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CASE NUMBER: 116425

No. 16-116425-A

IN THE
COURT OF APPEALS OF THE
STATE OF KANSAS

MATTHEW JAEGER
Petitioner-Appellant

vs.

STATE OF KANSAS
Respondent-Appellee

BRIEF OF APPELLANT

Appeal from the District Court of Douglas County, Kansas
Honorable B. Kay Huff, Judge
District Court Case No. 13 CV 423

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Nature of the Case

Following the completion of his direct appeal from conviction, Matthew Jaeger filed a timely motion under K.S.A. 60-1507 alleging his right to counsel was violated by the deficient representation of his trial counsel. The district court denied several of Mr. Jaeger's claims following a non-evidentiary preliminary hearing and denied the remainder of his motion after an evidentiary hearing. Mr. Jaeger appeals the denial of his 60-1507 motion.

Statement of the Issues

Issue 1: **The district court erred when it summarily dismissed claims of ineffective assistance of counsel raised in Mr. Jaeger's timely K.S.A. 60-1507 motion.**

Issue 2: **The district court's conclusions following an evidentiary hearing were not supported by substantial competent evidence.**

Statement of the Facts

Underlying Criminal Case

On August 13, 2009, a jury convicted Matthew Jaeger of one count each of kidnapping, a severity level three person felony; aggravated battery, a severity level four person felony; and criminal threat, a severity level nine person felony. (R. 7, 239-40; R. 8, 327-35). At sentencing on March 4, 2010, based on a criminal history score "I," the district court sentenced Mr. Jaeger to a controlling 106-month prison sentence, with a 36-month postrelease supervision term. (R. 8, 327-30).

Mr. Jaeger appealed, and this Court affirmed his convictions. *State v. Jaeger*, No. 104,119, 2011 WL 6382749 (Kan. Ct. App. Dec. 16, 2011). The Kansas Supreme Court denied his petition for review and his appeal became final February 20, 2013.

Mr. Jaeger's 60-1507 Motion

On September 9, 2013, Mr. Jaeger filed a motion pursuant to K.S.A. 60-1507 claiming that Carl Cornwell, his counsel for preliminary hearing and arraignment, and Pedro Irigonegaray, his counsel for the remainder of trial proceedings, had provided ineffective assistance of counsel. (R. 1, 8-16). Mr. Jaeger specifically claimed that Mr. Irigonegaray had been ineffective for several reasons, including because he had failed to:

(1) argue that the victim's video statement should be excluded because it was cumulative evidence;
(2) raise or pursue a voluntary intoxication defense;
(3) request any lesser included offense instructions for the aggravated battery charge;
(4) request definitional instructions for "great bodily harm" or "serious bodily injury;"
(5) request an instruction on criminal restraint as a lesser included offense of aggravated kidnapping; or
(6) file a motion for change of venue based on the significant media coverage.

(R. 1, 12-16). The State answered the motion on April 7, 2014, and on May 2, 2014, the court appointed counsel to represent Mr. Jaeger on the motion. (R. 1, 22-110, 119). On September 10, 2014, Mr. Jaeger filed an Amended Motion and Response to Answer, providing supplemental facts and argument to his initial motion, but not raising additional claims. (R. 2, 123-244).

On October 21, 2014, the court held a non-evidentiary preliminary hearing. (R. 5, 2). At this hearing, the State conceded that Mr. Jaeger should have an evidentiary hearing on his claims regarding the voluntary intoxication defense, the criminal restraint

instruction, and the motion for change of venue. (R. 5, 4). However, the State argued "the file, the application and the records of the case conclusively show that Mr. Jaeger's not entitled to relief" on the remaining claims. (R. 5, 23). After hearing argument on the remaining claims, the court summarily denied these claims. (R. 2, 249).

Evidentiary Hearing

Matthew Jaeger's Testimony

At the evidentiary hearing on March 6, 2015, Mr. Jaeger testified that he had retained Pedro Irigonegaray to represent him at trial. (R. 4, 5). He explained that he had told Mr. Irigonegaray that on the night of the incident he had (1) been fasting for three days and had only eaten a sub sandwich during that time; (2) consumed five Valium and five Xanax pills; and (3) had consumed alcohol, including several shots of tequila. (R. 4, 8-9). He had told Mr. Irigonegaray because he believed it was important to show his state of mind at the time. (R. 4, 10). However, when Mr. Jaeger testified at trial Mr. Irigonegaray asked only briefly about the alcohol, did not ask about any drugs, and did not pursue a voluntary intoxication defense. (R. 4, 9-10). Mr. Jaeger acknowledged that he had never told law enforcement about his drug use and only had told them he had consumed "a couple beers." (R. 4, 19-20).

Mr. Jaeger explained that he had not discussed the criminal restraint issue with Mr. Irigonegaray because he "didn't really have legal knowledge on what lesser includeds or any of that stuff meant at the time." (R. 4, 16). However, he had told Mr. Irigonegaray that he did not believe what had happened amounted to kidnapping and had

provided his perspective on the events that had occurred. (R. 4, 16-17). Otherwise, he had simply relied on his attorney's expertise. (R. 4, 17).

Finally, Mr. Jaeger testified that he had discussed the issue of a change of venue at least five or six times with Mr. Irigonegaray. (R. 4, 11). He approached the issue because he did not believe he could get a fair trial in Douglas County based on several comments he had read on the Lawrence Journal-World articles online and the numerous threats that were made against him and his family. (R. 4, 11-13). Further, he explained that of particular concern was that several facts about the case particularly were being publicized that were not true. (R. 4, 15). Mr. Irigonegaray told Mr. Jaeger that "he would look into it," but Mr. Jaeger did not receive any additional response. (R. 4, 15).

Pedro Irigonegaray's Testimony

Mr. Irigonegaray testified that he had considered the possibility of a voluntary intoxication defense. (R. 4, 27). He explained that Mr. Jaeger had talked with him about both his alcohol consumption and that he had taken several pills the night of the incident. (R. 4, 29). However, he explained he did not pursue this defense because the evidence presented at trial showed that Mr. Jaeger had made a voluntary decision to try and protect a friend and had taken specific actions to locate her. (R. 4, 28). Because of this evidence, Mr. Irigonegaray believed "[i]t would be incongruous to suggest that someone was so intoxicated as to not have the ability to generate an intent when the primary defense was that there was a specific intent to defend." (R. 4, 28).

Regarding an instruction on criminal restraint, Mr. Irigonegaray similarly said he chose not to request the instruction because of the defense he had chosen to pursue. (R.

4, 36). He explained that the defense was that no kidnapping had occurred at all, so there was no discussion of any lesser offense instructions. (R. 4, 36).

Finally, Mr. Irigonegaray testified that he had considered and discussed the possibility of requesting a change of venue due to the "significant publicity in this case." (R. 4, 31). Mr. Irigonegaray explained that much of the publicity came straight from Lawrence, Kansas, and that "a significant portion of that publicity was unfair." (R. 4, 34). He also acknowledged that "many ugly statements" had been made, such as threats, and that both he and Mr. Jaeger had been the subject of the statements. (R. 4, 34). Further, Mr. Irigonegaray testified that, amongst this significant publicity, the most egregious to him was the inclusion of erroneous facts about the case that a sexual injury had been inflicted on the victim. (R. 4, 35).

Yet, despite this information, Mr. Irigonegaray chose not to investigate or pursue a motion for change of venue, a decision he stated "in retrospect" he might have done differently. (R. 4, 32). He chose not to file a motion because his perspective "was that Douglas County was about as good a place in Kansas" as he could think to try a criminal case. (R. 4, 32). Additionally, he explained that if the case were transferred to another county, it would likely end up in a more conservative county that would have a "lack of open-mindedness to perhaps a defense such as the one we were pursuing." (R. 4, 32). Finally, he noted that he knew "at the time that a change of venue was an extremely difficult bar to reach and had expressed concerns about whether or not we could be successful in reaching it." (R. 4, 32). Because of this, he and co-counsel decided they believed Mr. Jaeger could have a fair trial in Douglas County. (R. 4, 33).

Court's Decision

Following the hearing, the State filed proposed findings of facts and conclusions of law, to which Mr. Jaeger filed a response. (R. 3, 254-98; 326-28). On July 24, 2015, the district court issued a written decision that contained findings of fact and conclusions of law, and denied the remainder of Mr. Jaeger's 60-1507 motion. (R. 3, 329-35). Mr. Jaeger timely appealed. (R. 3, 338).

Argument and Authorities

Issue 1: The district court erred when it summarily dismissed claims of ineffective assistance of counsel raised in Mr. Jaeger's timely K.S.A. 60-1507 motion.

Introduction

Matthew Jaeger timely filed a K.S.A. 60-1507 motion that alleged his trial counsel, Pedro Irigonegaray, was ineffective. The district court summarily denied several of Mr. Jaeger's claims. Because the record demonstrated these issues were substantial, the district court erred in denying them without an evidentiary hearing.

Standard of Review and Preservation of the Issue

If a district court "denies a 60-1507 motion based only on the motion, files, and records after a preliminary hearing," this Court is "in as good a position as that court to consider the merits" and exercises de novo review. *Sola-Martinez v. State*, 300 Kan. 875, 881, 335 P.3d 1162 (2014).

This issue is preserved by Mr. Jaeger's timely notice of appeal from the trial court's summary dismissal of his motion filed pursuant to K.S.A. 60-1507. (R. 3, 338).

Analysis

In order to demonstrate that an evidentiary hearing is warranted on the motion, Mr. Jaeger was required to "make more than conclusory contentions and must state an evidentiary basis in support of the claims or an evidentiary basis must appear in the record." *Sola-Martinez*, 300 Kan. at 881 (quoting *Holmes v. State*, 292 Kan. 271, 274, 252 P.3d 573 [2011]). If he met this burden, the court is *required* to grant an evidentiary hearing, unless the motion is successive. *Sola-Martinez*, 300 Kan. at 881. As was the case in *Sola-Martinez*, because Mr. Jaeger's motion was based on the "ineffectiveness of his trial counsel, the substantive guarantees of effective counsel control whether he is entitled to an evidentiary hearing." *See* 300 Kan. at 881-82.

The Kansas Supreme Court has explained

> [i]t is erroneous to deny a 60-1507 motion without an evidentiary hearing where the motion alleges facts which do not appear in the original record, which if true would entitle the movant to relief, and it identifies readily available witnesses whose testimony would support such facts or other sources of evidence.

State v. Holmes, 278 Kan. 603, 629, 102 P.3d 406 (2004).

Right to Effective Assistance of Counsel

The Sixth Amendment to the U.S. Constitution, made applicable to the states under the Fourteenth Amendment, guarantees the right to counsel in criminal proceedings. *Miller v. State*, 298 Kan. 921, 929, 318 P.3d 155 (2014). The right to counsel is also protected by Section 10 of the Kansas Constitution Bill of Rights. *State v. Mixon*, 27 Kan. App. 2d 49, 51, 998 P.2d 519 (2000). This right requires not only that counsel be present, but also that counsel provide effective assistance. *Strickland v.*

Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also Chamberlain v. State*, 236 Kan. 650, 656-57, 694 P.2d 468 (1985) (adopting *Strickland* standard). The purpose of this guarantee is to "ensure that criminal defendants receive a fair trial." *State v. Galaviz*, 296 Kan. 168, 174, 291 P.3d 62 (2012).

As the Kansas Supreme Court recognized, the benchmark in evaluating a claim of ineffective assistance "must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Bledsoe v. State*, 283 Kan. 81, 90, 150 P.3d 868 (2007). To obtain reversal of conviction based on ineffectiveness, a defendant must show (1) that counsel's performance was deficient under the totality of the circumstances and (2) that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland*, 466 U.S. at 687.

To meet the first "prong" of this test, a defendant must show

> counsel's representation fell below an objective standard of reasonableness. Judicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

State v. Betancourt, 301 Kan. 282, 306, 342 P.3d 916 (2015). To demonstrate prejudice where a defendant was convicted after a jury trial, the defendant must show "there is a reasonable probability the jury would have reached a different result absent the deficient performance." *Sola-Martinez*, 300 Kan. at 885.

Mr. Jaeger's Claims Against Pedro Irigonegaray

Mr. Jaeger's 60-1507 motion raised several claims that Mr. Irigonegaray had provided ineffective assistance of counsel. (R. 1, 8-16). After Mr. Jaeger filed his motion, the district court appointed counsel and conducted a preliminary hearing on the motion. (R. 1, 119; R. 5, generally). Following arguments of counsel, the district court summarily denied several claims, including Mr. Irigonegaray's (1) failure to challenge evidence as cumulative; (2) failure to challenge a defective complaint; and (3) failure to request additional jury instructions related to the aggravated battery charge. (R. 2, 245-49). Because the motion, files, and records of this case did not conclusively show that Mr. Jaeger was entitled to no relief on these claims, the district court erred in denying him an evidentiary hearing on the claims.

Failure to Challenge Cumulative Evidence

Mr. Jaeger's motion alleged Mr. Irigonegaray was ineffective because he "failed to argue Ms. Biggs' video statement should be excluded for being cumulative testimony by virtually allowing Ms. Biggs to testify twice," and instead only objected to the evidence as more prejudicial than probative. (R. 1, 12). The amended motion noted that both the trial transcript and the Court of Appeals opinion of Mr. Jaeger's direct appeal demonstrate that Mr. Irigonegaray "failed to make a specific and timely objection to the admission of the victim's video statement as being cumulative." (R. 2, 123).

The court provided two reasons for dismissing this claim. First, it held that Mr. Jaeger had already litigated this claim before the Court of Appeals, and that the Court of Appeals had rejected the claim. (R. 2, 246); *Jaeger*, 2011 WL 6382749, at *8. Second, it

held that "[t]he evidence code clearly contemplates prior statements may be relevant and may be admissible for persons present at the hearing and available for cross-examination." (R. 2, 246).

However, these conclusions do not support a finding that the motion and files *clearly demonstrate* that Mr. Jaeger is not entitled to relief on this issue. In fact, the conclusions have no factual or legal determinations regarding whether Mr. Irigonegaray was ineffective in failing to object to the video as cumulative. Rather, it simply relies on its conclusions that, upon appellate review, exclusion of the evidence would not amount to error. In doing so, the court wholly failed to analyze the specific question presented.

Additionally, the court failed to recognize the posture under which this Court "decided" the question on direct appeal. Mr. Irigonegaray filed a pre-trial motion to exclude the video that "simply argued the video was more prejudicial than probative," and then he failed to contemporaneously object to the totality of the video when it was presented at trial. *Jaeger*, 2011 WL 6382749, at *8. Rather, he objected to certain parts of the video, arguing that the portions that were being played at those points were repetitive or cumulative. *Jaeger*, 2011 WL 6382749, at *8.

On appeal, Mr. Irigonegaray argued that the court "erred in failing to exclude cumulative evidence presented at trial," and challenged the admission of the video in addition to the live testimony. *Jaeger*, 2011 WL 6382749, at *8. This Court concluded that the issue was not preserved for appellate review. *Jaeger*, 2011 WL 6382749, at *8. However, the Court then determined that *even if* the objection was preserved, it did not find an abuse of discretion in admitting the video. *Jaeger*, 2011 WL 6382749, at *8.

The reliance on what is arguably dicta from an appellate court is not sufficient to determine that Mr. Jaeger is not entitled to relief without an evidentiary hearing. In *Rowland v. State*, 289 Kan. 1076, 1079, 219 P.3d 1212 (2009), the defendant argued on direct appeal that the district court erred in failing to instruct the jury on voluntary intoxication, and that he was denied due process because of his trial counsel's actions in admitting the defendant's guilt despite the defendant's assertion of innocence and failing to request the involuntary intoxication instruction. *Rowland*, 289 Kan. at 1079. The Court found the failure to instruct on voluntary intoxication was not clearly erroneous and that the defendant's counsel was not ineffective based upon the evidence available on the record. *Rowland,* 289 Kan. at 1079 (citing *State v. Rowland*, No. 90,128, 2004 WL 1683106 [Kan. Ct. App. 2004]).

Following his direct appeal, the defendant filed a K.S.A. 60-1507 motion arguing his counsel was ineffective for failing to challenge a witness's inconsistent testimony, to pursue the issue of the defendant's intent, and to investigate. *Rowland*, 289 Kan. at 1080. The trial court rejected this argument, ruling it had been dealt with on direct appeal. *Rowland*, 289 Kan. at 1080-81. On appeal, the defendant asserted his direct appeal dealt with counsel's guilt-based defense, rather than his current argument that counsel failed to investigate or pursue the element of intent. *Rowland*, 289 Kan. at 1081.

In reversing the district court, the Supreme Court noted that ineffective assistance of counsel is ordinarily not suitable for direct appeal, and reiterated the policy reasons underlying that stance. *Rowland*, 289 Kan. at 1084. The Court then looked to the Court of Appeals' disposition on direct appeal of the voluntary intoxication instruction issues,

noting the ruling that the failure to give the instruction was not clear error, *i.e.*, when it was not preserved by a defense request, was not the "analytical equivalent" of a ruling that the defendant's counsel (1) had performed adequate pretrial investigation; (2) had presented adequate evidence at trial, possibly including evidence that could have supported the voluntary intoxication instruction; or (3) that a failure to do either did not prejudice the defendant. *Rowland*, 289 Kan. at 1085.

The Court then ruled that any determination on direct appeal on whether counsel was ineffective for failing to bring a voluntary intoxication instruction was premature. *Rowland*, 289 Kan. at 1086. Further, the Court noted that the record available on direct appeal was insufficient to determine if such a choice was strategic, and until such a record was available, no judge should have decided the merits of the ineffective assistance of counsel issue on the merits or as a matter of law. *Rowland*, 289 Kan. at 1086. Because the ineffective assistance of counsel claim regarding the instruction and failure to investigate did not receive the complete review that was due, the Court reversed the district court and remanded for further 60-1507 proceedings on the issue. *Rowland*, 289 Kan. at 1086-87.

Similar to the situation in *Rowland*, there is a difference between whether error occurred in allowing evidence to be presented and whether counsel was ineffective for not objecting to the evidence for a particular reason. Simply because an appellate court determined that a court did not abuse its discretion in admitting the video in this case, that conclusion does not answer the question of whether Mr. Irigonegaray was ineffective for failing to object to the evidence on the basis that it was cumulative in the first place.

The evidence available to the court in this case did not show if Mr. Irigonegaray's choice to not raise a cumulative evidence objection was strategic such that the issue can be decided as a matter of law. In fact, the fact that Mr. Irigonegaray chose to raise the issue on appeal as a cumulative evidence question actually raises questions about his reasoning and strategy for not objecting to the evidence for that reason at trial. Because the record available to the district court does not answer the ineffective assistance question, and the district court itself failed to answer that question, this Court should reverse for an evidentiary hearing on this issue.

Failure to Request Jury Instructions

In his motion, Mr. Jaeger alleged Mr. Irigonegaray was ineffective because he (1) failed to request the lesser-included offenses for aggravated battery and (2) failed to request definitional instructions for "great bodily harm" and "serious bodily injury." (R. 1, 14). In deciding this question, the court recounted several facts about the case, including facts as stated in the Court of Appeals opinion. (R. 2, 247-48). It then relied on cases that have found that a district court did not err in instructing a jury only on aggravated battery based on the injuries presented in the case. (R. 2, 247). Based on these considerations, the court concluded that, in this case, "[n]o reasonable jury could consider the injury slight, trivial, or minor." (R. 2, 248). Further, it concluded that even if a definitional instruction had been given for "great bodily harm," the result would not have differed because of the extent of the injuries. (R. 2, 248).

As above, the question presented to the court and the conclusion made by the court differed. The cases cited by the court involved appellate review of the failure of district

courts to provide lesser instructions on aggravated battery. What an appellate court might conclude regarding whether an instructional error occurred differs significantly from the question of whether counsel was ineffective by failing to request an instruction in the first place. *See Rowland*, 289 Kan. at 1086. The record contains no evidence of trial strategy or any reason why Mr. Irigonegaray failed to request a lesser offense instruction for aggravated battery or a definitional instruction regarding the amount of harm. As such, this claim could not be resolve on the motions, files, and record of the case and without an evidentiary hearing.

Conclusion

Mr. Jaeger's motion presented claims that Mr. Irigonegaray was constitutionally deficient in representing him at trial. These claims alleged sufficient facts and law necessary to warrant an evidentiary hearing. Because the motions, files, and records did not conclusively show that Mr. Jaeger was entitled to no relief on these issues, the district court erred in summarily denying the claims. Mr. Jaeger requests this Court reverse the summary denial of these claims and remand for an evidentiary hearing.

Issue 2: The district court's conclusions following an evidentiary hearing were not supported by substantial competent evidence.

Introduction

The district court held an evidentiary hearing to consider three of Mr. Jaeger's allegations that Mr. Irigonegaray provided ineffective assistance at trial. Following the evidentiary hearing, the court determined Mr. Jaeger was not entitled to relief on any of

his claims. Because the court's factual findings were not supported by substantial competent evidence, this Court should reverse.

Standard of Review and Preservation of the Issue

When the district court conducts a full evidentiary hearing on claims brought under K.S.A. 60-1507, this Court "review[s] the district court's factual findings for substantial competent evidence and [] determine[s] whether the factual findings support the district court's conclusions of law." *Fuller v. State*, 303 Kan. 478, 485, 363 P.3d 373 (2015). Substantial competent evidence means "legal and relevant evidence that a reasonable person could accept as being adequate to support a conclusion." *State v. Schultz*, 289 Kan. 334, 340, 212 P.3d 150 (2009). An appellate court does not weigh conflicting evidence, evaluate witnesses' credibility, or to redetermine questions of fact. *State v. Johnson*, 289 Kan. 870, 888, 218 P.3d 46 (2009).

This issue is preserved by Mr. Jaeger's timely notice of appeal from the trial court's denial of his motion filed pursuant to K.S.A. 60-1507. (R. 3, 338).

Analysis

As with the first issue, this issue requires consideration of Mr. Jaeger's right to effective assistance of counsel under both the U.S. and Kansas Constitutions. As such, this Court examines whether Mr. Jaeger established "(1) the performance of [Mr. Irigonegaray] was deficient under the totality of the circumstances and (2) prejudice, *i.e.*, that there is a reasonable probability the jury would have reached a different result absent the deficient performance." *Sola-Martinez*, 300 Kan. at 883 (citing *State v. Beldsoe*, 283 Kan. 81, 90, 150 P.3d 868 [2007]; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.

Ct. 2052, 80 L. Ed. 2d 674 [1984]). In deciding a claim of ineffectiveness, the court must consider "the reasonableness of counsel's challenged conduct on the facts of the particular case viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690.

The Kansas Supreme Court has recognized a presumption that counsel's conduct is reasonable, and explained that

> certain decisions relating to the conduct of a criminal case are ultimately for the accused: (1) what plea to enter; (2) whether to waive a jury trial; and (3) whether to testify. Others are ultimately for defense counsel. The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his or her client.

Bledsoe v. State, 283 Kan. 81, 92, 150 P.3d 868 (2007).

However, "[m]ere invocation of the word 'strategy' does not insulate the performance of a criminal defendant's lawyer from constitutional criticism." *Fuller v. State*, 303 Kan. 478, 489, 363 P.3d 373, 383 (2015). This is especially true "when counsel lacks the information to make an informed decision due to inadequacies of his or her investigation." *Wilkins v. State*, 286 Kan. 971, 982, 190 P.3d 957 (2008).

Mr. Jaeger's Claims Against Pedro Irigonegaray

In this case, at the State's concession, the district court conducted an evidentiary hearing to consider Mr. Jaeger's claims that Mr. Irigonegaray was ineffective because (1) he failed to pursue a voluntary intoxication defense; (2) he failed to request a lesser included offense instruction of criminal restraint; and (3) he failed to pursue a motion for change of venue. (R. 4, generally; R. 5, 4). After the hearing, the court denied the motion in a written order. (R. 3, 335).

Failure to Pursue Voluntary Intoxication Defense

The motion alleged Mr. Irigonegaray was ineffective by failing to make a voluntary intoxication defense. (R. 1, 13). In the amended motion, Mr. Jaeger argued that voluntary intoxication was a valid defense to the charge of aggravated kidnapping and that it would have been given by the court had Mr. Irigonegaray elicited any evidence at trial regarding Mr. Jaeger's level of intoxication. (R. 2, 123-24).

At the hearing, Mr. Jaeger testified he had fasted for three days, eating only a sub sandwich, and that on the night of the incident had taken five Valium and five Xanax in addition to drinking hard alcohol, including tequila shots. (R. 4, 8-9). Mr. Irigonegaray testified that Mr. Jaeger had told him about the alcohol and drug consumption, but explained he failed to pursue the voluntary intoxication defense because he believed it was "incongruous" with the defense he had chosen to present. (R. 4, 28).

However, in his interview with law enforcement, Mr. Jaeger explained he had only had "a couple beers," and officers did not believe that Mr. Jaeger was intoxicated. (R. 4, 19-20). At trial, Mr. Jaeger testified he had "a couple beers, a couple shots" the night of the incident, but did not testify about taking any pills. (R. 4, 10, 19).

The district court denied Mr. Jaeger's motion on this claim, finding that the evidentiary hearing "clearly established that trial counsel made a strategic decision not to pursue an involuntary intoxication defense which was inconsistent with their theory of defense." The court also cited the officer's opinion and the videotaped interviewed to show that defense counsel could look at the evidence and "form an opinion" regarding whether a jury would believe that Mr. Jaeger was so intoxicated he could not form the

requisite intent. (R. 3, 333). As such, the court concluded that, Mr. Jaeger "failed to meet his burden to prove that no reasonable attorney would have proceeded in this manner." (R. 3, 333).

Deficient Performance

The factual findings of the court's decision did not support the court's legal conclusion that Mr. Irigonegaray's performance was not deficient when he failed to pursue the voluntary intoxication defense. Additionally, the court did not consider the totality of the circumstances, and instead apparently rested its decision largely on Mr. Irigonegaray's claim of "strategy."

Mr. Jaeger had informed Mr. Irigonegaray that he had consumed alcohol and pills the night of the incident in this case, but Mr. Irigonegaray chose not to investigate those claims further. (R. 4, 8, 29). Additionally, while he felt the defense was inconsistent with the defense he had chosen to present, he acknowledged that, were the jury to believe the intoxication defense, it would negate the intent element of the kidnapping charge and result in acquittal. (R. 4, 28-29). Further, case law is clear that "a defendant in a criminal case may rely upon voluntary intoxication to show a lack of specific intent even though he also relies upon other defenses which may be inconsistent therewith." *State v. Sappington*, 285 Kan. 158, 165, 169 P.3d 1096 (2007).

The mere fact of inconsistent defenses was not sufficient to demonstrate that Mr. Irigonegaray's "strategy" was reasonable. He provided no other statement to show that he believed pursuing one defense would undermine the jury's confidence or belief in another defense, only that he could not balance, in his mind, the apparent inconsistencies.

(R. 4, 30). This fact is not sufficient to demonstrate that Mr. Irigonegaray, under the totality of the circumstances, was not deficient when he failed to pursue a defense of voluntary intoxication.

Prejudice

Had Mr. Irigonegaray investigated Mr. Jaeger's claims of voluntary intoxication, and elicited the same testimony that Mr. Jaeger provided at the evidentiary hearing, it is likely that an instruction on voluntary intoxication would have been appropriate in this case. *See* PIK Crim. 4th 52.050. Based on this evidence, there is a reasonable possibility that the jury would have believed his statement and found that his voluntary intoxication was such that he was incapable of forming the specific intent required for a conviction of aggravated kidnapping or kidnapping. As such, Mr. Jaeger was prejudiced by Mr. Irigonegaray's failure to pursue the voluntary intoxication defense.

Failure to Request Criminal Restraint Instruction

Additionally, Mr. Jaeger alleged trial counsel was ineffective because he failed to request an instruction on criminal restraint as a lesser included offense of aggravated kidnapping. (R. 1, 14-15). The district court denied this claim, finding "defense counsel again made a strategic choice." (R. 3, 333). The court noted that defense counsel's theory was that the victim had voluntarily accompanied Mr. Jaeger to the car, and he had presented expert testimony in pursuit of that defense. (R. 3, 333). As such, the court explained, if counsel's theory were successful, it would have resulted in acquittal. The court held that "the decision to argue for acquittal clearly falls within the region of tactics and strategy." (R. 3, 334).

Deficient Performance

The factual findings of the court's decision did not support the court's legal conclusion that Mr. Irigonegaray's performance was deficient when he failed to request an instruction on criminal restraint. Again, the court failed to consider the totality of the circumstances and only relied on its determination that the failure to request the instruction was "strategy."

Mr. Irigonegaray testified that the defense theory was that Mr. Jaeger was not guilty of the charged crime of aggravated kidnapping, and, indeed, that he was not guilty of any crime. (R. 4, 36-37). Because of this strategy, he chose not to request lesser offense instructions of aggravated battery. In fact, according to the State, Mr. Irigonegaray had objected to instructing the jury on the lesser included offense of kidnapping.

However, while defense counsel may pursue an "all or nothing" defense, in this case that strategy was insufficient to explain why Mr. Irigonegaray failed to request the lesser included offense instruction for criminal restraint. Once the district court determined to instruct the jury on kidnapping, the jury was not left with the choice of aggravated kidnapping or nothing. The "all or nothing" strategy was not sufficient to demonstrate that Mr. Irigonegaray's decision to not request an additional lesser included offense instruction was still reasonable strategy. He provided no additional information to show he believed there was a reason why, in giving the kidnapping instruction, the court should not also provide an instruction on criminal restraint. Under the totality of the circumstances, the fact of the "all or nothing" strategy was not sufficient to

demonstrate that Mr. Irigonegaray was not deficient when he failed to request the additional lesser included offense instruction.

Prejudice

Had Mr. Irigonegaray requested an instruction on criminal restraint, there is a reasonable possibility that the jury would have convicted Mr. Jaeger of criminal restraint instead of kidnapping. After hearing the evidence in this case, the jury chose to convict Mr. Jaeger of the lesser offense of kidnapping, finding that his conduct was less than the original aggravated kidnapping charge. This demonstrates that the jury rejected Mr. Irigonegaray's "all or nothing" defense strategy. As such, it is possible that, had the jury been instructed on criminal restraint, it would have convicted Mr. Jaeger of that lesser charge instead of the kidnapping charge. This conviction would have been a class A misdemeanor instead of a severity level three felony, and Mr. Jaeger was prejudiced by Mr. Irigonegaray's failure to request an instruction on criminal restraint as a lesser included offense.

Failure to Purse Motion for Change of Venue

Finally, Mr. Jaeger alleged Mr. Irigonegaray was ineffective because he failed to file a motion for change of venue despite significant media coverage of the case. (R. 1, 15). The district court denied this claim finding that Mr. Irigonegaray had repeatedly considered whether to file a motion for change of venue and concluded that Douglas County was the best county to defend a criminal case, in part because of concern regarding where the case might be transferred. (R. 3, 334). The court also found that Mr.

Irigonegaray "testified to succeed on a motion to transfer venue under Kansas law is difficult and expensive." (R. 3, 334).

Further, the court determined "the hearing showed that the cause for concern was not media publicity so much as internet blogging with inaccurate information." (R. 3, 334). Because of the nature of the internet, the court concluded that "[c]onceivably, [Mr.] Jaeger might have to deal with this issue of pre-trial information wherever the trial occurred." (R. 3, 334).

Ultimately, the court held the Mr. Jaeger was not denied a fair trial and that he did not show presumed prejudice. (R. 3, 335). It found that, while the information online "were derogatory and unflattering in nature," Mr. Jaeger did not show how that information affected the jury. (R. 3, 335). Further, the court found that the jury had actually convicted Mr. Jaeger "of a lesser charge, rejecting aggravated kidnapping for kidnapping, and failed to reach a verdict on the aggravated burglary charge." (R. 3, 335). This, the court found, demonstrated that the chosen jury had actually weighed the evidence at trial. (R. 3, 335).

Deficient Performance

The factual findings of the court's decision were not supported by substantial competent evidence and did not support the court's legal conclusion that Mr. Irigonegaray's performance was not deficient when he failed to pursue a motion for change of venue.

The court first erred in its consideration of what had actually occurred at trial, including voir dire and the verdict reached by the jury. (R. 3, 334-35). When

considering whether counsel was ineffective in failing to file a motion for change of venue, the court was required to look at "the reasonableness of counsel's challenged conduct on the facts of the particular case viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. The court's consideration of what the jury actually concluded and the outcome of voir dire should have no bearing on whether Mr. Irigonegaray was ineffective in deciding to not file a motion to change venue. At the time of the decision, he did not have this information nor did he know what the outcomes would actually be.

Further, he never testified that he chose to use juror questionnaires to address the problem of pretrial publicity. Rather, Mr. Irigonegaray explained that he had discussed the question with Mr. Jaeger and co-counsel on numerous occasions and determined he would not file a motion to change venue. (R. 4, 31-34). He then, as trial strategy for voir dire, requested to use juror questionnaires that would produce information regarding any possible bias based on the pretrial publicity. (R. 6, 55-59).

The court also discounted the publicity that was present, noting that it "was not media publicity so much as internet blogging with inaccurate information." (R. 3, 334). This was not only a mischaracterization of the concerning publicity, which involved comments on forums related to online articles from the *Lawrence Journal-World*, but also incorrectly concluded that blogging does not constitute "publicity." Although not a traditional medium, internet blogging is increasingly common and generates significant internet traffic. Additionally, according to the court, because the internet information is widely available, "[c]onceivably, [Mr.] Jaeger might have to deal with this issue of pre-

trial information" regardless of where the trial is actually held. (R. 3, 334). The court's minimization of the impact of the media coverage and associated commentary does not accurately reflect the evidence in the record, nor does it reflect Mr. Irigonegaray's understanding of the impact of the publicity that existed prior to the trial.

At the time Mr. Irigonegaray chose to not file a motion for change of venue, he was aware of the significant pretrial publicity in the case, including: (1) physical threats against Mr. Jaeger and his family; (2) physical threats against trial counsel; (3) and the promulgation of factually erroneous information about the extent of the injuries to the victim. (R. 4, 34-35). Most of the publicity referenced in this case was from the online version of the *Lawrence Journal-World*, which is a local paper, and Mr. Irigonegaray testified that a significant amount of the publicity came straight from Lawrence, Kansas, which is in Douglas County. (R. 4, 34). Yet his belief remained that Douglas County was the best place to hold the trial, without any facts to support his decision.

It was undisputed that there was a significant amount of pretrial publicity from local Douglas County sources in this case, and it was undisputed that most of the commentary on that publicity demonstrated significant animus toward Mr. Jaeger. Despite this, Mr. Irigonegaray did not investigate what impact that fact might have on Mr. Jaeger's case in order to make an informed decision about whether he should file a motion for change of venue. Rather, he simply relied on his belief that because Lawrence was more "liberal" than other counties, it was the best place to try the case, utterly discounting any possibility that the publicity demonstrated that Douglas County was not the place to try the case *because* the incident had occurred there. Because of this fact, Mr.

Irigonegaray provided constitutionally deficient performance when he failed to fully investigate the issue before deciding not to file a motion for change of venue.

Prejudice

Counsel recognizes that this Court has held "that where the record does not contain any indication that a motion to change venue could have been successful, a defendant cannot establish prejudice." *Becker v. State*, No. 108,776, 2014 WL 1707435, * 8 (Kan. Ct. App. April 25, 2014).[1] Further, pretrial publicity alone is insufficient to demonstrate prejudice. *Becker*, 2014 WL 1707435, at *8.

In this case, the concern regarding pretrial publicity was not only related to the articles written about the case. Rather, the larger concern was centered on the commentary expressed by individuals on the articles from the website of the *Lawrence Journal-World.* It was not simply what the media had said about the case, but was the comments that Mr. Irigonegaray believed had come from Lawrence, Kansas, by people who would be part of the jury pool.

Douglas County is a relatively small community compared to larger counties such as Wyandotte, Shawnee, or Sedgwick counties, and this necessarily creates a smaller jury pool. The incident in this case occurred on October 9, 2007, and Mr. Jaeger's trial began on July 27, 2009. (R. 6, 9, 14). The first article, with comments, presented to the court in this case was dated October 19, 2007, and appeared regularly on the *Lawrence Journal-World* website through the first day of jury selection. (R. 2, 129-244).

[1] Pursuant to Kan. Sup. R. 7.04(g), this opinion is included as Attachment A.

These factors should have at least warranted further investigation by Mr. Irigonegaray that would have provided additional information to include in a motion requesting change of venue. However, this information is also significant enough to demonstrate that there was a reasonable possibility that, had the motion been filed, it would have been successful in showing there was "so great a prejudice" against Mr. Jaeger in Douglas County that he could not obtain a fair and impartial trial in that county.

Conclusion

The district court's factual findings regarding Mr. Irigonegaray's "strategy" for not pursuing a voluntary intoxication defense, criminal restraint instruction, or motion for change of venue were not supported by substantial competent evidence. Additionally, its factual findings did not support its legal conclusion that Mr. Irigonegaray was not ineffective in failing to pursue a motion for change of venue. As such, this Court should reverse the denial of these claims.

Conclusion

For the above reasons, Mr. Jaeger requests this Court reverse the district court's denial of his 60-1507 motion.

322 P.3d 1027 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

Samuel M. BECKER, Appellant,

v.

STATE of Kansas, Appellee.

No. 108,776.

|

April 25, 2014.

|

Review Denied February 19, 2015.

Appeal from Cherokee District Court; Oliver Kent Lynch, Judge.

Attorneys and Law Firms

William K. Rork, and Wendie C. Miller of Topeka, for appellant.

Natalie Chalmers, assistant solicitor general, for appellee.

Before McANANY, P.J., STANDRIDGE and STEGALL, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** Samuel Becker's convictions, including a conviction for first degree felony murder, were affirmed on direct appeal by the Kansas Supreme Court in *State v. Becker,* 290 Kan. 842, 235 P.3d 424 (2010). The underlying facts as recited in that decision are as follows:

> "From the evening of January 29, 2007, to the morning of January 30, 2007, three men [including Samuel Becker] engaged in a course of conduct that would take them across two Kansas towns and into the homes of several people, ultimately resulting in one death and multiple charges of kidnapping, assault, battery, and murder....
>
> "On January 29, 2007, Edward Gordon discovered that someone had broken into his house in Baxter Springs and stolen a safe in which he kept money and a supply of drugs that he kept for sale. He called Geoffrey Haynes, who gave Gordon and Gordon's girlfriend, Chandra Dupree, a ride to Pittsburg. There they met Aaron Graham and the defendant Becker.
>
> "Gordon, Graham, and Becker discussed how to determine who had stolen the safe and how to retrieve it. The three picked up a handgun at Graham's father's house and then drove to the home of George Rantz in Riverton. When Rantz answered the door, the three forced their way into the house. They proceeded to interrogate him about the missing safe, during which Graham waved the gun in the air and Becker suggested that someone was going to pay for the theft with his life. Rantz told them he did not know about the safe, and Becker urged Gordon and Graham to 'shoot the motherfucker' to make an example out of him. Rantz's girlfriend, Haley Watkins, said she was going to call the police, and the three intruders became calmer. Rantz then said he would go with them to find the thief, and they all went back to Haynes's car and proceeded to the home of Drew Thiele.
>
> "Gordon, Graham, and Becker forced their way into Thiele's house and began questioning him about the contents of the safe and where he had been that night. During this questioning, Becker hit Thiele in the face with his fist. They then knocked Thiele down, and Becker beat him while Gordon pointed the gun at him. During the beating, Becker shoved his thumb into Thiele's eye and choked him. They finally left Thiele on the floor, telling him not to call the police and that he should have the drugs and money available at 5 a.m. or they would kill him.
>
> "They dropped Dupree off and made several other stops before driving to Gordon's house. All five men-Gordon, Graham, Becker, Haynes, and Rantz-went inside. Dupree showed up a short time later because she had forgotten her cell phone. Gordon then called Brad Ashe and asked him to come to his house. Ashe and his girlfriend, Natalie Stephens, came into the house, where Graham approached Stephens, demanding to know who she was and telling her to leave.
>
> "Inside the house, Graham and Becker shouted at and threatened Ashe and waved the gun around.

They forced him to sit on the couch and asked him questions about the missing safe. After Ashe denied any knowledge about it, Becker began to punch him and hit him with his knee. Stephens returned to the house and sat behind the couch while the men beat and questioned Ashe. At one point, Graham put the gun in Ashe's mouth and threatened to shoot him.

*2 "Dupree attempted to leave the house, but Graham stopped her, telling her that she was 'not fucking going anywhere' and that she had to go to the back bedroom, which she did out of fear for her safety. Graham then discovered Stephens behind the couch and directed her to sit next to Ashe on the couch. Graham held the gun to her head and asked Ashe whether Stephens's life was worth five thousand dollars.

"Gordon, Graham, and Becker then sent Haynes, Rantz, and Stephens to the back bedroom with Dupree, and they complied because they were afraid and thought they had no reasonable choice in the matter. The three men continued to beat and question Ashe, who mentioned the name of J–Rich, a nickname for Jamey Richardson.

"While subjecting Ashe to the interrogation and beatings, Gordon and Graham went back and forth between the living room, where Ashe was located and the bedroom, where Dupree, Rantz, Haynes, and Stephens were located, while Becker stayed with Ashe. They threatened their captives with the gun and told them that they would shoot anyone who tried to leave the room. When Gordon and Graham went to take the cell phones from the people in the bedroom, Becker wielded two hacksaws at Ashe and asked him, 'Do you know what kind of sick motherfucker I am?'

"Around that time, Jamey Richardson arrived at the front door, apparently in response to a call from Gordon. Gordon and Graham let him into the house, and Graham pointed the gun at him. The three men directed him to sit on the couch, where they ordered him to tell them where the missing safe and its contents were. Graham pointed the gun at Richardson, who attempted to knock it away. Richardson then grabbed the barrel of the gun and forced it up toward the ceiling as he tried to stand up. Gordon, Graham, and Becker acted in concert to physically force him back onto the couch.

"Richardson then suggested that they all go talk to someone else and again got up from the couch. He got as far as the front door, although Graham continued to train the gun on him and Graham attempted to block his path. Richardson went outside, and Gordon, Graham, and Becker followed him.

"Ashe, who remained in the house, heard people yelling outside, followed by a gunshot. He heard someone say, 'I shot your boy,' and then Gordon returned to the house, ran through the house, and then ran back outside. A few seconds later he heard a second gunshot. Gordon, Graham, and Becker came back inside and told everyone to leave the house. Everyone ran from the house, during which time Rantz and Haynes saw Becker holding the gun.

"As they ran from the house, Richardson screamed for help, but no one stopped to give him aid. A bullet had struck him in the leg, severing two arteries and causing him to bleed to death shortly after he was shot. At around 2 a.m., police, responding to calls from neighbors, found Richardson dead in the driver's seat of his car.

"The following day, Becker admitted to Graham's mother that he had shot Richardson. He told her that Richardson had somehow taken the gun, which fired, and Richardson said he had 'shot your boy.' The gun then somehow fell to the ground, and Becker, fearing that Graham had been shot and that he himself would be shot next, picked up the gun and shot Richardson in self-defense.

*3 "Becker was eventually charged with a number of felonies: one count of aggravated burglary for entering a structure with the intent to commit aggravated assault against George Rantz and/or Haley Watkins; one count of aggravated assault against George Rantz; one count of kidnapping of George Rantz with the intent to injure or terrorize Rantz or Ashe or Richardson; one count of aggravated burglary for entering a structure with the intent to commit aggravated assault against Joseph Thiele; one count of aggravated battery against Thiele; one count of aggravated battery against Ashe; one count of aggravated assault against Natalie Stephens; one count of kidnapping of Natalie Stephens with the intent to injure or terrorize Stephens or Ashe or Richardson; one count of kidnapping of Chandra Dupree with the intent to injure or terrorize Dupree or Ashe or Richardson; one count of kidnapping of Richardson with the intent to injure or terrorize

Richardson; one count of kidnapping of Ashe with the intent to injure or terrorize Ashe; and one count of first degree felony murder for the death of Richardson while Becker was kidnapping Stephens and/or Dupree and/or Richardson.

"A jury found Becker not guilty of the first count-aggravated burglary of the residence of Rantz and/or Watkins. The jury found him guilty of the lesser offense of attempted kidnapping of Richardson and guilty of every other count as charged. The district court sentenced him to an aggregate term of life plus 68 months." *Becker,* 290 Kan. at 842–46.

After the Kansas Supreme Court affirmed his convictions on direct appeal, Becker filed a K.S.A. 60–1507 motion in the district court alleging ineffective assistance of counsel. After a full evidentiary hearing, the district court determined Becker's counsel was not ineffective and denied Becker's motion. Becker now appeals from this ruling and raises five ineffective assistance of trial counsel claims and one claim of ineffective assistance of appellate counsel.

When reviewing an appeal from a full evidentiary hearing on a K.S .A. 60–1507 motion, "an appellate court must determine whether the district court's factual findings are supported by substantial competent evidence and whether those findings are sufficient to support the district court's conclusions of law." *Bellamy v. State,* 285 Kan. 346, 355, 172 P.3d 10 (2007). While we must give deference to the district court's findings of fact, accepting as true any evidence and inferences that support the district court's findings, we exercise unlimited review over the district court's conclusions of law and ultimate decision to either grant or deny the motion. *Bellamy,* 285 Kan. at 355

"To support a claim of ineffective assistance of counsel, it is incumbent upon a defendant to prove that (1) counsel's performance was deficient, and (2) counsel's deficient performance was sufficiently serious to prejudice the defense and deprive the defendant of a fair trial." *Bledsoe v. State,* 283 Kan. 81, 90, 150 P.3d 868 (2007). Counsel's performance must be judged by an objective standard of reasonableness considering all the circumstances, and we begin with the presumption that the performance falls within the broad range of objectively reasonable performance. In so doing, we apply a "highly deferential" standard that makes "every effort ... to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Bledsoe,* 283 Kan. at 90.

***4** If Becker can establish that his defense counsel's performance was deficient by this standard, he must then establish prejudice. Before finding prejudice, we must be convinced that but for the deficient performance, the trial results would have been different. When determining whether confidence in the trial outcome has been undermined by the deficient performance, an appellate court must consider the evidence as presented below in its totality. *Bledsoe,* 283 Kan. at 90–91.

With these principles in mind, we will address each of Becker's claimed instances of ineffective assistance of counsel in turn.

FAILURE TO REQUEST A CONTINUANCE

Becker first claims his trial attorney, Michael Gayoso, was ineffective for failing to request a continuance in order to investigate and decide whether to pursue a self-defense theory based on newly discovered evidence. Becker then argues that his appellate counsel was likewise ineffective for failing to challenge trial counsel's performance in this regard.

Becker's claim stems from the anticipated testimony of trial witness Lori Graham, Becker's codefendant's mother. Early in the case, Graham told law enforcement that shortly after Richardson was murdered, her son told her that Becker had done "something" to Richardson. Before trial, Gayoso had moved to have this anticipated testimony excluded on the grounds that Becker would not testify at trial making Graham's testimony inadmissible hearsay. Then 3 days before trial, the State advised Gayoso that Graham was now claiming that Becker himself told her he was the shooter.

Because Graham's new statement suggested that Becker had directly confessed to being the shooter, Gayoso immediately asked the court to either exclude Graham's testimony due to unfair surprise or, in the alternative, to force the State to request a continuance so that Gayoso would have time to investigate and prepare for the new evidence. Gayoso explained there was absolutely no way he could properly prepare his defense before trial began,

but he argued Becker should not be forced to ask for the continuance himself and give up his right to a speedy trial. Gayoso further argued that if Graham's testimony was believed, Becker may have a self-defense claim and Gayoso needed more time to investigate this new potential defense theory.

The district court agreed it was not feasible to expect Gayoso to deal with the new evidence on such short notice, but it ruled it would allow the evidence to come in at trial. The court refused to order the State to request the continuance, however, the court indicated it would allow Becker a continuance if he wanted one. Because Becker refused to waive his right to a speedy trial, Gayoso did not request the continuance.

The record demonstrates that Gayoso properly informed the court, in Becker's presence, of the problems Graham's new statement presented to Becker's defense. Gayoso secured an opportunity for Becker to obtain a continuance in order for Gayoso to investigate the new evidence. It was Becker who refused to waive his speedy trial rights and chose not to take advantage of a continuance. Becker does not contest that he did, in fact, refuse to waive his speedy trial rights. He argues instead that he refused to waive his speedy trial rights because Gayoso did not properly advise him as to the potential significance of the new evidence and that if he had been properly advised, he would have waived his speedy trial rights. The record does not support Becker's version of events.

*5 Becker was present when Gayoso explained to the district court the need for a continuance and the potential for a self-defense claim. At that hearing Gayoso told the court the new evidence was "devastating" to the defense and that there was absolutely no way he could properly prepare the defense before trial. Gayoso argued that Graham's testimony may pave the way for a self-defense claim. He explained that a jury could infer from Graham's testimony that Becker was "in fear for his life" when he shot Richardson. Gayoso told the court that he needed more time to investigate this possibility. Finally, Gayoso advised the court he had spoken with Becker and that Becker was unwilling to waive his right to a speedy trial.

The testimony elicited at Becker's K.S.A. 60–1507 hearing establishes that Becker's decision to proceed to trial was made knowingly. Gayoso testified he discussed Graham's new statement with Becker and his family members. Gayoso said he advised the Beckers to ask for a continuance so his private investigator could speak to Graham. Gayoso told the Beckers he needed to find ways to attack her credibility. Gayoso also testified he was unhappy with the jury pool and a continuance would perhaps give them an opportunity to get a new jury pool. Gayoso testified that he told Becker a continuance would be a greater benefit to him. Gayoso testified that despite all this, Becker was unwilling to waive his right to a speedy trial.

Becker's mother, Maggie Becker, agreed that Gayoso advised them to wait to proceed with trial. She said the family "didn't know what to do" and decided to just "go with it." Becker's father Darrel Becker agreed that Gayoso wanted to continue the trial in order to interview Graham. However, according to Mr. Becker, the family money was all gone and a postponement of the trial would be "kicking the can down the road."

Read in totality, the record is clear that Gayoso properly articulated to the district court and to Becker that a continuance was necessary and why it was necessary. Despite this, Becker refused to waive speedy trial. In this circumstance, defense counsel is bound by the knowing decision of his client. We are convinced that Gayoso's performance with respect to his failure to obtain a continuance did not fall outside the wide range of objectively reasonable performance. As such, we need not discuss whether Becker was actually prejudiced by Gayoso's performance. Moreover, because Gayoso was not ineffective for failing to obtain a continuance, it necessarily follows that Becker's appellate counsel was not ineffective for failing to raise the issue on direct appeal. Because Gayoso committed no error, there was no basis upon which an appellate claim could have been made.

FAILING TO INVESTIGATE AND PURSUE A PROXIMATE CAUSE DEFENSE THEORY

Becker next claims Gayoso was ineffective for failing to investigate and pursue a defense theory that Becker's conduct was not the proximate cause of Richardson's death. Becker argues that had it been properly pursued, there would have been evidence to support the theory that Richardson's cause of death was not the gunshot wound but rather the lack of timely medical intervention. Becker alleges Gayoso's performance was deficient in that

he did not investigate this theory; he did not question the witnesses at trial on this theory; he did not subpoena expert witnesses to testify on the issue; and he did not request an independent autopsy.

*6 Becker's claim in this regard fails for many reasons. First, Gayoso's decision to not pursue a line of defense based on proximate cause of death was a tactical one this court will not question on appeal absent evidence that Gayoso disregarded evidence entirely or failed to complete a reasonable investigation.

Gayoso testified he did not pursue a proximate cause defense because he did not feel it was viable after reviewing the information he had and speaking with the coroner. Gayoso said he researched the proximate cause issue, but the caselaw in that area involved situations where a subsequent act by medical personnel in the actual treatment of a victim arguably resulted in a death. Gayoso testified that in his opinion this defense was not available given the facts of the case and that, if he had pursued such a defense, he may have lost credibility with the jury.

Kansas courts routinely stress that strategic decisions made by trial counsel based on a thorough investigation are virtually unchallengeable.

> "Trial counsel has the responsibility for making tactical and strategic decisions including the determination of which witnesses will testify. Even though experienced attorneys might disagree on the best tactics or strategy, deliberate decisions based on strategy may not establish ineffective assistance of counsel. Strategic choices based on a thorough investigation of the law and facts are virtually unchallengeable." *Flynn v. State,* 281 Kan. 1154, Syl. ¶ 5, 136 P.3d 909 (2006).

It is equally clear that defense counsel may not disregard pursuing a line of investigation and call it "trial strategy." Deference to trial strategy is inappropriate when counsel lacks the information to make an informed decision due to the inadequacies of his investigation. *State v. James,* 31 Kan.App.2d 548, 554, 67 P.3d 857, *rev. denied* 276 Kan. 972 (2003); *Mullins v. State,* 30 Kan.App.2d 711, 716–17, 46 P.3d 1222, *rev. denied* 274 Kan. 1113 (2002).

Here, Becker has failed to demonstrate that Gayoso's investigation of the proximate cause theory was inadequate. Becker has provided no caselaw that demonstrates the theory reasonably could have succeeded on the merits. The only case Becker cites, *State v. Jones,* 287 Kan. 547, 198 P.3d 756 (2008), involves strikingly different facts than those present here. In *Jones,* the victim died 18 days after his encounter with the defendant. At trial, the defense raised the issue of proximate cause of death because there was evidence the victim may have died due to complications he suffered during multiple surgeries following the initial injury.

Becker concedes that the first officer at the scene of Richardson's murder-Officer David Groves-arrived at around 2:08 a.m. According to the evidence presented, when Groves approached Richardson, Richardson displayed no signs of life. Groves immediately called for an ambulance, and it took approximately 5 minutes for emergency medical personnel to arrive. Groves did not assist Richardson during those 5 minutes and instead took cover in his unit because he did not know if there were other suspects in the area. Becker points to evidence that medical personnel were advised to stay back when they first arrived and that Richardson was determined to be unresponsive and without a pulse at 2:31 a.m.

*7 These facts are not sufficiently similar to those in *Jones* to demonstrate that Gayoso's investigation into the question of proximate cause was insufficient to invoke the rule protecting defense counsel's trial strategy. We therefore find that Gayoso's decision not to pursue a proximate cause of death argument was a trial strategy arrived at after sufficient investigation.

Because we find that Gayoso's performance in this regard was not deficient, we need not address the question of prejudice. It is worth noting, however, that even if Gayoso's performance had been deficient, Becker has provided no evidence whatsoever to suggest that a defense based on proximate cause of death could have succeeded. At the K.S.A. 60–1507 hearing, Becker presented no evidence suggesting Richardson died from anything other than the loss of blood due to the gunshot wound to his leg and no evidence indicating the loss of blood could have been prevented with better medical care. Becker's entire argument is based on pure speculation.

FAILURE TO INVESTIGATE AND PURSUE A MENTAL STATE THEORY OF DEFENSE

Becker's next claim of ineffective assistance of counsel arises from Gayoso's alleged failure to investigate and pursue a defense that Becker did not have the requisite mental state to commit the charged crimes. Becker claims that Gayoso knew that Becker had been diagnosed with post-traumatic stress disorder (PTSD) years before the crimes were committed, yet he did not investigate Becker's mental state at the time of the shooting. Becker claims that Gayoso should have conducted research on PTSD; talked to mental health professionals about PTSD; and presented evidence of PTSD as a defense strategy.

As discussed above, trial strategy based on a thorough and sound investigation is sacrosanct and will not be second guessed by this court. The evidence at the K.S.A. 60–1507 hearing was undisputed that Gayoso and Becker discussed the possibility of presenting Becker's mental state as a defense and Becker was not amendable to that. Moreover, Gayoso testified that nothing in his discussions with Becker indicated he had dissociative thoughts, blackouts, or post-traumatic occurrences, and Becker never told Gayoso that he experienced psychological trauma during the crimes. Finally, Gayoso testified that Becker never demonstrated or indicated any inability to distinguish right from wrong. As a result of this investigation, Gayoso came to the conclusion that he "did not believe [PTSD] was a viable defense."

The record is void of any evidence suggesting that Gayoso should have investigated Becker's mental state further. We therefore find that Gayoso's decision not to pursue a defense based on Becker's mental state was a trial strategy arrived at after sufficient investigation.

Because we find that Gayoso's performance in this regard was not deficient, we need not address the question of prejudice. It is again worth noting, however, that even if Gayoso's should have investigated Becker's mental state further, Becker has provided no evidence whatsoever to suggest that a defense based on his prior PTSD diagnosis could have succeeded. At the K.S.A. 60–1507 hearing, Becker failed to point to any evidence suggesting he was or he could have been still suffering from PTSD 4 years after his initial diagnosis or that he may not have had the requisite mental state to commit the crimes committed in 2007. The claimed prejudice is entirely conjectural and speculative and is not sufficient to meet a defendant's burden to establish that but for the alleged deficiency, the trial result would have been different.

FAILURE TO REQUEST A CHANGE OF VENUE

***8** Becker next claims Gayoso should have filed pretrial motions to secure a change of venue and to conduct voir dire in manner that would allow individual questioning of the jurors. Additionally, Becker claims that because Richardson was a "local athlete who was well known to the community" and Cherokee County is a small, close-knit county, Gayoso should have hired individuals to poll the community and determine whether there were biases or prejudices. Becker notes there was a "lot of publicity" in the area about Richardson's murder, and a number of jurors had knowledge about witness, victims, or participants in the case.

Whether to request a change of venue has generally been held to be a question of trial strategy. See, *e.g., Schoonover v. State,* 218 Kan. 377, 543 P.2d 881 (1975); *Shakhtur v. State,* No. 88, 312, 2003 WL 22283002, *3 (Kan.App.) 2003 (unpublished opinion) ("the decision to seek a venue change is a function of trial strategy, which is left to the discretion of the defense attorney"). Our Supreme Court has held that defense counsel's decision to rely on jury questionnaires rather than community polling is not ineffective assistance of counsel. *Flynn v. State,* 281 Kan. 1154, 1166, 136 P.3d 909 (2006). This court has previously held that where the record does not contain any indication that a motion to change venue could have been successful, a defendant cannot establish prejudice. *Albright v. State,* No. 102454, 2012 WL 1649825, *2 (Kan.App.) 2012 (unpublished opinion); see also *Strickland v. Washington,* 466 U.S. 668, 697, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) ("[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed").

In support of his argument, Becker has failed to produce any evidence that a motion to change venue could have succeeded. He cannot point to any evidence that a particular juror was prejudiced or that a potential juror actually made a comment that could have tainted other jurors. In fact, Becker candidly admits some potential jurors were excused because they indicated they could not set aside their biases while some jurors indicated they could set their personal biases aside.

Mere pretrial publicity is not sufficient, by itself, to establish prejudice justifying a change in venue. *State v. Jorrick,* 269 Kan. 72, 77, 4 P.3d 610 (2000). Here, Becker presents absolutely no evidence beyond the mere fact of pretrial publicity demonstrating that a change of venue would actually have been granted in his case. Gayoso's traditional methods of ferreting out potential juror bias by relying on jury questionnaires and voir dire were not unreasonable and, in fact, proved effective. As such, Becker's claim of ineffective assistance of counsel in this regard must fail.

FAILURE TO PREPARE BECKER TO TESTIFY

Becker next claims Gayoso was ineffective for failing to prepare him to testify in pursuit of the self-defense claim and that he was denied the right to testify. These claims have no merit. At the K.S.A. 60–1507 hearing, Becker admitted that Gayoso informed him of his right to testify and advised him that it would be in his best interest not to testify. Becker repeatedly acknowledged that he knew it was his right to testify. Becker agreed Gayoso did not prevent him from testifying and admitted that it was his choice not to testify. Becker was not denied the right to testify.

*9 With respect to Becker's claim that Gayoso failed to prepare him to offer a self-defense narrative, we have already explained how Gayoso's inability to investigate and pursue a self-defense theory was attributable entirely to Becker's refusal to waive his speedy trial rights. Becker's performance in this regard was not deficient.

LACK OF SUFFICIENT EXPERIENCE, TRAINING, AND KNOWLEDGE

Becker's final claim is that Gayoso was not qualified to undertake his case. Becker complains that Gayoso's level of experience was insufficient pursuant to K.A.R. 105–3–2(a)(3) (stating in order to serve on the panel of attorneys eligible to represent indigent defendants, an attorney assigned to the defense of any felony classified as an off-grid offense or a non-drug grid offense with a severity level of 1 or 2 shall have tried to verdict 5 or more jury trials involving certain listed offenses) and he points to other generalized complaints about Gayoso's level of training and knowledge.

The qualifications set forth in K.A.R. 105–3–2 do not establish a minimum threshold below which counsel is per se ineffective. *Flynn,* 281 Kan. at Syl. ¶ 3. Furthermore, the regulation governs court-appointed defense attorneys, not retained counsel such as Gayoso. Thus, K.A.R. 105–3–2 provides little to no guidance in this case and we are left with traditional modes of evaluating the performance of defense counsel.

At Becker's K.S.A. 60–1507 hearing, Gayoso testified that he graduated from law school in 1999; had previously represented Becker on an aggravated assault case; had previously acted as co-defense counsel in a first-degree premeditated murder case; and was handling another first-degree premeditated murder case at the time of Becker's case. In substance, Becker's argument regarding Gayoso's lack of experience amounts to little more than a rehash of the same alleged instances of ineffectiveness discussed thoroughly above.

Given that each of Becker's specific claims have failed, it would be difficult to conclude that Gayoso was not qualified by reason of inexperience to represent Becker. More importantly, our Supreme Court has recently held that "a defendant can 'make out a claim of ineffective assistance only by pointing to specific errors made by trial counsel.' " *State v. Cheatham,* 296 Kan. 417, 434–35, 292 P.3d 318 (2013). Because we have not found a single specific instance of ineffective assistance of counsel, Becker's catch-all claim based on alleged lack of experience must likewise fail.

Affirmed.

All Citations

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Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that service of the above and foregoing brief was sent by emailing a copy to Charles E Branson, Douglas County Attorney, at daappeals@douglas-county.com; and by e-mailing a copy to Derek Schmidt, Attorney General, at ksagappealsoffice@ag.ks.gov on the 21st day of February, 2016.

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