn*, 304 Kan. at 819.
- *Standard of Review* — Appellate courts exercise unlimited review when evaluating assertions of charging document error. *Dunn*, 304 Kan. at 819.
- *Reversibility* — If the charging document fails to charge a crime as defined by Kansas statute, then the statutory error is subject to a harmlessness inquiry. If the charging document is insufficient on constitutional grounds, then the constitutional harmless error standard likely applies. See *Dunn*, 304 Kan. at 821.

§ 8.18 Prosecutorial Error

In 2016, the Kansas Supreme Court "revisited the framework for considering claims of prosecutorial misconduct and relabeled that issue as 'prosecutorial error.'" *State v. Sturgis*, 307 Kan. 565, 568, 412 P.3d 997 (2018) (citing *State v. Sherman*, 305 Kan. 88, 378 P.3d 1060 [2016]). In doing so, the court did away with issue-specific factors and emphasized that "appellate courts should resist the temptation to articulate categorical pigeonholed factors that purportedly impact whether the State has met its *Chapman* burden." *Sherman*, 305 Kan. at 110-11.

Now, regardless of the conduct complained of, appellate courts "must first determine whether prosecutorial error has occurred by deciding whether the prosecutor's actions fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial." *Sturgis*, 307 Kan. at 568. As of yet, it appears the court has not stated, explicitly, whether this review is unlimited or subject to another standard.

If the appellate court finds that error existed, it "moves to the prejudice step and applies the traditional constitutional harmlessness inquiry demanded by *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), *i.e.*, whether the State can show there is no reasonable possibility that the error affected the verdict." *Sturgis*, 307 Kan. at 568.

VI. REVERSIBILITY

If the appellate court finds that an error occurred under the applicable standard of review, it moves to the third step of its analysis: reversibility. In this step, the appellate court asks whether the error requires reversal. *State v. Williams*, 295 Kan. 506, 516, 286 P.3d 195 (2012). Where the applicable test is met, the error requires reversal.

This Part discusses the three most common reversibility tests: clear error, harmless error, and cumulative error.

§ 8.19 Clear Error

The clear error test is most often found in cases discussing jury instruction challenges. The language of the test thus presumes the existence of a trial: clear error exists only where the appellate court is firmly convinced the jury would have reached a different verdict without the error. *State v. McLinn*, 307 Kan. 307, 318, 409 P.3d 1 (2018). "The party claiming a clear error has the burden to demonstrate the necessary prejudice." *McLinn*, 307 Kan. at 318.

§ 8.20 Harmless Error

Two harmless error tests exist: the statutory harmless error test and the constitutional harmless error test. *State v. Ward*, 292 Kan. 541, 565, 256 P.3d 801 (2011). The Kansas Supreme Court has expressed dissatisfaction with practitioners' and courts' tendency to use this terminology, instead preferring that they do not view the harmless error inquiry as two tests but as one test with two different levels of certainty. *Ward*, 292 Kan. at 566.

The main reason behind the court's preference is the fact that both tests utilize the same benchmark. That is, they both start with the question whether the error affected "a party's substantial rights, meaning it will not or did not affect the trial's outcome." *Ward*, 292 Kan. at 565. The tests differ only in the level of certainty required to find an error harmless. *Ward*, 292 Kan. at 566. Still, for the sake of clarity, this Section discusses the harmless error inquiry as consisting of two separate tests.

If the error implicates a right guaranteed by the United States Constitution, then the appellate court "must be persuaded beyond a reasonable doubt that there was no impact on the trial's outcome." *Ward*, 292 Kan. at 565. In other words, the error is only harmless if the court is persuaded beyond a reasonable doubt that "there is no reasonable possibility that the error contributed to the verdict." *Ward*, 292 Kan. at 565. This degree of certainty is often referred to as the "constitutional harmless error test."

If the error does not implicate a federal constitutional right, then the appellate court "must be persuaded that there is no reasonable probability that the error will or did affect the outcome." *Ward*, 292 Kan. at 565. This degree of certainty is sometimes referred to as the "statutory harmless error test" in part because it arises from K.S.A. 60-261 and K.S.A. 60-2105's prohibition against reversing a trial court's decision for harmless error. In more recent Kansas cases, the standard has also been referred to as the "nonconstitutional error standard." *Russell v. May*, 306 Kan. 1058, 1082, 400 P.3d 647 (2017).

§ 8.21 Cumulative Error

"The reversibility test for cumulative error is 'whether the totality of circumstances substantially prejudiced the defendant and denied the defendant a fair trial. No prejudicial error may be found under this cumulative effect rule, however, if the evidence is overwhelming against the defendant.' [Citations omitted.]" *State v. Williams*, 299 Kan. 1039, 1050, 329 P.3d 420 (2014); see also *Cessna Aircraft Co. v. Metropolitan Topeka Airport Authority*, 23 Kan. App. 2d 1038, 1058, 940 P.2d 84 (1997).

Because the cumulative-error rule does not apply where only one error, or no error, occurred, the court's first step is "to count up the errors." *Williams*, 299 Kan. at 1050. Where multiple errors exist, courts are still reluctant to find cumulative error because "the touchstone is whether the defendant received a fair trial, not whether he received a perfect trial." *State v. Kahler*, 307 Kan. 374, 405, 410 P.3d 105 (2018).