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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

v.

STATE OF KANSAS,
Respondents-Appellee

BRIEF OF APPELLEE

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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BRIEF OF APPELLEE

NATURE OF THE CASE

Matthew Jaeger appeals the denial of his K.S.A. 60-1507 claims.

STATEMENT OF THE ISSUES

I. **No error occurred when the district court summarily denied certain of Jaeger's ineffective assistance of counsel claims.**

II. **Substantial competent evidence supports the district court's denial of Jaeger's remaining ineffective assistance of counsel claims.**

STATEMENT OF FACTS

Jaeger's Trial and Convictions.

The evidence that convinced a jury that Matthew Jaeger committed aggravated battery, kidnapping, and criminal threat, but not aggravated burglary, are already known to this Court. (*See* R. Vol. 3, 256–61 (presenting *State v. Jaeger*, No. 104, 119, 2011 WL 6382749, at *1–*5 (Kan. App. Dec. 16, 2011) (unpublished), rev. denied Feb. 19, 2013). But that evidence deserves repeating:

> Matthew Jaeger and Mary Francine Biggs, who were both students at the University of Kansas, had a relationship for various periods of time between August 2005 and October 2007. Although Biggs considered their relationship to be over, she continued to have contact with Jaeger.
>
> Biggs and Jaeger spent time together on the afternoon of October 8, 2007. That evening, Biggs went to a friend's apartment for dinner while Jaeger went to All Stars with one of his friends, Evan Carroll. According to Carroll, he noticed that Jaeger became agitated and obsessed with his cell phone over the course of the evening. In the early morning hours of October 9, 2007, there were 26 calls and text messages sent from Jaeger's cell phone to Biggs' cell phone. Eventually, Biggs turned off her cell phone and ignored Jaeger's calls and text messages.
>
> Biggs returned to her apartment around 11:45 p.m. Shortly thereafter, Dylan Jones, who had been casually dating Biggs for several weeks, came to visit Biggs at her apartment. Around midnight, Jaeger and Carroll left All Stars. Carroll drove Jaeger's car because Jaeger did not believe he should drive due to the amount of alcohol he had consumed. After the two visited a friend at a sorority house, Jaeger told Carroll to drive to Biggs' apartment. Upon arrival at the Biggs' apartment building, Jaeger jumped out of the car before Carroll could park.

Carroll saw Jaeger run up the stairs and break the front window of Biggs' apartment, which was on the second floor. After Carroll parked the car, he stood outside to smoke a cigarette while waiting for Jaeger to return.

In the apartment, Biggs and Jones were engaged in sexual intercourse when they heard a window breaking. Upon hearing the noise, Biggs got out of bed, closed the bedroom door, and turned on the light. Biggs told Jones he needed to leave because she thought her ex-boyfriend had broken into the apartment.

Jones quickly dressed and went out onto the balcony adjacent to Biggs' bedroom. While Jones climbed over the railing of the balcony, he saw Jaeger come into the bedroom. Jones described Jaeger as looking angry and enraged. As Jones was still hanging onto the balcony, Jaeger told him, "You're fucking dead." Jones then dropped from the balcony. As he did so, he heard a "flop up against the wall" and Biggs saying, "What the fuck, Matt."

Jaeger then went outside in an attempt to find Jones. Fearing that he would run into Jaeger on the ground, Jones climbed back onto Biggs' balcony, ran through the apartment, out the front door, and down the stairs. Jones hid for a short time while Jaeger looked for him. When he was hiding, Jones could hear Biggs pleading with Jaeger to stop. Jones then ran to a nearby residence where Biggs' brother lived.

Jones, who was barefoot and wearing only a shirt and pants, woke up Biggs' brother frantically telling him to call 911. Jones also told Biggs' brother that his sister was hurt and that "Matt is a psycho." Biggs' brother then called 911 to report what had occurred.

Upon seeing a male running between the apartment buildings, Carroll pulled Jaeger's car to the front of Biggs' building. Although Jaeger came to the car and started to get in, he abruptly ran back up the stairs and went inside Biggs' apartment. Carroll heard screaming and yelling coming from inside the apartment. But when the screaming and yelling stopped, Carroll grew nervous and decided to go inside Biggs' apartment.

In the back bedroom of the apartment, Carroll saw Biggs on the floor with Jaeger hunched over her. Carroll urged Jaeger to

leave. Shortly thereafter, Carroll, Jaeger, and Biggs left the apartment and went down the stairs. When they reached Jaeger's car, Carroll got into the driver's seat while Jaeger and Biggs got into the back seat. Biggs told Carroll that she was injured and needed to go to the hospital.

Two of Biggs' neighbors, who live directly across the parking lot from Biggs' apartment, had been awakened by the sound of loud voices and glass breaking. One of the neighbors, Katelyn Hall, heard a female screaming and went out on the front balcony of her apartment building. She was joined on the balcony by Troy Gower. Hall called 911 to report what she was observing.

Hall told the dispatcher that she saw two men dragging a woman by her arms and her hair down the stairs of Biggs' apartment building. She also told the dispatcher that she saw one of the men force the woman into the back seat of a car and then get into the back seat with her. Hall also described the car. And she told the dispatcher that the car was "moving pretty fast," that it had failed to stop at a stop sign, and that it turned left onto Michigan Street as it left the apartment complex.

A few minutes later, police officers stopped Jaeger's car near the intersection of 6th Street and Florida Street, as it was travelling in the opposite direction of Lawrence Memorial Hospital. One of the officers had Carroll exit Jaeger's car and placed him in a patrol car. The other officer approached the two people in the back seat. The officer noticed that Biggs was wearing all black clothing, was not wearing shoes, and appeared to have been crying. He also saw that her hands were clasped tightly between her legs.

An officer asked Biggs a few questions while she was still in the back seat of Jaeger's car, but she did not answer. Instead, she looked at Jaeger, who answered on her behalf. When an officer asked Jaeger where they were going, he told the officer that the three were on their way to The Wheel to get a pizza.

After learning Biggs' name, an officer ran a records search and discovered that Biggs had an outstanding warrant for failure to provide proof of insurance. Even after being told about the warrant, Biggs continued to refuse to exit the vehicle. One of the officers then heard Jaeger give Biggs permission to get out of the car.

As Biggs got out of the car, an officer noticed that her hands and the back seat of Jaeger's car were covered with blood. The officer also noticed that blood was dripping onto the pavement. Biggs, who was having difficulty walking and complaining of pain, motioned to the officer that the blood was coming from between her legs.

Biggs initially told the officers that she thought she had glass in her vagina. She also told the officers that Jaeger was crazy and that they did not understand what she was dealing with. After being placed in an ambulance, Biggs told the officers that Jaeger had broken into her apartment and had strangled her until she was unconscious. She also told the police that when she awoke, there was another altercation and Jaeger had dragged her from her apartment and forced her into his car.

One of the officers who was at the scene saw that Jaeger had blood on his hands and shorts. When Jaeger was asked about the blood, he told the officer, "I bite my fingernails." Jaeger was subsequently transported by the police to the Law Enforcement Center, and Biggs was taken by ambulance to the emergency room at Lawrence Memorial Hospital.

In the emergency room, Dr. Lisa Gard examined Biggs and found her to be in emotional distress and in severe pain. Dr. Gard observed a traumatic injury to Biggs' genitalia, including a hematoma that she believed required an immediate consultation with an obstetrician and gynecologist. Dr. Gard later testified at trial that she had never seen such an extensive external injury to the female genitalia. Dr. Gard also testified that she had treated "straddle injuries" to female patients on multiple occasions. Based on this experience and her examination of Biggs, Dr. Gard rendered the opinion that Biggs' injury was not a straddle injury.

Dr. Kathy Gaumer, an obstetrician and gynecologist, also conducted a physical examination of Biggs' genitalia in the early morning hours of October 9, 2007. Dr. Gaumer observed extensive trauma, active bleeding, and a rapidly expanding hematoma. Biggs told Dr. Gaumer that her ex-boyfriend had broken into her apartment and had assaulted her. Biggs also told Dr. Gaumer that she had lost consciousness and noticed the injury in her genital area after she woke up.

Dr. Gaumer performed surgery to repair the hematoma and to stop the bleeding. In doing so, she discovered several lacerations that were approximately 1 inch in length. At trial, Dr. Gaumer rendered the opinion that the hematoma resulted from the application of significant blunt force and was not a straddle injury. Dr. Gaumer further testified that in her 18 years of medical practice, she had never seen such an extensive gynecological injury.

Biggs was hospitalized for 11 days. During her hospitalization, Biggs was given medication to control the pain, as well as medicine to control her anxiety. Ultimately, she was discharged from Lawrence Memorial Hospital on October 20, 2007. After her discharge from the hospital, however, Biggs continued to receive home health care services and continued to have a catheter in place.

Jaeger was eventually charged with one count each of aggravated kidnapping, aggravated battery, aggravated burglary, and criminal threat. An 11–day jury trial commenced on July 27, 2008. At trial, 25 witnesses were called and hundreds of exhibits were admitted into evidence.

Jaeger's defense was that he broke into Biggs' apartment because he thought she was in distress. In addition, he claimed that Biggs had injured herself by falling onto the railing of her bed. In support of this defense, Jaeger called expert witnesses who rendered the opinion that Biggs had suffered a straddle injury. Furthermore, one of the expert witnesses rendered the opinion that Biggs was not choked, nor did she lose consciousness.

Jaeger also called a forensic scientist who rendered the opinion that the pattern of the blood stains did not show any signs that Biggs struggled or was forced into Jaeger's vehicle. Moreover, Jaeger called an expert witness to testify about the medication Biggs took in the hospital, which allegedly made her susceptible to suggestion from family members or law enforcement officers.

Following the close of evidence, the jury deliberated for approximately 4 days. . . .

[. . . .]

> The following day the jury returned a verdict, finding Jaeger guilty of kidnapping, aggravated battery, and criminal threat. The jury was unable to reach a unanimous decision on the aggravated burglary charge, and the district court declared a mistrial on that count. Jaeger subsequently filed a motion for a new trial, which was denied. Thereafter, Jaeger was sentenced to 106 months in prison.

Jaeger, 2011 WL 6382749 *1–*5.

Jaeger's 60-1507 Motion and Evidentiary Hearing.

As it relates to this appeal, Jaeger's 60-1507 motion alleged the he received ineffective assistance from one of his trial attorneys, Pedro Irigonegaray. Irigonegaray, according to Jaeger, failed to: (1) object to playing the video of Biggs' interview with police as cumulative of her trial testimony; (2) challenge a defective complaint; (3) request additional jury instructions related aggravated battery; (4) pursue a voluntary intoxication defense; (5) request instruction on criminal restraint, as a lesser included offense to (aggravated) kidnapping; and (6) pursue a motion for change of venue. (R. Vol. 1, 12–15; R. Vol. 2, 123–28).

After a non-evidentiary preliminary hearing, the court summarily denied the first three of Jaeger's above-recited claims. (R. Vol. 2, 245–49). On the last three claims, the court held an evidentiary hearing. (R. Vol. 3, 329; s*ee generally* R. Vol. 4). Only Jaeger and Irigonegaray testified at that hearing. (*See generally* R. Vol. 4).

Voluntary Intoxication Testimony. Jaeger and Irigonegaray discussed Jaeger's mental state and the possibility of presenting a voluntary

intoxication defense. (R. Vol. 4, 7–8, 18, 27–31). Jaeger stated that prior to the time officers discovered him with an injured Biggs, he "had done a fasting . . . made it three days and . . . had to get a Jimmy John sandwich;" took "five Xanax;" and drank "about five shots" of tequila. (R. Vol. 4, 8–9). Overall, Jaeger described his mental state as "pretty sedated, I guess." (R. Vol. 4, 8). Yet Jaeger agreed that he told officers in an interview conducted approximately 30 minutes after his arrest that he had only a couple beers that night and made no mention of taking any drugs. (R. Vol. 4, 19–21). Irigonegaray agreed that his conversations with Jaeger touched on Jaeger's alcohol consumption and "[n]ot the quantities, but that there was a potential for [pill ingestion] to have occurred." (R. Vol. 4, 28–29). Irigonegaray considered what effect those substances might have had on Jaeger's mental state. (R. Vol. 4, 29).

And ultimately, Irigonegaray determined that Jaeger's "primary defense" was not reasonably congruous with arguing voluntary intoxication. (R. Vol. 28–29). Jaeger's defense, Irigonegaray explained,

> was based on a specific intent to alleviate a perceived danger to another individual, first by looking for that individual; and secondly, upon reaching that individual's residence and recognizing that something wasn't right, which was corroborated by a witness hearing loud noises and a scream and a banging on the walls, a desire to enter the residence to help the individual that he believed was being attacked at that time.
>
> So the issue of an inability to develop a prerequisite intent was incongruous with the capacity to develop the prerequisite intent to do all of the things I have just mentioned. I could not, in my mind, balance those two and say there was such a degree of

> intoxication as to not have the capacity to develop an intent, when the primary defense was a very specific intent being generated to rescue someone that was being harmed.

(R. Vol. 29 –30). Had Jaeger told Irigonegaray to argue otherwise, he would have done so. (R. Vol. 4, 31).

Criminal Restraint Testimony. Jaeger and Irigonegaray did not extensively discuss requesting a criminal restraint instruction. (R. Vol. 4, 16, 36–37). Instead, Jaeger "told [Irigonegaray] that there wasn't a kidnapping" and Irigonegaray made that the defense. (R. Vol 4, 16, 36) "We just determined," Irigonegaray recalled, "that we would challenge the kidnapping, the aggravated kidnapping, by the defense which was presented"—i.e., Biggs "went with Mr. Jaeger willingly to go get medical help" and Jaeger's "efforts were simply to try to get [Biggs] to a hospital for treatment, with no intent to restrain, kidnap, much less aggravated kidnapping." (R. Vol. 4, 36–37, 40). So despite understanding that criminal restraint is a lesser included offense to kidnapping, he chose not to request that instruction at trial. (R. Vol. 4, 35–36).

Change of Venue Testimony. Jaeger and Irigonegaray had numerous conversations about whether to pursue a change of venue light of certain media. (R. Vo. 4, 10–11, 31). Jaeger claims that he "didn't want to stay in [Douglas County]." (R. Vol. 4, 16). He thought he would receive an unfair trial in Douglas County "[b]ased on all the feedback" appearing as comments on *Lawrence Journal-World* online articles. (R. Vol. 4, 11–12). Certain of those comments either contained threats against Jaeger, his family, or

Irigonegaray; mischaracterized Biggs' injury; or generally made "ugly" statements about Biggs' attacker. (R. Vol. 4, 11–12, 14–16, 21–23, 33–35). All of those articles and comments appeared online, accessible even to the people at Jaeger's California treatment facility. (R. Vol. 4, 12, 22–24).

The online material concerned Irigonegaray too. (R. Vol. 4, 31–33). He reviewed and kept records of the online articles and blogger comments. (R. Vol. 4, 33–34). He, "experienced criminal defense attorney Mike Saken," and Jaeger had "numerous discussions about whether or not a fair trial could be obtained in Douglas County." (R. Vol. 4, 31–33, 38–39). And against that concern, he balanced multiple perspectives:

> My perspective was that Douglas County was about as good a place in Kansas as I could think of to try a criminal case.
>
> The concern was that because we do not have a choice, if a change of venue is granted, as to the district to which the case is transferred, that we would perhaps end up in a county that was more conservative, which means any other county in the state, and the lack of open-mindedness to perhaps a defense such as the one that we were pursuing.
>
> I also 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. Vol. 4, 32–33). "[U]ltimately, with co-counsel," Irigonegaray explained, "the decision, which was shared with Matt, was made that we believed that we could get a fair trial here in Douglas County, and we proceeded in that manner." (R. Vol. 4, 32–33). And to assist with securing an impartial jury, Irigonegaray crafted and obtained permission to circulate before trial a jury

questionnaire that involved several questions related to the pretrial publicity. (R. Vol. 4, 39).

After receiving that evidence and written argument from the parties, the district court ultimately denied Jaeger's remaining claims. (R. Vol. 3, 329–35).

ARGUMENTS AND AUTHORITIES

I. No error occurred when the district court summarily denied certain of Jaeger's ineffective assistance of counsel claims.

Jaeger's Argument. The "motion, files, and records of this case," according to Jaeger, do not support the district court's partial summary denial of his motion. (Appellant's Brief, 9). Specifically, Jaeger argues that the motion, files, and records of his case do not conclusively show that he was entitled to no relief on his 60-1507 claims that one of his trial counsel, Mr. Irigonegaray, ineffectively failed (1) to object to playing the video of Biggs' interview with police as cumulative of her testimony, (2) to challenge a defective complaint, and (3) to request additional jury instructions related aggravated battery. (Appellant's Brief, 9).

Standard of Review. "The standard of review for the summary dismissal of K.S.A. 60-1507 motions is de novo, requiring an appellate court to determine whether the motion, files, and records of the case conclusively show that the movant is entitled to no relief." *State v. Sprague*, 303 Kan. 418, 425, 362 P.3d 828 (2015) (quotation omitted).

Standard for Ineffective Assistance of Counsel. To show a plausible ineffective assistance of counsel claim, Jaeger's well-pled allegations and the record must show: (1) deficiency (meaning that "counsel's representation fell below an objective standard of reasonableness") and (2) prejudice (meaning that without counsel's unprofessional errors, it is reasonably probable that the trial's result would have been different). *Edgar v. State*, 294 Kan. 828, 837–38, 283 P.3d 152 (2012) (quotation omitted).

Regarding deficiency, counsel's conduct is presumed reasonable, "sound trial strategy." *State v. Coones*, 301 Kan. 64, 70, 339 P.3d 375 (2014). Jaeger must show otherwise, that counsel did not act within "the wide range of reasonable professional assistance." *Edgar*, 294 Kan. at 838 (quotation omitted). Hindsight declarations that his trial attorney should have tried his case differently prove nothing. *See Strickland v. Washington*, 466 U.S. 668, 689 (1984). And the Court must take a "highly deferential" view of counsel's performance that accounts for "counsel's perspective at the time" and "all the circumstances." *Edgar*, 294 Kan. at 838 (quotation omitted). The result: a "highly demanding" burden to prove "gross incompetence." *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986).

Regarding prejudice, an error is reasonably probable to alter a proceeding's outcome if the error sufficiently undermines confidence in the original outcome. *Edgar*, 294 Kan. at 838. "[T]he likelihood of a different

result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (*citing Strickland*, 466 U.S. at 693).

A court need not consider both prongs if Jaeger makes an insufficient showing on one. *Edgar*, 294 Kan. at 843.

A. No additional evidence was necessary to reject Jaeger's claim that Irigonegaray ineffectively failed to object to Biggs' video interview as cumulative of her testimony.

Toward showing that this claim deserved an evidentiary hearing, Jaeger argues that the district court "wholly failed to analyze the specific question presented"—i.e. the district court allegedly gave "no factual or legal determinations regarding whether Mr. Irigonegaray was ineffective in failing to object to the video as cumulative." (Appellant's Brief, 10). Instead, according to Jaeger, the district court simply mistreated the issue as a question of whether "exclusion of the evidence would . . . amount to error," like the analytical question this Court considered on Jaeger's direct appeal when Jaeger argued that Ms. Biggs' videotaped statements amounted to inadmissible cumulative evidence. (Appellant's Brief, 10); *see also Jaeger*, 2011 WL 6382749 at *8. Any reliance the court below placed on this Court's disposition of the cumulative-error issue raised on Jaeger's direct appeal, Jaeger considers inappropriate. (Appellant's Brief, 10–13). And ultimately, he considers the motion, files, and records inadequate to support summary denial because that evidence does "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." (Appellant's Brief 13).

Strategic or not, however, Irigonegaray's failure to raise a cumulative evidence objection can be decided as a matter of law. That is because, as a matter of law, proving ineffective assistance of counsel requires proving both deficiency *and* prejudice. *See Edgar*, 294 Kan. at 837–38. Failure to prove either element justifies dismissal. *Id.* at 843.

On appeal, Jaeger only focuses on deficiency. He essentially complains that the district court lacked evidence to conclude whether or not Irigonegaray acted strategically. But his position and its reliance on *Rowland* ignore the reality that summary denial was appropriate because the motion, files, and records conclusively show that, in all reasonable probability, Irigonegaray's failure to raise a cumulative evidence objection had no outcome-altering impact on Jaeger's trial. *See Trotter v. State*, 288 Kan. 112, 133–34, 200 P.3d 1236 (2009) (equating conclusion from direct appeal that trial error was constitutionally harmless with failure, on collateral appeal, to show IAC-prejudice from same alleged error); *but see Rowland v. State*, 289 Kan. 1076, 1085, 219 P.3d 1212 (2009) (finding improper the resolution of IAC claim raised for the first time on direct appeal without an evidentiary hearing).

More specifically, the motion, files, and records of the case show that the trial court would have overruled Jaeger's proposed cumulative evidence

objection. As noted by this Court in Jaeger's direct appeal, cumulative evidence "is not objectionable in and of itself." *Jaeger*, 2011 WL 6382749 at *8 (citation omitted). Still, a trial judge may exercise discretion to admit or exclude cumulative evidence. *Id.* And in fact, this Court opined that Jaeger's trial judge fairly *could* exercise its discretion to admit Biggs' video interview along with her live testimony. *Id.* So to begin to prove the likelihood of a different result, the question becomes whether the record indicates that the trial judge *in fact would* have exercised its discretion to exclude the *entire* interview as cumulative.

Various comments and actions by the trial judge show that it would have overruled any objection to excluding the entire interview. Initially, the trial judge twice denied motions by Jaeger to wholesale exclude the video interview. (*See* R. Vol 6, 145–48; Vol. 7, 197–200; Vol. 9, 50–71). The judge also indicated that cross-examination of Biggs would impact the interview's admissibility. (R. Vol. 9, 53; *see also* Vol. 2, 246 (referencing K.S.A. 60-460(a)). And ultimately, the judge refused to sustain a cumulative objection raised to just a portion of the interview. (R. Vol. 10, 362–63). These actions show that it is not reasonably likely that the trial judge would have sustained Jaeger's proposed objection to altogether exclude Biggs' video interview.

And even if sustained, the motion, files, and records further show that the video's admission caused Jaeger no outcome-altering prejudice. Jaeger, as this Court earlier noted, subjected Biggs to "comprehensive cross-

examination;" thus, this Court "conclude[d] that Jaeger's right to a fair trial was not substantially prejudiced by the admission of this evidence." *Jaeger*, 2011 WL 6382749 at *8. Neither Jaeger's 60-1507 motion nor his appellate brief offer anything to disturb that original conclusion. And other authority suggests that cumulative evidence is generally nonprejudicial. *See Stano v. State*, No. 103,571, 2011 WL 781554, at *3 (Kan. App. Mar. 4, 2011) (unpublished) (concluding that admission of cumulative testimony, even if error, "had little, if any, likelihood of having changed the result of the trial."); R. Vol. 2, 246 ("One might ruminate on just how prejudicial a cumulative statement can be. If the jury has already heard the statement, how earth-shattering can a repeat version be?") (quoting *State v. Portillo*, 294 Kan. 242, 250, 274 P.3d 640 (2012), *rev'd on other grounds*); *see also Bledsoe v. State*, 283 Kan. 81, 102–03, 150 P.3d 868 (2007) (suggesting that failure to present cumulative testimony is not ineffective assistance of counsel).

Furthermore, "the evidence against Jaeger was overwhelming." *Jaeger*, 2011 WL 6382749 at *10, *13. "When the evidence of guilt is direct and overwhelming, the erroneous admission of evidence in violation of a constitutional right could not have affected the result of the trial." *State v. Hill*, 281 Kan. 136, 155, 130 P.3d 1 (2006).

Accordingly, the district court appropriately dismissed this issues without an evidentiary hearing. (*See* R. Vol. 2, 246–47).

B. Jaeger improperly briefs and thus abandons any claim that Irigonegaray's alleged failure to challenge a defective complaint needed an evidentiary hearing.

Jaeger characterizes this claim as erroneously denied, but he offers no supporting argument or authority. *(See* Appellant's Brief, 9–14). Accordingly, his argument "is deemed waived and abandoned." *State v. Tague*, 296 Kan. 993, 1001–02, 298 P.3d 273 (2013).

C. No additional evidence was necessary to reject Jaeger's claim that Irigonegaray ineffectively failed to request additional jury instructions related to aggravated battery.

Here, like before, Jaeger suggests that the district court erroneously dismissed his claim without necessary findings. Specifically, he claims that 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." (Appellant's Brief, 14). He further insists that, without that evidence, "this claim could not be resolve[d]." (Appellant's Brief, 14).

Again, Jaeger's deficiency-focused position overlooks the reality that summary denial was appropriate because the motion, files, and records conclusively show that Jaeger can prove no prejudice. *See Edgar*, 294 Kan. at 837–38. Jaeger can prove no prejudice for two reasons: (1) Jaeger cannot show that the omitted instructions were factually appropriate and (2) Jaeger

cannot show a more-than-conceivable likelihood that giving his omitted instructions would have resulted in a different verdict.

1. No evidence supported the omitted instructions.

Initially, showing prejudice necessarily requires proof that the proposed instructions were legally and factually appropriate. *See State v. Johnson*, 304 Kan. 924, 931, 376 P.3d 70 (2016) (conditioning jury instruction issue analysis, in part, on determining that the instruction was legally appropriate and supported by sufficient evidence); *Harris v. State*, 288 Kan. 414, 417, 204 P.3d 557 (2009) ("Trial counsel was not ineffective for failing to request an improper instruction"). Stated otherwise, Jaeger must first show that, had Irigonegaray so requested, the trial court would have instructed the jury on either (1) lesser included offenses for aggravated battery [see K.S.A. 21-3414(a)(1)(B), (a)(1)(C), (a)(2)(B), and 21-3412(a)(1)] or (2) the definition of "great bodily harm" and "serious bodily injury."

The jury convicted Jaeger of aggravated battery, in violation of K.S.A. 21-3414(a)(1)(A). (R. Vol. 15, 1864–65). Instruction No. 11 at Jaeger's trial informed the jury that establishing that charge required proof that Jaeger "intentionally caused great bodily harm to Mary Frances Biggs . . . on or about the 9th day of October, 2007, in Douglas County, Kansas." (R. Vol. 15, 1661).

The trial record contains insufficient evidence to support instruction on any of Jaeger's suggested lesser included offenses to aggravated battery. Those lesser included offenses generally involve some lesser degree of harm

(i.e. mere "bodily harm") and/or some lesser mental state (i.e. "recklessly causing"). *See* K.S.A. 21-3414(a)(1)(B), (a)(1)(C), (a)(2)(B), and 21-3412(a)(1). To support instruction on those lesser offenses, therefore, the trial evidence, reasonably construed in Jaeger's favor, need allow a reasonable factfinder to find that Ms. Biggs suffered mere "bodily harm" and/or Jaeger "recklessly" caused that harm.

A reasonable factfinder could not find mere "bodily harm" from the trial evidence. "[T]he word 'great' distinguishes the bodily harm necessary for aggravated battery from slight, trivial, minor, or moderate harm." *Jaeger*, 2011 WL 6382749 at *6 (quoting *State v. Kelly*, 262 Kan. 755, Syl. ¶ 2, 942 P.2d 579 (1997)). Case law shows that certain injuries, as a matter of law to be determined by the court, cannot be considered "slight, trivial, minor, or moderate harm." *E.g.*, *State v. Brice*, 276 Kan. 758, 772–74, 80 P.3d 1113 (2003); *State v. Moore*, 271 Kan. 416, 419–20, 23 P.3d 815 (2001); *see also State v. Shortey*, 256 Kan. 166, Syl. ¶ 2, 884 P.2d 426 (1994) ("Where . . . all of the evidence taken together shows that the offense, if committed, was clearly of the higher degree, instructions relating to the lesser degrees of the offense are not necessary.").

In Jaeger's case, "[i]t is undisputed that Biggs suffered a significant injury, including substantial loss of blood." *Id.* at *3, *7. Indeed, at a minimum, Biggs' injury caused her to experience "very intense pain;" surgery and nearly two weeks of hospital care, followed by a week of in-home medical

car; three weeks' reliance on a catheter; and, the cause of it all, two labial lacerations and a hematoma filled with roughly 1/2 a cup of blood—i.e. the worst genital injury to a non-pregnant woman ever seen by her treating ER and OB-GYN doctors. (R. Vol. 10, 357, 365, 461; R. Vol. 13, 1103, 1107–09, 1174–86, 1193–94).

Given the absence of evidence showing that the hematoma and lacerations to Biggs' labia were "slight, trivial, minor, or moderate," no factual basis existed for Irigonegaray to earn Jaeger's proposed instructions on certain lesser included offenses to aggravated battery. *See McKinney v. State*, No. 106,074, 2012 WL 3171823, at *5–*6 (Kan. App. Aug. 3, 2012) (unpublished) (explaining that "if the evidence shows without question that the victim suffered great bodily harm and nothing less, then [can be] no error in taking [that] determination away from the jury" and no prejudice from trial counsel's failure to request lesser offense instructions).

Similarly, a reasonable factfinder could not find that Jaeger "recklessly" harmed Biggs. The State offered evidence and argument at trial that tended to show that Jaeger intentionally injured Biggs. *See Jaeger*, 2011 WL 6382749, at *7 (offering synopsis of evidence supporting finding that Jaeger intentionally caused great bodily harm to Biggs); (R. Vol. 9, 150–52, 159–60, 187–88, 208–09, 215–17, 225, 252, 266–69; R. Vol. 10, 321–22, 339–44, 347, 349–50, 358–59, 367, 374, 462–65; R. Vol. 11, 722, 843–51, 902, 915; R. Vol. 13, 968–69, 973, 975). For his part, Jaeger denied intentionally

injuring Biggs. (R. Vol. 14, 1276). His own and other experts' testimony instead countered that "Biggs had injured herself by falling onto the railing of her bed." *Jaeger*, 2011 WL 6382749, at *4; (R. Vol. 14, 1272, 1278, 1353–54, 1421–22, 1444–63). No evidence, alternatively, suggested that Jaeger recklessly harmed Biggs. Even had Irigonegaray made the request for nonintentional-type lesser included instructions to aggravated battery, therefore, no factual basis would have supported giving those instructions.

Jaeger's proposed definitional instructions are similarly inappropriate. A trial court need not define an instruction's every word or phrase; in fact, the court should define a term only when the instructions as a whole would mislead the jury. *State v. Patton*, 33 Kan.App.2d 391, 396, 102 P.3d 1195 (2004) (quotation omitted). And generally, trial courts should follow PIK instructions. *State v. Scott*, 271 Kan. 103, 116, 21 P.3d 516 (2001) (encouraging trial courts to regard PIK instructions as "not mandatory but strongly recommended," to be followed without modification unless particular facts require modification). No instruction at Jaeger's trial used the phrase "serious bodily injury." (R. Vol. 15, 1657–62). So the jury needed no further definition for that term; if anything, defining that term likely would have confused the jury. As for "great bodily harm," neither statute nor PIK instructions define the term, and case law explains that the K.S.A. 21-3414-derived language "is readily understandable, and there are no omissions of necessary language." *State v. Dubish*, 234 Kan. 708, 715–16, 675 P.2d 877

(1984). Given that "great bodily harm" is "readily understandable" language, undefined elsewhere, and Jaeger suggests no way in which the failure to define "great bodily harm" misled the jury, no basis exists to show the definitional instruction was appropriate. *Id.*; *see also Patton*, 33 Kan.App.2d at 396 ("A term which is . . . readily comprehensible need not have a defining instruction").

2. In all reasonable likelihood, the jury still would have convicted Jaeger of aggravated battery.

Even if appropriate, Jaeger still must show a more-than-conceivable likelihood that giving his suggested instructions would have resulted in a different verdict. *See Trotter*, 288 Kan. at 133–34 (equating conclusion that "there is no possibility that the jury would have returned a different verdict if the [instruction] had been given" with failure to "establish the prejudice prong of the ineffective counsel test"). For the same reasons that Jaeger's proposed instructions lacked factual support, there is no reasonable likelihood the jury would have based its verdict on the idea that Biggs did not suffer great bodily harm and/or the idea that Jaeger recklessly caused Biggs' injuries. *See Jaeger*, 2011 WL 6382749, at *1–*5, *13 (reviewing trial evidence; then, "conclud[ing] that the evidence in the record overwhelmingly supports the jury's verdict" against Jaeger).

II. Substantial competent evidence supports the district court's denial of Jaeger's remaining ineffective assistance of counsel claims.

Jaeger's Argument. According to Jaeger, the district court erroneously denied his remaining ineffective assistance of counsel claims without using substantial, competent evidence from the evidentiary hearing to support its decision. More particularly, Jaeger argues that substantial competent evidence shows that Irigonegaray ineffectively failed (1) to pursue a voluntary intoxication defense; (2) to request instruction on criminal restraint, as a lesser included offense to (aggravated) kidnapping; and (3) to pursue a motion for change of venue. (Appellant's Brief, 14–16).

Standard of Review. A bifurcated review standard applies to ineffective assistance of counsel claims denied following a 60-1507 evidentiary hearing. *Fuller v. State*, 303 Kan. 478, 485–86, 362 P.3d 373 (2015). This Court reviews any legal conclusions de novo and reviews factual findings for substantial competent evidence, asking "whether the factual findings support the district court's conclusions of law." *Id.*

Standard for Ineffective Assistance of Counsel. The standard for proving ineffective assistance of counsel discussed in Section I applies here, with the qualification that Jaeger must prove his claims by admissible evidence and not by well-pled allegations from his motion.

A. Irigonegaray effectively decided not to pursue a voluntary intoxication defense.

Addressing only the deficiency prong, the district court denied this claim. Factually, the court determined that

> [T]he hearing clearly established that trial counsel made a . . . decision not to pursue an involuntary intoxication defense which

> was inconsistent with their theory of defense. Trial counsel reviewed the discovery and talked with Jaeger about the amount of drugs and alcohol he consumed the night in question before the trial lawyers formulated a theory of the case. The police officer who arrested Jaeger that night was of the opinion that Jaeger was not intoxicated at the time. The interview was videoptaped, and defense counsel could form an opinion whether a jury would believe that Jaeger was so intoxicated that he could not form the requisite intent.

(R. Vol. 3, 333). From those facts, the court legally concluded that "trial counsel made a strategic decision" and, therefore, "Jaeger failed to meet his burden to prove that no reasonable attorney would have proceeded in this manner." (R. Vol. 3, 333).

Jaeger disputes the court's decision. He does not dispute the court's factual findings but instead argues that the facts offered by the court do not support the court's legal conclusion that Irigonegaray made a reasonable, strategic decision. (Appellant's Brief, 18). "The mere fact of inconsistent defenses," he insists, "was not sufficient to demonstrate that Mr. Irigonegaray's 'strategy' was reasonable," particularly because Irigonegaray "provided no other statement to show that he believed pursuing one defense would undermine the jury's confidence or belief in another defense. (Appellant's Brief, 18). Finally, Jaeger speculates that "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." (Appellant's Brief, 19).

1. The district court properly concluded that Jaeger received effective representation.

Comparing the district court's decision with the record-backed evidence presented in the above "Statement of Facts," substantial competent evidence supported the district court's factual findings.

As for the court's legal conclusion, that too is supported. Inconsistent defenses are permissible, as Jaeger points out. (Appellant's Brief, 18 (quoting *State v. Sappington*, 285 Kan. 158, 164–65, 169 P.3d 1096 (2007)). But the decision about "the type of defense" to present belongs to counsel. *State v. Rivera*, 277 Kan. 109, 117, 83 P.3d 169 (2004). And reasonable representation does not require raising inconsistent defenses. In fact, more often than not, courts agree that reasonable representation includes decisions to forgo a defense inconsistent with other, especially stronger, defenses. Consider, for example:

- *Aldrich v. State*, No. 109,326, 2014 WL 1707579, at *13–*15 (Kan. App. Apr. 25, 2014) (unpublished) (hereinafter *Aldrich II*) (concluding that trial counsel's "decision not to present a voluntary-intoxication defense was within the range of choices an attorney could reasonably make, where the defense conflicted with another reasonable defense and effectively sent the jury "the message . . . that [the defendant] might be lying about one of the defenses but should be believed about the other")

- *State v. Stallard*, No. 99,365, 2009 WL 596536, at *4 (Kan. App. Mar. 6, 2009) (unpublished) (considering it reasonable not to request a self-defense instruction "when self-defense was inconsistent with the [actual innocence] defense . . . presented to the jury")

- *State v. Lee-El*, No. 90,052, 2004 WL 719259, at *5 (Kan. App. Apr. 2, 2004) (unpublished opinion) (characterizing refusal to request an

instruction that contradicted the theory of defense as a "deliberate decision made for strategic reasons")

- *Thornburg v. Mullin*, 422 F.3d 1113, 1140 (10th Cir. 2005) ("[T]he decision to forego the voluntary-intoxication instruction was not objectively unreasonable" because raising that "inconsistent defense could further weaken what litter there was of the defense" defendant already had);

- *Alderson v. State*, 36 Kan.App.2d 29, 39, 138 P.3d 330 (2006) (stating "one of the most fundamental rules in trial practice: Never to do anything inconsistent with your theory of defense.")

Furthermore, comparing Jaeger's suggested voluntary-intoxication testimony with the record shows that a voluntary intoxication instruction would have been improper. Instruction on voluntary intoxication need occur only when the evidence, reasonably viewed in the defendant's favor, "shows that the defendant was intoxicated to the extent that his or her ability to form the requisite intent was impaired." *State v. Hilt*, 299 Kan. 176, 193, 322 P.3d 367 (2014). Courts cannot infer impairment from evidence of consumption alone. *Id.*

But consumption alone is essentially what Jaeger's offered testimony shows. He states that a three(ish)-day fast, "five Xanax," and "about five [tequila] shots" left him feeling "pretty sedated" the evening officers found him with an injured Biggs. (R. Vol. 4, 8–9). But nowhere in his proposed testimony does he explain that feeling "pretty sedated" deprived him of his mental faculties or otherwise rendered him unable to understand his actions. Indeed, such an inference is entirely inconsistent with the detailed recollection of the evening he offered at trial. As such, Irigonegaray was not

ineffective for foregoing a defense that the trial court would not have permitted instruction on. *See, e.g.*, *Northcutt v. State*, No. 110,986, 2015 WL 1310712, at *10–*12 (Kan. App. Mar. 13, 2015) (unpublished opinion); *Aldrich II*, 2014 WL 1707579 at *13–*15; *Aldrich v. State*, No. 100,013, 2009 WL 1858249, at *7 (Kan. App. June 26, 2009) (unpublished opinion); *see also State v. Smith*, 278 Kan. 45, 50, 92 P.3d 1096, 1100 (2004).

These authorities in mind, Jaeger fails to show that reasonable representation required pursuing a voluntary intoxication defense.

2. Jaeger's unsupported speculation also shows no prejudice.

The "possibility that the jury would have believed" Jaeger's testimony that he mixed drugs, alcohol, and fasting, does not show a reasonable likelihood that Jaeger's convictions would be different. (Appellant's Brief, 19). As before, Jaeger can prove prejudice only by showing a reasonable likelihood that (1) a voluntary intoxication instruction would have been proper and (2) if pursued by evidence and instruction at his trial, the voluntary intoxication defense would have resulted in a different verdict. *See Johnson*, 304 Kan. at 931; *Harris*, 288 Kan. at 417; *Trotter*, 288 Kan. at 133–34.

The above-discussed authority shows that Jaeger's evidence falls within the category of instruction-unworthy cases where "our Supreme Court has found that when defendants can remember details about their alleged crimes, those details suggest that their mental faculties were not impaired at

the time of the crime." *Northcutt*, 2015 WL 1310712, at *11–*12; *see also Stallard*, 2009 WL 596536 at *3–*5.

But even if pursued, no reasonable likelihood exists that the voluntary intoxication defense would have earned Jaeger an acquittal. Initially, comparing the jury's verdict with Jaeger's actual-innocence-focused trial testimony shows that the jury disbelieved Jaeger. (*Compare* R. Vol. 14, 1266–79 *with* R. Vol. 15, 1864–66). Advancing two inconsistent defenses is unlikely to have improved Jaeger's credibility with the jury. Furthermore, Jaeger's detailed account of the evening and other evidence—like (his agreement with) Officer Lindsay's interview observation that Jaeger "obviously" appeared "not intoxicated"—contradict the likelihood of a voluntary intoxication defense's success. (R. Vol. 11, 669 (State's Trial Ex. 36 played for jury); R. Vol. 14, 1266–79, 1322–32). And of course, the record already "overwhelming supports the jury's verdict." *Jaeger*, 2011 WL 6382749, at *10, *13. Collectively considered, therefore, Jaeger's proposed voluntary-intoxication-defense lacks outcome-altering force. *See Perez v. State*, No. 112,328, No. 2015 WL 5458660, at *5–*6 (Kan. App. Sept. 18, 2015) (unpublished opinion); *Moore v. State*, No. 104,267, 2011 WL 2555655, at *3 (Kan. App. June 24, 2011) (unpublished opinion).

B. Irigonegaray effectively decided not to request instruction on criminal restraint.

The district court also denied this claim based entirely on the reasonableness of Irigonegaray's performance. Factually, the court determined that

> The defense theory was that Ms. Biggs willingly accompanied Jaeger to the car. The defense team called a blood spatter expert who testified that the blood evidence was inconsistent with Ms. Biggs being forced out of her apartment and into Jaeger's car. Had the trial strategy succeeded, it would have resulted in a complete acquittal because Jaeger maintained that he was assisting Ms. Biggs and transporting her to the hospital for help.

(R. Vol. 3, 333–34). From those facts, the court legally concluded that, "While the trial strategy may have failed, . . . the decision to argue for acquittal clearly falls within the region of tactics and strategy;" Irigonegaray "again made a strategic choice." (R. Vol. 3, 333–34).

As before, Jaeger disputes that the court's factual findings support its legal conclusion. Irigonegaray's "all or nothing" approach to the aggravated kidnapping charge, according to Jaeger, is no evidence to suggest that Irigonegaray strategically decided not to request a criminal restraint instruction, particularly given that the court included instruction on the lesser offense of (non-aggravated) kidnapping. (Appellant's Brief, 20). And had Irigonegaray requested instruction on criminal restraint, Jaeger believes a reasonable possibility exists that the jury would have convicted him of that charge—because after all, the "jury rejected Mr. Irigonegaray's 'all or nothing' defense strategy." (Appellant's Brief, 21).

1. The district court properly concluded that Jaeger received effective representation.

Here, Irigonegaray made a pretrial decision, after consulting Jaeger, to defend Jaeger against the aggravated kidnapping charge by arguing for Jaeger's innocence. (R. Vol. 4, 27, 36–40). His discussions with Jaeger convinced him of Jaeger's innocence and pursuing that defense at trial, specifically that "Matt's efforts were simply to try to get [Biggs] to a hospital for treatment, with no intent to restrain, kidnap, must less aggravated kidnapping." (R. Vol. 4, 16–17, 36–40). So he presented that defense at trial. Not until the final day of trial did any lesser included offenses come into play, when at the State's suggestion the court agreed to submit kidnapping to the jury as a lesser included offense to aggravated kidnapping. (R. Vol. 15, 1621). By that moment, the jury had already received all evidence supporting Jaeger's defense. Accordingly, Irigonegaray noted his objection to the court instructing the jury on the lesser included offense of kidnapping and otherwise kept steadfast to the evidence and actual-innocence defense he had already presented. (R. Vol. 4, 36–40; R. Vol. 15, 1631).

Comparing the district court's decision with the record-backed evidence presented immediately above, in the "Statement of Facts," shows that substantial competent evidence supported the district court's factual findings.

As for the court's legal conclusion, that too is supported. Again, the "type of defense" to present belongs to counsel. *Rivera*, 277 Kan. at 117. And reasonable representation may include pursuing a defense designed to force

the jury to either convict or acquit a defendant of particular charges. *See State v. Hargrove*, 48 Kan.App.2d 522, 550, 293 P.3d 787 (2013) (characterizing situation where "[d]efense counsel requested no lesser included offense instructions be given specifically to force the jurors into a choice between convicting the defendant . . . or acquitting him" as "plainly . . . a strategic call"); *Timmerman v. State*, No. 100,003, 2009 WL 1692027, at *2 –*3 (Kan. App. June 12, 2009) (unpublished opinion) (affirming district court conclusion that "strategy of trying for an outright acquittal was reasonable"); *Davis v. State*, No. 89,688, 2004 WL 794437, at *4 (Kan. App. Apr. 9, 2004) (unpublished opinion) ("[W]e cannot say that it was ineffective trial strategy to take an 'all or nothing' tact.").

Considering also that Jaeger's trial evidence focused on actual innocence, no trial evidence supported a criminal restraint instruction. As compared to criminal restraint, "[k]idnapping is simply graded higher, *i.e.*, involves more culpability, because it requires the perpetrator to effect the restraint or confinement by force, threat, or deception, with the specific intent to accomplish a particular illegal purpose." *State v. Ramirez*, 299 Kan. 224, 231, 328 P.3d 1075 (2014). The trial evidence suggested two alternatives. Either Jaeger kidnapped Biggs with specific intent or he didn't and Biggs willingly joined him. *Compare, e.g.*, R. Vol. 10, 338–42, 350, 358, 360–61, 367 (Biggs' account) *with* R. Vol. 14, 1271 –78, 1329 (Jaeger's account); *see also Jaeger*, 2011 WL 6382749, at *4–*6 (discussing "Jaeger's defense" and

evidence supporting kidnapping conviction). In such situations, the trial evidence clearly excludes the lesser offense. *See State v. Simmons*, 282 Kan. 728, 742–43, 148 P.3d 525 (2006) (considering criminal restraint instruction unwarranted where "given the evidence, the jury had the opportunity either to believe the [defendant that he did not commit the crimes] and acquit or to believe the incriminating evidence"); *State v. Kesselring*, 279 Kan. 671, 686, 112 P.3d 175 (2005); *State v. Baourassa*, 28 Kan.App.2d 161, 173–75, 15 P.3d 835 (1999); *Shortey*, 256 Kan. at Syl. ¶ 2.

Forgoing instruction on the factually unsupported charge of criminal restraint, therefore, was objectively reasonable. *See Baker v. State*, No. 97,199, 2007 WL 4297993, at *3–*4 (Kan. App. Dec. 7, 2007) (unpublished opinion); *Davis*, 2004 WL 794437 at *4.

These authorities in mind, Jaeger fails to show that reasonable representation required instructing the jury on criminal restraint.

2. Prejudice does not follow from the jury's verdict.

Jaeger can prove prejudice only by showing a reasonable likelihood that (1) a criminal restraint instruction would have been proper and (2) he would have avoided his kidnapping conviction had the jury received a criminal restraint instruction. *See Johnson*, 304 Kan. at 931; *Harris*, 288 Kan. at 417; *Trotter*, 288 Kan. at 133–34.

The above-discussed authority shows that the trial evidence precludes any reasonable likelihood that Irigonegaray would have convinced the court to instruct on criminal restraint. And the same trial evidence, which fails to

support that instruction, likewise negates any reasonable likelihood that a jury would have rendered a verdict other than kidnapping.

Nothing in the jury's decision to convict Jaeger of kidnapping and acquit him of aggravated kidnapping suggests otherwise. In fact, the jury's verdict reasonably supports only two inferences. First, Irigonegaray reasonably approached the trial with an aggravated kidnapping-or-nothing defense strategy, which was weakened by the court's instruction decision. Second, the jury's verdict indicates that it disbelieved Jaeger's evidence. (*Compare* R. Vol. 14, 1266–79 *with* R. Vol. 15, 1864–66). Even assuming that Jaeger presented some evidence to support criminal restraint, only speculation would suggest that a criminal restraint instruction would have changed the jury's verdict. *See Timmerman*, 2009 WL 1692027 at *3.

C. Irigonegaray effectively decided not to pursue a change of venue.

Jaeger proved neither deficiency nor prejudice to support claim, according to the district court. Factually, the court made several findings. Regarding Irigonegaray's performance, the court decided:

> The hearing testimony clearly showed that defense counsel and the defense team carefully considered this issue as the case was pending. Defense counsel concluded that Douglas County was probably the best county in Kansas to defend a criminal case and was concerned with where the trial might land if the motion succeeded. Simultaneously, defense counsel testified [that] to succeed on a motion to transfer venue under Kansas law is difficult and expensive.
>
> As an alternative, defense counsel elected to address the issue of pretrial publicity with the panel on voir dire. Defense counsel submitted specialized jury questionnaires and conducted some

> individualized voir dire. A number of jurors were removed for cause.

(R. Vol. 3, 334). From those facts, the court concluded that "trial counsel made a reasonable strategic decision not to pursue a change of venue." (R. Vol. 3, 334).

Concerning prejudice, the court further found that:

> the hearing showed that the cause for concern was not media publicity so much as internet blogging with inaccurate information. That internet information was available anywhere, in any location, as Jaeger pointed out, when he noted that . . . internet users in California confronted him about the incident.
>
> . . . .[And a]lthough numerous anonymous comments made on online forums associated with the *Lawrence Journal World* were derogatory and unflattering in nature, ...[i]t is unclear how many bloggers lived in Douglas County, as opposed to internet readers weighing in anonymously and provocatively.

(R. Vol. 3, 334–35). Bloggers, the court found, represent a "self-selected sample" and "small percentage of the community's general population." (R. Vol. 3, 335). And the court also noted that "the petit jury . . . reject[ed] aggravated kidnapping for kidnapping, and failed to reach a verdict on the aggravated burglary charge." (R. Vol. 3, 335). From those facts, the court alternatively concluded that Jaeger shows no prejudice.

Jaeger disagrees with the court's findings and conclusions.

1. The district court properly concluded that Irigonegaray reasonably chose to defend Jaeger in Douglas County.

Again, the district court's factual findings comport with the record, as described above in the "Statement of Facts" and in this Court's prior opinion.

But some specific discussion, however, need occur in light of Jaeger's contentions. Jaeger points out that Irigonegaray "never [specifically] testified that he chose to use juror questionnaires to address the problem of pretrial publicity." (Appellant's Brief, 23). True enough. But Irigonegaray's testimony and the record nonetheless reflect that what he never specifically said is generally what occurred. (*See* R. Vol. 4, 39; R. Vol. 6, 55–59; R. Vol. 9, 4–8, 10, 12–14). Furthermore, Jaeger points to no evidence in the record to support his claim that the court's alleged "minimization of the impact of the media coverage and associated commentary does not accurately reflect the evidence in the record." (Appellant's Brief, 23–24). Overall, none of Jaeger's arguments show that the district court's factual findings lacked substantial competent evidence.

Indeed, the true thrust of Jaeger's argument is that, yet again, the court's factual findings fail to support its legal conclusion that Irigonegaray provided constitutionally adequate representation. But authority supports the court's legal conclusion. Whether to seek a change of venue is normally a strategic decision belonging to counsel. *See Schoonover v. State*, 218 Kan. 377, 380, 543 P.2d 881 (1975). No counsel need pursue activities that, balancing limited resources at the time, reasonably appear distractive from more important duties. *See Harrington*, 562 U.S. at 107. Reasonable trial strategy includes foregoing meritless pretrial motions. *See Bledsoe*, 283 Kan. at 103; *State v. Smith*, No. 2015 WL 1122951, at *11–*12 (Kan. App. Mar. 6,

2015). Reasonable trial strategy encompasses decisions not to request a change of venue that might remove a defendant to a less favorable venue. *See Risby v. State*, No. 95, 399, 2006 WL 2443939, at *3 (Kan. App. Aug. 18, 2006) (unpublished opinion). And reasonable trial strategy also includes using a jury questionnaire to address concerns about publicity. *See Flynn v. State*, 281 Kan. 1154, 1166, 136 P.3d 909 (2006).

That authority in mind, Jaeger fails to show that no reasonable attorney would have decided, as Irigonegaray did, to defend Jaeger in Douglas County.

2. Jaeger also proves no prejudice.

Here, Jaeger can prove prejudice only by showing a reasonable likelihood that the court would have granted a motion to change venue. *See Bledsoe*, 283 Kan. at 103; *Becker v. State*, No. 108,776, 2014 WL 1707435, at *8 (Kan. App. Apr. 25, 2014) (unpublished opinion).

Jaeger does not specify on which particular legal basis he believes Irigonegaray could have earned him a change of venue. *See State v. Carr*, 300 Kan. 1, 56–84, 331 P.3d 544 (2014) (recognizing three analytical approaches to change of venue: (1) presumed prejudice under the Sixth Amendment; (2) actual prejudice under the Sixth Amendment; and (3) actual prejudice under K.S.A. 22-2616(1)), *rev. on other grounds Kansas v. Carr*, 136 S.Ct. 633 (2016). He also offers no legal authority to support his claim that a filed motion to change venue had a reasonable possibility of succeeding. *See*

Tague, 296 Kan. at 1001–02 ("A failure to support an argument with pertinent authority . . . is akin to failing to brief the issue.").

Still, it is clear Jaeger shows no likelihood of prejudice. He points to no "evidence that a particular juror was prejudiced or that a potential juror actually made a comment that could have tainted other jurors." *Becker*, 2014 WL 1707435 at *8; *see also Smith*, 2015 WL 1122951 at *11–*12. Indeed, that the jury convicted Jaeger of the lesser included offense of kidnapping and failed to reach a unanimous verdict on the aggravated burglary charge indicates its unbiased consideration of the evidence. *See Skilling v. United States*, 561 U.S. 358, 383 (2010) ("It would be odd for an appellate court to presume prejudice in a case in which jurors' actions run counter to that presumption.").

Jaeger's mention of the language "so great a prejudice" possibly refers to proving actual prejudice under K.S.A. 22-2616(1). (*Compare* Appellant's Brief, 26 *with* K.S.A. 22-2616(1) (authorizing change of venue "if the court is satisfied that there exists in the county where the prosecution is pending *so great a prejudice* against the defendant that he cannot obtain a fair and impartial trial in that county") (emphasis added)). But even with that provision in mind, his prejudice claim fails.

Obtaining a change of venue under K.S.A. 22-2616(1) would have burdened Jaeger with showing that such prejudice existed in the Douglas County community that it was reasonably certain he would have received an

unfair trial. *State v. Longoria*, 301 Kan. 1128, 509, 343 P.3d 1128 (2015). Nine factors inform that determination:

> (1) the particular degree to which the publicity circulated throughout the community; (2) the degree to which the publicity or that of a like nature circulated to other areas to which venue could be changed; (3) the length of time which elapsed from the dissemination of the publicity to the date of trial; (4) the care exercised and the ease encountered in the selection of the jury; (5) the familiarity with the publicity complained of and its resultant effects, if any, upon the prospective jurors or the trial jurors; (6) the challenges exercised by the defendant in the selection of the jury, both peremptory and for cause; (7) the connection of government officials with the release of the publicity; (8) the severity of the offense charged; and (9) the particular size of the area from which the venire is drawn.

Id. On appeal, Jaeger touches on only factors 1, 3, and 9. Again, Jaeger waives argument on those factors he fails to support with proper authority and argument. *See Tague*, 296 Kan. at 1001–02.

Factor 1: Degree of publicity throughout the community.

The record indicates that Jaeger's prosecution received routine publicity on the *Lawrence Journal-World* website, with articles (and attendant blogger comments) occurring on October 19, 2007; October 20, 2007; October 24, 2007; October 26, 2007; February 23, 2008; February 27, 2008; May 15, 2008; August 8, 2008; June 30, 2009; July 26, 2009; and July 27, 2009. (R. Vol. 2, 129–244). Jaeger references this publicity. (Appellant's Brief, 25).

But evidence that over approximately 21 months 11 articles appeared online from a local media outlet—even articles with sometimes unfavorable,

anonymously posted commentary—fails to substantiate the likelihood that anti-Jaeger prejudice pervaded Douglas County. *See State v. Chapman*, --- Kan. ---, 392 P.3d 1285, 1289–90 (2017) (noting absence of statistical or other expert analysis to show county-specific prejudice from media coverage). And even if 11 articles amounted to appreciable publicity, "media publicity alone *never* establishes prejudice." *State v. Roeder*, 300 Kan. 901, 911, 336 P.3d 831 (2014) (quotation omitted) (emphasis original).

Factor 2: Degree of publicity in areas to which venue could be changed.

Jaeger presents no evidence or argument concerning this factor on appeal. He likewise presented no evidence touching on this factor below, other than his own testimony that acquaintances at a California treatment facility could access information about his case online. (R. Vol. 4, 22–24). At a minimum, that testimony offers no support for the conclusion that other venues escaped publicity of Jaeger's prosecution. At most, that testimony substantiates the likelihood that no other venue promised an unaffected jury pool. *See Roeder*, 300 Kan. at 911–12 (noting that, without survey evidence to the contrary, nationally available media attention "counseled against changing venue because a move to another Kansas judicial district would still leave the trial susceptible to" any publicity-based prejudice); *State v. Grissom*, 251 Kan. 851, 928, 840 P.2d 1142 (1992) (weighing statewide access to media publicity against change of venue).

Factor 3: Time between the publicity and trial date.

As Jaeger points out, articles relating to his prosecution occurred as early as October 19, 2007, and as late as July, 27, 2009, the day before jury selection actually occurred. (Appellant's Brief, 25 (citing R. Vol. 2, 129–244)). Of the 11 evidenced articles only 3 occurred in the year in which Jaeger was tried. Given that the "majority of the coverage about which [Jaeger] complains . . . occurred months before the trial," this factor is uncompelling for Jaeger. *Roeder*, 300 Kan. at 912.

Factor 4: The care exercised and ease encountered in jury selection.

Jaeger's appeal ignores this factor. In fact, "the proceedings in voir dire are not in the record. Thus, it is impossible to determine whether there were any problems in picking a jury. . . . [I]n the absence of such a record, the appellate court presumes the action of the trial court was proper." *State v. Higgenbotham*, 271 Kan. 582, 594, 23 P.3d 874 (2001); (*see also* R. Vol. 9, 16, 84).

What record exists concerning jury selection, however, suggests that considerable care and little trouble occurred in picking the jury. Irigonegaray moved for and the court allowed circulation of special jury questionnaire and individual voir dire of the jury. (R. Vol. 4, 39; R. Vol. 6, 55–59; R. Vol. 9, 4–18); *see also Longoria*, 301 Kan. at 511 (considering use of juror questionnaires and individual voir dire indicative of careful jury selection). The record further reflects that the parties accomplished jury selection in a day. (R. Vol 9, 84). "[L]ittle trouble in picking a jury tends to support the . . .

conclusion that no change of venue was necessary." *Higgenbotham*, 271 Kan. at 594.

Factor 5: Familiarity with publicity and its resultant effects.

Again, the absence of the voir dire transcript or any specific argument from Jaeger defeats meaningful review of this factor and weighs against Jaeger.

As already mentioned, however, the record indicates that media publicity had no unfair impact on the jury or its verdict. The court regularly admonished the jury not to consult media or discuss the case. (R. Vol. 9, 86–87, 301–02; R. Vol. 11, 677). And the jury's multi-day deliberation, failure to reach a unanimous verdict on the aggravated burglary charge, and conviction of the lesser included offense of kidnapping, all demonstrate an unbiased and earnest consideration of the evidence. *See Skilling*, 561 U.S. at 383.

Factor 6: Challenges exercised by defendant in jury selection.

Without properly briefed argument and the voir dire transcript, this factor too weighs against Jaeger.

Factor 7: Connection of government officials with publicity.

Jaeger offers "no evidence any government official was responsible for the publicity in the record." *Chapman*, 392 P.3d at 1290.

Factor 8: Severity of the offense charged.

Jaeger entered trial charged with aggravated kidnapping, aggravated battery, aggravated burglary, and criminal threat. (R. Vol. 6, 94–96). Though serious, these charges are considerably less serious than the murder charges most often at issue in Kansas' change-of-venue jurisprudence. *See, e.g.*, *Chapman*, 392 P.3d at 1290 ("Chapman was charged with one of the most severe offenses—first-degree premeditated murder."); *Longoria*, 301 Kan. at 510 (weighing capital murder charge in favor of change of venue); *Roeder*, 300 Kan. at 913–14.

Factor 9: Size of the area from which prospective jurors are drawn.

Concerning this factor, Jaeger observes that "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." (Appellant's Brief, 25). While correct, Jaeger's observation does not direct the conclusion that Douglas County provides a jury pool so small that an impartial jury was likely unavailable. Even excluding enrollment at Kansas University, 2010 U.S. Census information reported Douglas County's population as 110,826. *See State v. Poulos*, 196 Kan. 253, 258, 411 P.2d 694 (1996) (authorizing courts to take judicial notice of population details). That 110,826 figure is nearly five times the possible Barton County juror pool considered "relatively small" enough by case law to favor a change of venue. *See Chapman*, 392 P.3d at 1290; *Longoria*, 301 Kan. at 510 ("[A] population

of 20,546 eligible jurors provided a relatively small pool from which to draw the venire panel.").

Collectively considered, these factors provide no basis to conclude that Irigonegaray could have earned Jaeger a trial in another venue. He accordingly shows no prejudice. *See Bledsoe*, 283 Kan. at 103; *Becker*, 2014 WL 1707435 at *8.

CONCLUSION

For the above-discussed reasons, this Court should affirm the district court's actions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 26th day of June 2017, the above brief was electronically filed with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to registered participants, and a copy of this Appellee's Brief was served on Appellant's counsel, Corrine E. Gunning, by email to adoservice@sbids.org.

/s/ Jon S. Simpson
Jon S. Simpson

264 P.3d 1059 (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.

STATE of Kansas, Appellee,
v.
Matthew JAEGER, Appellant.

No. 104,119.
|
Dec. 16, 2011.

Synopsis

Background: Defendant was convicted in the District Court, Douglas County, Robert W. Fairchild, J., of kidnapping, aggravated battery, and criminal threat. Defendant appealed.

Holdings: The Court of Appeals, Bruns, J., held that:

[1] there was sufficient evidence to support the convictions;

[2] trial court did not abuse its discretion by allowing victim and defendant's friend to present live testimony and videotaped statements at trial;

[3] trial court did not abuse its discretion in limiting defendant's cross-examination of victim;

[4] any error in admitting evidence that defendant had previously choked victim or in not giving a limiting instruction was harmless;

[5] instruction stating that to establish kidnapping charge, jury had to find that State proved defendant took or confined victim by force or fear was warranted; and

[6] trial court did not abuse its discretion in denying defendant's motion for a new trial based on juror misconduct.

Affirmed.

West Headnotes (8)

[1] **Kidnapping**
⇐ Weight and sufficiency

There was sufficient evidence that defendant used force, threat, or deception to take and/or confine victim, with the intent to hold victim to facilitate flight, as required to support kidnapping conviction; eyewitness testified that she saw defendant and another man dragging victim by her arms and hair down the stairs of victim's apartment, that victim was screaming and one of the men was shouting, "Shut the fuck up," and that once the three reached the car, one of the men forced or shoved the victim into the back seat of the vehicle and then got into the back seat with her, another eyewitness testified that the car was moving pretty fast when it left the apartment complex and that it did not stop at a stop sign, and police officer testified that after the car was stopped, victim would not talk to him or get out of the vehicle until defendant gave her permission to do so. K.S.A. 21–3420(b).

Cases that cite this headnote

[2] **Assault and Battery**
⇐ Assault causing, or intended to cause, great bodily harm

There was sufficient circumstantial evidence that defendant intentionally caused great bodily harm to victim to support aggravated battery conviction; victim suffered a traumatic injury to her genitalia, including a hematoma that required surgery, physician rendered the opinion that the hematoma resulted from the application of significant blunt force, both victim and her boyfriend testified that defendant entered the apartment angry and enraged, victim testified that defendant strangled her until she was unconscious and that, upon regaining consciousness, she

noticed she had been injured, defendant had taken martial arts classes and learned how to perform a choke hold that could cause a person to pass out within a few seconds, and victim was found lying on the floor with defendant hunched over her. West's K.S.A. 21–3414(a)(1)(A).

Cases that cite this headnote

[3] **Threats, Stalking, and Harassment**
Threats in general

Evidence that defendant, who broke into his ex-girlfriend's apartment, told her new boyfriend, "You're fucking dead," when he saw him leaving from the balcony, was sufficient to support conviction for criminal threat. West's K.S.A. 21–3419(a)(1).

Cases that cite this headnote

[4] **Criminal Law**
Cumulative evidence in general

Trial court did not abuse its discretion by allowing victim and defendant's friend to present live testimony as well as admitting their videotaped statements into evidence at kidnapping and aggravated battery trial, despite the allegedly cumulative nature of the evidence.

1 Cases that cite this headnote

[5] **Witnesses**
Immoral or unlawful acts or conduct in general

Evidence that victim allegedly attempted to extort money from her former boss was not admissible to prove a trait of her character, that she would hide the truth for a price, and thus trial court did not abuse its discretion in limiting defendant's cross-examination of victim by prohibiting questions regarding the alleged extortion, at kidnapping and aggravated battery trial. K.S.A. 60–422(d).

Cases that cite this headnote

[6] **Criminal Law**
Reception of evidence

Criminal Law
Evidence of other offenses and misconduct

Any error in admitting evidence that defendant had previously choked victim or in not giving a limiting instruction was harmless in light of the other compelling evidence of defendant's guilt, in prosecution for kidnapping, aggravated battery, and criminal threat. K.S.A. 60–455(b).

Cases that cite this headnote

[7] **Kidnapping**
Instructions

Instruction stating that to establish kidnapping charge, jury had to find that State proved defendant took or confined victim by force or fear was warranted, where victim was shoved into a vehicle, defendant got into the back seat with her, although victim was bleeding and needed to go to the hospital, the car was headed away from the hospital when it was stopped by the police, victim would not speak to the police and defendant answered questions for her, defendant gave victim permission to get out of the car, and victim told the police she did not initially speak because she was scared of defendant.

Cases that cite this headnote

[8] **Criminal Law**
Experiments by jurors

Jury
Discharge of juror or jury pending trial

Juror's misconduct in experimenting to determine whether a person could fall onto a bed rail and suffer the type of injury that victim suffered to her genitalia did not substantially prejudice defendant's right to a fair trial, in prosecution for aggravated battery, and thus trial court did not abuse its discretion in denying defendant's motion for a new trial, where trial court dismissed

the offending juror, determined that the remaining jurors could fairly decide the case, and replaced the dismissed juror with an alternate, and the remaining jurors and the alternate engaged in extensive deliberations before returning a verdict.

Cases that cite this headnote

Appeal from Douglas District Court; Robert W. Fairchild, Judge.

Attorneys and Law Firms

Pedro L. Irigonegaray and Elizabeth R. Herbert, of Irigonegarary & Assoc., of Topeka, for appellant.

Andrew Bruch, assistant district attorney, Nola F. Wright, assistant attorney general, and Derek Schmidt, attorney general, for appellee.

Before ATCHESON, P.J., ARNOLD-BURGER and BRUNS, JJ.

MEMORANDUM OPINION

BRUNS, J.

***1** This is a direct appeal from Matthew Jaeger's convictions for kidnapping, aggravated battery, and criminal threat. Jaeger raises multiple issues on appeal, including lack of sufficient evidence to support the convictions, juror misconduct, and cumulative error. We find that there was sufficient evidence presented to the jury to support the convictions. We further find that the district court appropriately handled the evidentiary issues presented at trial and properly instructed the jury regarding the law. Finally, we find that Jaeger received a fair trial and that the district court appropriately addressed the issue of juror misconduct. Thus, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Matthew Jaeger and Mary Francine Biggs, who were both students at the University of Kansas, had a relationship for various periods of time between August 2005 and October 2007. Although Biggs considered their relationship to be over, she continued to have contact with Jaeger.

Biggs and Jaeger spent time together on the afternoon of October 8, 2007. That evening, Biggs went to a friend's apartment for dinner while Jaeger went to All Stars with one of his friends, Evan Carroll. According to Carroll, he noticed that Jaeger became agitated and obsessed with his cell phone over the course of the evening. In the early morning hours of October 9, 2007, there were 26 calls and text messages sent from Jaeger's cell phone to Biggs' cell phone. Eventually, Biggs turned off her cell phone and ignored Jaeger's calls and text messages.

Biggs returned to her apartment around 11:45 p.m. Shortly thereafter, Dylan Jones, who had been casually dating Biggs for several weeks, came to visit Biggs at her apartment. Around midnight, Jaeger and Carroll left All Stars. Carroll drove Jaeger's car because Jaeger did not believe he should drive due to the amount of alcohol he had consumed. After the two visited a friend at a sorority house, Jaeger told Carroll to drive to Biggs' apartment. Upon arrival at the Biggs' apartment building, Jaeger jumped out of the car before Carroll could park.

Carroll saw Jaeger run up the stairs and break the front window of Biggs' apartment, which was on the second floor. After Carroll parked the car, he stood outside to smoke a cigarette while waiting for Jaeger to return.

In the apartment, Biggs and Jones were engaged in sexual intercourse when they heard a window breaking. Upon hearing the noise, Biggs got out of bed, closed the bedroom door, and turned on the light. Biggs told Jones he needed to leave because she thought her ex-boyfriend had broken into the apartment.

Jones quickly dressed and went out onto the balcony adjacent to Biggs' bedroom. While Jones climbed over the railing of the balcony, he saw Jaeger come into the bedroom. Jones described Jaeger as looking angry and enraged. As Jones was still hanging onto the balcony, Jaeger told him, "You're fucking dead." Jones then dropped from the balcony. As he did so, he heard a "flop up against the wall" and Biggs saying, "What the fuck, Matt."

***2** Jaeger then went outside in an attempt to find Jones. Fearing that he would run into Jaeger on the ground,

Jones climbed back onto Biggs' balcony, ran through the apartment, out the front door, and down the stairs. Jones hid for a short time while Jaeger looked for him. When he was hiding, Jones could hear Biggs pleading with Jaeger to stop. Jones then ran to a nearby residence where Biggs' brother lived.

Jones, who was barefoot and wearing only a shirt and pants, woke up Biggs' brother frantically telling him to call 911. Jones also told Biggs' brother that his sister was hurt and that "Matt is a psycho." Biggs' brother then called 911 to report what had occurred.

Upon seeing a male running between the apartment buildings, Carroll pulled Jaeger's car to the front of Biggs' building. Although Jaeger came to the car and started to get in, he abruptly ran back up the stairs and went inside Biggs' apartment. Carroll heard screaming and yelling coming from inside the apartment. But when the screaming and yelling stopped, Carroll grew nervous and decided to go inside Biggs' apartment.

In the back bedroom of the apartment, Carroll saw Biggs on the floor with Jaeger hunched over her. Carroll urged Jaeger to leave. Shortly thereafter, Carroll, Jaeger, and Biggs left the apartment and went down the stairs. When they reached Jaeger's car, Carroll got into the driver's seat while Jaeger and Biggs got into the back seat. Biggs told Carroll that she was injured and needed to go to the hospital.

Two of Biggs' neighbors, who live directly across the parking lot from Biggs' apartment, had been awakened by the sound of loud voices and glass breaking. One of the neighbors, Katelyn Hall, heard a female screaming and went out on the front balcony of her apartment building. She was joined on the balcony by Troy Gower. Hall called 911 to report what she was observing.

Hall told the dispatcher that she saw two men dragging a woman by her arms and her hair down the stairs of Biggs' apartment building. She also told the dispatcher that she saw one of the men force the woman into the back seat of a car and then get into the back seat with her. Hall also described the car. And she told the dispatcher that the car was "moving pretty fast," that it had failed to stop at a stop sign, and that it turned left onto Michigan Street as it left the apartment complex.

A few minutes later, police officers stopped Jaeger's car near the intersection of 6th Street and Florida Street, as it was travelling in the opposite direction of Lawrence Memorial Hospital. One of the officers had Carroll exit Jaeger's car and placed him in a patrol car. The other officer approached the two people in the back seat. The officer noticed that Biggs was wearing all black clothing, was not wearing shoes, and appeared to have been crying. He also saw that her hands were clasped tightly between her legs.

An officer asked Biggs a few questions while she was still in the back seat of Jaeger's car, but she did not answer. Instead, she looked at Jaeger, who answered on her behalf. When an officer asked Jaeger where they were going, he told the officer that the three were on their way to The Wheel to get a pizza.

***3** After learning Biggs' name, an officer ran a records search and discovered that Biggs had an outstanding warrant for failure to provide proof of insurance. Even after being told about the warrant, Biggs continued to refuse to exit the vehicle. One of the officers then heard Jaeger give Biggs permission to get out of the car.

As Biggs got out of the car, an officer noticed that her hands and the back seat of Jaeger's car were covered with blood. The officer also noticed that blood was dripping onto the pavement. Biggs, who was having difficulty walking and complaining of pain, motioned to the officer that the blood was coming from between her legs.

Biggs initially told the officers that she thought she had glass in her vagina. She also told the officers that Jaeger was crazy and that they did not understand what she was dealing with. After being placed in an ambulance, Biggs told the officers that Jaeger had broken into her apartment and had strangled her until she was unconscious. She also told the police that when she awoke, there was another altercation and Jaeger had dragged her from her apartment and forced her into his car.

One of the officers who was at the scene saw that Jaeger had blood on his hands and shorts. When Jaeger was asked about the blood, he told the officer, "I bite my fingernails." Jaeger was subsequently transported by the police to the Law Enforcement Center, and Biggs was taken by ambulance to the emergency room at Lawrence Memorial Hospital.

In the emergency room, Dr. Lisa Gard examined Biggs and found her to be in emotional distress and in severe pain. Dr. Gard observed a traumatic injury to Biggs' genitalia, including a hematoma that she believed required an immediate consultation with an obstetrician and gynecologist. Dr. Gard later testified at trial that she had never seen such an extensive external injury to the female genitalia. Dr. Gard also testified that she had treated "straddle injuries" to female patients on multiple occasions. Based on this experience and her examination of Biggs, Dr. Gard rendered the opinion that Biggs' injury was not a straddle injury.

Dr. Kathy Gaumer, an obstetrician and gynecologist, also conducted a physical examination of Biggs' genitalia in the early morning hours of October 9, 2007. Dr. Gaumer observed extensive trauma, active bleeding, and a rapidly expanding hematoma. Biggs told Dr. Gaumer that her ex-boyfriend had broken into her apartment and had assaulted her. Biggs also told Dr. Gaumer that she had lost consciousness and noticed the injury in her genital area after she woke up.

Dr. Gaumer performed surgery to repair the hematoma and to stop the bleeding. In doing so, she discovered several lacerations that were approximately 1 inch in length. At trial, Dr. Gaumer rendered the opinion that the hematoma resulted from the application of significant blunt force and was not a straddle injury. Dr. Gaumer further testified that in her 18 years of medical practice, she had never seen such an extensive gynecological injury.

***4** Biggs was hospitalized for 11 days. During her hospitalization, Biggs was given medication to control the pain, as well as medicine to control her anxiety. Ultimately, she was discharged from Lawrence Memorial Hospital on October 20, 2007. After her discharge from the hospital, however, Biggs continued to receive home health care services and continued to have a catheter in place.

Jaeger was eventually charged with one count each of aggravated kidnapping, aggravated battery, aggravated burglary, and criminal threat. An 11–day jury trial commenced on July 27, 2008. At trial, 25 witnesses were called and hundreds of exhibits were admitted into evidence.

Jaeger's defense was that he broke into Biggs' apartment because he thought she was in distress. In addition, he claimed that Biggs had injured herself by falling onto the railing of her bed. In support of this defense, Jaeger called expert witnesses who rendered the opinion that Biggs had suffered a straddle injury. Furthermore, one of the expert witnesses rendered the opinion that Biggs was not choked, nor did she lose consciousness.

Jaeger also called a forensic scientist who rendered the opinion that the pattern of the blood stains did not show any signs that Biggs struggled or was forced into Jaeger's vehicle. Moreover, Jaeger called an expert witness to testify about the medication Biggs took in the hospital, which allegedly made her susceptible to suggestion from family members or law enforcement officers.

Following the close of evidence, the jury deliberated for approximately 4 days. On the third day of deliberation, one of the jury members gave a note to the bailiff that stated:

> "I have concern that we have a juror that [openly] stated he had pursued an investigation on his own away from the courtroom. Quote 'a reenactment' with his girlfriend that he used as a basis to draw conclusions about the case.
>
> "My concern is that this juror has [openly] stated he has made his verdict in this case on all counts. And quote, 'nothing we say is going to change his mind.' "

After informing the parties of the juror's note, the trial judge held a hearing in which the presiding juror confirmed that the note was accurate. The trial judge then brought in the juror, who admitted that he had experimented with his girlfriend to see how Biggs may have been injured. The juror also admitted that he had already made up his mind before he engaged in the experiment. The trial judge determined that the juror should be dismissed, and defense counsel did not object to the juror's dismissal.

After the juror was dismissed, the trial judge called in the rest of the jurors to question them about what they had been told. The remaining jurors indicated that the dismissed juror had told them that he reenacted the bedroom scene with his girlfriend and that he based his decision at least partially on that reenactment. The remaining jurors agreed that nothing the dismissed juror

told them would impact their decision. Although Jaeger moved for a mistrial, the trial judge denied the motion and replaced the dismissed juror with an alternate who had heard the evidence.

***5** The following day the jury returned a verdict, finding Jaeger guilty of kidnapping, aggravated battery, and criminal threat. The jury was unable to reach a unanimous decision on the aggravated burglary charge, and the district court declared a mistrial on that count. Jaeger subsequently filed a motion for a new trial, which was denied. Thereafter, Jaeger was sentenced to 106 months in prison.

ISSUES PRESENTED AND ANALYSIS

On appeal, Jaeger presents seven issues: (1) whether there was sufficient evidence to support his convictions; (2) whether the district court abused its discretion by allowing the State to present cumulative evidence; (3) whether the district court abused its discretion by limiting defense counsel's cross-examination of Biggs; (4) whether the district court erred in admitting evidence of Jaeger's prior bad acts; (5) whether the district court erred in instructing the jury on kidnapping; (6) whether the district court abused its discretion in denying Jaeger's motion for a new trial based on juror misconduct; and (7) whether cumulative error denied Jaeger a fair trial. We will address these issues in the order they were presented.

WAS THERE SUFFICIENT EVIDENCE TO SUPPORT JAEGER'S CONVICTIONS?

Standard of Review

The standard of review for Jaeger's challenge to the sufficiency of the evidence is whether, after review of all the evidence, viewed in the light most favorable to the prosecution, we are convinced that a rational factfinder could have found Jaeger guilty beyond a reasonable doubt. See *State v. McCaslin*, 291 Kan. 697, 710, 245 P.3d 1030 (2011). In determining whether there is sufficient evidence to support the convictions, we will not reweigh the evidence or the credibility of witnesses. See 291 Kan. at 710, 245 P.3d 1030; *State v. Trautloff*, 289 Kan. 793, 801, 217 P.3d 15 (2009).

Kidnapping

[1] Jaeger was charged with aggravated kidnapping under K.S.A. 21–3421, but the jury eventually convicted Jaeger of the lesser included offense of kidnapping under K.S.A. 21–3420. "Kidnapping is the taking or confining of any person, accomplished by force, threat or deception, with the intent to hold such person ... to inflict bodily injury or to terrorize the victim or another." K.S.A. 21–3420(c). The jury was also instructed that the taking or confining could have been done with the intent to facilitate flight or the commission of any crime. See K.S.A. 21–3420(b).

Jaeger contends that the evidence presented at trial was not sufficient to support a conviction for kidnapping. We disagree. Based on our review of the record in the light most favorable to the prosecution, we find that there is sufficient evidence upon which a reasonable jury could have found Jaeger guilty of kidnapping beyond a reasonable doubt.

Under K.S.A. 21–3420(b) and (c), kidnapping includes "the taking or confining of any person, accomplished by force, threat or deception, with the intent to hold such person ... (b) to facilitate flight or the commission of any crime; [or] (c) to inflict bodily injury or to terrorize the victim or another." In *State v. Buggs*, 219 Kan. 203, 216, 547 P.2d 720 (1976), the court held that in order to facilitate a crime, the movement must not be "slight, inconsequential, and merely incidental to the other crime," must not "be of the kind inherent in the nature of the other crime," and must have some independent significance from the crime that "makes the other crime substantially easier of commission or substantially lessens the risk of detection."

***6** Although we will not repeat all of the evidence contained in the voluminous record that supports the kidnapping conviction, we will briefly summarize the evidence. In addition to Biggs' own testimony, Hall testified that she saw two men dragging a woman by her arms and hair down the stairs of Biggs' apartment. She further testified that the woman was screaming and that one of the men was shouting, " 'Shut the fuck up.' " Once the three reached the car, Hall saw one of the men force or shove the woman into the back seat of the vehicle and then get into the back seat with her. In addition, Gower offered similar testimony at trial.

The eyewitness testimony cited above, if believed, constitutes sufficient evidence that Jaeger used force, threat, or deception to take and/or confine Biggs. Moreover, a police officer testified that after Jaeger's car was stopped, Biggs would not talk to him or get out of the vehicle. The officer testified that Biggs kept looking at Jaeger and only got out of the car after Jaeger gave her permission to do so.

There is also evidence in the record that could lead a reasonable jury to conclude that Jaeger's intention in the kidnapping was to facilitate flight. Gower testified that the car was "moving pretty fast" when it left the apartment complex and that it did not stop at a stop sign. There was also testimony that Jaeger told Carroll to " '[d]rive, drive. Go, go, go' " and did not tell him how to get to the hospital —which is located only a few blocks away from Biggs' apartment.

Furthermore, Carroll testified that only Biggs attempted to give him directions to Lawrence Memorial Hospital. In fact, at the time Jaeger's car was stopped by the police, it was headed away from the hospital. Moreover, Jaeger did not mention that Biggs needed medical assistance, but instead he told the police at the scene that the three were going to The Wheel to get pizza.

It is only in rare cases, where the testimony is so incredible that no reasonable factfinder could find guilt beyond a reasonable doubt, that a guilty verdict will be reversed. See *State v. Matlock*, 233 Kan. 1, 5–6, 660 P.2d 945 (1983); *State v. Naramore*, 25 Kan.App.2d 302, 322, 965 P.2d 211, *rev. denied* 266 Kan. 1114 (1998). This is not one of those rare cases. Viewing the evidence in the light most favorable to the State, we conclude there was sufficient evidence on which the jury could rely to find Jaeger guilty of kidnapping.

Aggravated Battery

[2] Jaeger also contends there was insufficient evidence to support his aggravated battery conviction. Aggravated battery is the intentional infliction of "great bodily harm to another person or disfigurement of another person." K.S.A. 21–3414(a)(1)(A). "In defining great bodily harm, the word 'great' distinguishes the bodily harm necessary for aggravated battery from slight, trivial, minor, or moderate harm, and as such it does not include mere bruises, which are likely to be sustained in simple battery." *State v. Kelly*, 262 Kan. 755, Syl. ¶ 2, 942 P.2d 579 (1997).

*7 It is undisputed that Biggs suffered a significant injury, including substantial loss of blood. Although Jaeger's expert witnesses testified that Biggs' injury was "very compatible" with a straddle injury and that falling on the bed rail was the most probable cause of her injuries, both the emergency room physician and the obstetrician-gynecologist who treated Biggs rendered the opinion that she did not suffer a straddle injury. Rather, Dr. Gaumer rendered the opinion that the hematoma resulted from the application of significant blunt force.

Both Biggs and Jones testified that Jaeger entered the apartment angry and enraged. And there were several witnesses who testified that they heard screaming and yelling. Moreover, Jones testified that Biggs was not injured before he left the apartment.

Biggs testified that Jaeger strangled her until she was unconscious. And there was testimony from Steve Crawford, who runs a martial arts school in Overland Park, that Jaeger had taken martial arts classes from him and had learned how to perform a choke hold that could cause a person to pass out within a few seconds. Biggs also testified that upon regaining consciousness, she noticed that she had been injured. In addition, Carroll testified that when he went into Biggs' apartment, she was lying on the floor of the bedroom with Jaeger hunched over her.

A conviction of even the gravest offense can be based entirely on circumstantial evidence and the inferences fairly deductible therefrom. *McCaslin*, 291 Kan. at 710, 245 P.3d 1030. Here, there was sufficient circumstantial evidence in the record from which a reasonable jury could conclude that Jaeger intentionally caused great bodily harm to Biggs. Furthermore, it was up to the jury—not this court—to determine whether it found the testimony of Jaeger's expert witnesses to be credible. Thus, from a review of the record in the light most favorable to the State, we conclude that there was sufficient evidence presented to prove beyond a reasonable doubt that Jaeger committed aggravated battery.

Criminal Threat

[3] Jaeger next contends there was insufficient evidence to support his criminal threat conviction. Criminal threat is defined as any threat to commit violence, communicated with intent to terrorize another. K.S.A.2009 Supp. 21–3419(a)(1). Here, the alleged threat was made to Jones.

At trial, Jones testified that once Biggs thought Jaeger was in the apartment, Jones got dressed quickly and climbed over the balcony adjacent to Biggs' bedroom. As Jones was lowering himself to the ground floor, he saw Jaeger. According to Jones, Jaeger told him, " 'You're fucking dead.' " Biggs similarly testified that when Jaeger saw Jones leaving from the balcony, he said, " 'You're fucking dead.' " Then after Jones ran back through Biggs' apartment and out the front door, Jones heard Jaeger yelling for him to show his face because he was " 'fucking dead.' "

Therefore, after reviewing the evidence presented in the light most favorable to the State, we conclude that there was sufficient evidence in the record upon which a reasonable jury could conclude that Jaeger was guilty beyond a reasonable doubt of making a criminal threat to Jones.

DID THE DISTRICT COURT ABUSE ITS DISCRETION BY ALLOWING CUMULATIVE PRESENTATION OF EVIDENCE AT TRIAL?

***8** [4] Jaeger argues that the district court erred in failing to exclude cumulative evidence presented at trial. He challenges the district court's decision to allow Biggs and Carroll to present live testimony and videotaped statements because the evidence was "basically consistent and therefore duplicative in nature."

Cumulative evidence is evidence that is unduly repetitious. See *State v. Green*, 274 Kan. 145, 147, 48 P.3d 1276 (2002). Although a trial judge has the discretion to admit or exclude evidence that is cumulative, such evidence is not objectionable in and of itself. See *State v. Hickles*, 261 Kan. 74, 88, 929 P.2d 141 (1996). Thus, a trial judge's ruling on cumulative evidence should not be reversed unless there has been an abuse of discretion. See *State v. Miller*, 284 Kan. 682, 701, 163 P.3d 267 (2007); *State v. Reed*, 282 Kan. 272, 280, 144 P.3d 677 (2006).

Furthermore, a party must make a contemporaneous and specific objection to the admission of evidence in order to preserve the issue for appeal. See K.S.A. 60–404; *McCaslin*, 291 Kan. at 707, 245 P.3d 1030. Here, it does not appear that Jaeger objected at trial to either Biggs' and Carroll's testimony being cumulative to each other or being cumulative to their videotaped statements. And although Jaeger objected to Biggs' videotaped testimony, his objection was on different grounds than those raised on appeal.

Prior to trial, Jaeger filed a motion to exclude from evidence the video of Biggs' statement recorded while she was still in the hospital. But Jaeger did not argue that the video should be excluded because it was cumulative to Biggs' live testimony. Jaeger simply argued the video was more prejudicial than probative. Furthermore, during Biggs' direct examination at trial, when the State offered into evidence the videotaped statement Biggs made to the police at the hospital, Jaeger did not object to its admission. Instead, Jaeger stated that he had objections to certain parts of the video.

The trial judge ruled that the video of Biggs' statement could be admitted, but defense counsel could object to portions of the video if an issue arose. At one point during the playing of the video, defense counsel objected, arguing that what was being played at that point was repetitive or cumulative. The trial judge determined that Biggs was repeating herself on the video somewhat, stating, "[S]he's repeating herself, but I think under the circumstances it's taken into context, it's okay."

Based on our review of the record, it does not appear that Jaeger preserved a cumulative evidence objection for appeal. Even if he had done so, we do not find that the trial judge abused his discretion by allowing Biggs and Carroll to testify in person as well as admitting their videotaped statements into evidence. We also note that both Biggs and Carroll were subject to comprehensive cross-examination by Jaeger's counsel at trial. Thus, we conclude that Jaeger's right to a fair trial was not substantially prejudiced by the admission of this evidence.

DID THE DISTRICT COURT ABUSE ITS DISCRETION IN LIMITING JAEGER'S CROSS–EXAMINATION OF BIGGS?

***9** [5] Jaeger next contends that the district court erred in limiting his cross-examination of Biggs. Specifically, he argues that the district court improperly denied him the opportunity to question Biggs regarding an alleged attempt to extort money from someone with whom she had engaged in a sexual relationship before she met Jaeger.

In sustaining an objection asserted by the State, the trial judge determined that while Biggs' faithfulness to Jaeger might be relevant, the alleged extortion was not relevant or material to the issues presented at trial.

The standards for reviewing rulings on the admissibility of evidence are set forth in *State v. Riojas*, 288 Kan. 379, 382–83, 204 P.3d 578 (2009). The scope of cross-examination is subject to reasonable control by the trial judge, and the decision to limit cross-examination is reviewed for abuse of discretion. Judicial discretion is abused when no reasonable person would adopt the district court's view. *State v. Corbett*, 281 Kan. 294, 308, 130 P.3d 1179 (2006). Abuse of discretion can also occur if the district court's decision was based on an error of law or fact. *State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801 (2011).

On appeal, Jaeger asserts that "[i]n refusing to allow the questioning [regarding the alleged extortion] to continue, the trial court prevented [him] from fully inquiring into Ms. Biggs' 'honesty or veracity or their opposites.' " See K.S.A. 60–420; K.S.A. 60–422. Jaeger further asserts that evidence regarding Biggs' alleged extortion of her former boss showed that she "was willing to hide the truth for a price."

K.S.A. 60–422(d) states that "evidence of specific instances of [a witness'] conduct relevant only as tending to prove a trait of his or her character, shall be inadmissible." "A witness's character traits for honesty and veracity can only be shown by opinion testimony or evidence of reputation, and not by specific instances of the witness's conduct." *Hagedorn v. Stormont–Vail Regional Med. Center*, 238 Kan. 691, Syl. ¶ 5, 715 P.2d 2 (1986); see also *State v. Aldrich*, 232 Kan. 783, 783–84, 658 P.2d 1027, *cert. denied* 464 U.S. 819, 104 S.Ct. 80, 78 L.Ed.2d 90 (1983) (a witness' character traits for honesty and veracity could not be shown by evidence that the witness had once sworn to a false affidavit).

Here, Jaeger attempted to introduce a specific instance of conduct—the alleged extortion—in an attempt to prove a trait of character—that Biggs will "hide the truth for a price." The evidence, therefore, was inadmissible under K.S.A. 60–422(d), and we conclude that the trial judge did not abuse his discretion in controlling Jaeger's cross-examination of Biggs by prohibiting questions regarding the alleged extortion.

DID THE DISTRICT COURT ERR IN ADMITTING EVIDENCE OF JAEGER'S PRIOR BAD ACTS?

[6] Jaeger contends the district court erred in allowing the State to admit evidence that he had previously choked Biggs from behind. He argues that admitting the evidence was contrary to K.S.A.2009 Supp. 60–455, which makes evidence that a person committed a crime or civil wrong on a specified occasion inadmissible to prove the person's disposition to commit crimes or civil wrongs. He recognizes, however, that prior crimes or civil wrongs may be admissible if "relevant to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." K.S.A.2009 Supp. 60–455(b).

***10** For prior crimes or civil wrongs evidence to be admissible under the statute, the evidence must be relevant —*i.e.* probative and material—to prove one of the 60–455(b) facts, which must be a disputed material fact, and the probative value of the evidence must outweigh its prejudicial effect. See *State v. Reid*, 286 Kan. 494, 503, 186 P.3d 713 (2008). We review whether evidence is probative under an abuse of discretion standard, and we make a de novo review of whether evidence is material. See *State v. Berriozabal*, 291 Kan. 568, 586, 243 P.3d 352 (2010). Moreover, whether the probative value of the evidence outweighs its potential for producing undue prejudice is reviewed for abuse of discretion. See *State v. Wells*, 289 Kan. 1219, 1227, 221 P.3d 561 (2009).

Jaeger argues that evidence of prior incidents of choking was introduced without a proper *foundation* being laid. But a review of the record reveals that Biggs had personal knowledge of the prior instances of choking and that she was able to recall these instances. Thus, Jaeger's argument goes to the weight to be given to the evidence of prior incidents of choking and not to the foundation for the admission of such evidence.

Biggs testified that Jaeger choked her until she was unconscious and that she discovered she had been injured when she regained consciousness. Moreover, Jaeger did not object at trial when Biggs testified that he strangled her "quite often." Because Jaeger did not make a contemporaneous and specific objection to the admission of this evidence, this issue was not preserved for appeal.

See K.S.A. 60–404; *McCaslin*, 291 Kan. at 707, 245 P.3d 1030.

Jaeger does not argue that a limiting instruction should have been given. And it is unclear whether the trial judge admitted this evidence of prior incidents of choking under K.S.A.2009 Supp. 60–455(b). Nevertheless, the failure to give a limiting instruction is clearly erroneous " 'only if the reviewing court is firmly convinced there is a real possibility that the jury would have rendered a different verdict if the error had not occurred.' " *State v. Shirley*, 277 Kan. 659, 666, 89 P.3d 649 (2004) (quoting *State v. Davis*, 275 Kan. 107, 115, 61 P.3d 701 [2003]); see K.S.A. 22–3414(3).

Here, the evidence against Jaeger was overwhelming, including the testimony of Biggs, Carroll, the witnesses who saw Biggs being forced into Jaeger's car before it sped away from the apartment complex, and the physicians who treated Biggs for her injuries. In addition, the law enforcement officers who testified at trial offered convincing testimony, including the fact that Jaeger's car was headed away from Lawrence Memorial Hospital at the time it was stopped and that they found a terrified young woman bleeding profusely sitting next to Jaeger in the back seat. Moreover, when questioned by police at the scene, Jaeger gave the bizarre explanation that he had blood on him because he bites his fingernails and that the three were going out for pizza.

***11** Accordingly, we are not convinced there was a real possibility that a different verdict would have been reached even if the evidence of prior incidents of choking had not been introduced or if a limiting instruction had been given. Furthermore, we conclude that any error on the part of the trial judge was harmless in light of the other compelling evidence of Jaeger's guilt.

DID THE DISTRICT COURT ERR IN INSTRUCTING THE JURY?

[7] Jaeger contends the district court erred in instructing the jury on aggravated kidnapping and kidnapping by including the word "confined" in the jury instructions. Because Jaeger asserted an objection during the jury instruction conference, we must determine "if [the instruction] properly and fairly states the law as applied to the facts of the case and could not have reasonably misled the jury." *State v. Appleby*, 289 Kan. 1017, 1059, 221 P.3d 525 (2009). In making this determination, we must consider the jury instructions as a whole and not isolate any one instruction. 289 Kan. at 1059, 221 P.3d 525.

The jury instructions stated that to establish the kidnapping charge, the jury had to find the State proved that Jaeger "took or confined" Biggs by force or fear. Jaeger contends there was no physical or forensic evidence to show that Biggs was confined in the back seat of his car. He also contends that the evidence merely shows that Carroll may have confined Biggs by driving her away from her apartment.

Regarding the issue of confinement, the district court found: "And later she told [a police officer] she was afraid of Mr. Jaeger and that's why she didn't speak and why she didn't move, and that she was confined in the car. There's evidence to support that. Objection's overruled." We agree with the trial judge that there was sufficient evidence in the record from which a reasonable jury could conclude that Jaeger confined Biggs to the back seat of his car.

As indicated above, Hall testified that Biggs was "shoved into a vehicle," and it is undisputed that Jaeger got into the back seat with her. There is evidence in the record that although Biggs was bleeding and needed to go to the hospital, Jaeger's car was headed away from Lawrence Memorial Hospital when it was stopped by the police. Likewise, there is evidence in the record that after the police stopped the car, Biggs would not speak to the police and Jaeger answered questions for her. The record also includes evidence that Jaeger gave Biggs permission to get out of the car and that Biggs told the police she did not initially speak because she was scared of Jaeger. We conclude, therefore, that the inclusion of the word confined in the kidnapping instruction was supported by the evidence presented at trial.

DID THE DISTRICT COURT ABUSE ITS DISCRETION IN DENYING JAEGER'S MOTION FOR A NEW TRIAL BASED ON JUROR MISCONDUCT?

[8] It is undisputed that one of the jurors committed misconduct by conducting an experiment or reenactment with his girlfriend. Specifically, the juror and his girlfriend

attempted to determine whether a person could fall onto a bed rail and suffer the type of injury that Biggs suffered to her genitalia. Jaeger argues that the trial judge erred in denying his motion for a new trial based on this misconduct.

***12** A district court may grant a defendant's motion for a new trial if it is required in the interest of justice. K.S.A. 22–3501. On appeal, we review a district court's decision on a motion for a new trial under an abuse of discretion standard. See *State v. Mathis*, 281 Kan. 99, 103–04, 130 P.3d 14 (2006). " 'A trial court abuses its discretion when it denies a motion for a new trial based on juror misconduct if the defendant can show that (1) an act of the jury constituted misconduct and (2) the misconduct substantially prejudiced the defendant's right to a fair trial.' [Citations omitted.]" 281 Kan. at 104, 130 P.3d 14.

Jaeger argues that he is entitled to a new trial because the juror's misconduct deprived him of a dissenting voice injury deliberations. In his motion for a new trial, defense counsel stated that he spoke with the dismissed juror after the trial was over. According to defense counsel, the juror stated that he had formed the opinion that Jaeger was not guilty. But there is no affidavit or testimony in the record to support this contention.

Rather, we find from a review of the record that the trial judge very carefully and deliberately avoided bringing out any information regarding the dismissed juror's position regarding Jaeger's guilt or innocence. As a result, neither the attorneys nor the trial judge knew if the dismissed juror would have voted to acquit or convict Jaeger. And when the presiding juror was initially questioned, she indicated that the rest of the jury members had not yet made their decisions.

Clearly, the trial judge was placed in a difficult position upon receiving a note from one of the jurors regarding the experiment conducted by another juror. Under the circumstances, it was appropriate for the trial judge to dismiss the offending juror, and Jaeger did not object to that ruling. Likewise, it was also appropriate for the trial judge to speak with the remaining jurors—in the presence of Jaeger and his attorneys—to determine whether they had been tainted by the misconduct of the dismissed juror. After doing so, the trial judge determined that they had not been contaminated by the dismissed juror.

As such, it was only after being satisfied that the remaining jurors could fairly decide the case—based solely on the evidence presented at trial—that the trial judge replaced the dismissed juror with an alternate who had heard the evidence presented during the course of the trial. Thereafter, the remaining jurors and the alternate engaged in extensive deliberations before returning a verdict. Thus, we conclude that the misconduct of the dismissed juror did not substantially prejudice Jaeger's right to a fair trial and that the district court did not abuse its discretion in denying the motion for a new trial under the circumstances presented.

DID CUMULATIVE ERROR DENY JAEGER A FAIR TRIAL?

Jaeger argues he is entitled to a new trial because of cumulative trial errors. If individual errors are not sufficient to support reversal on their own, the cumulative effect of multiple errors may be great enough to require reversal. The test is " 'whether the totality of circumstances substantially prejudiced the defendant and denied the defendant a fair trial. No prejudicial error may be found upon this cumulative effect rule, however, if the evidence is overwhelming against the defendant.' [Citation omitted.]" *State v. Edwards*, 291 Kan. 532, 553, 243 P.3d 683 (2010).

***13** Because Jaeger failed to show any trial errors, he cannot show cumulative error. See *State v. Cofield*, 288 Kan. 367, 378, 203 P.3d 1261 (2009). Moreover, based on our review of the totality of the circumstances, we do not find that Jaeger was substantially prejudiced by any of his allegations of error. Finally, we conclude that the evidence in the record overwhelmingly supports the jury's verdict.

Affirmed.

All Citations

264 P.3d 1059 (Table), 2011 WL 6382749

247 P.3d 235 (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.

Vacarro M. STANO, Appellant,
v.
STATE of Kansas, Appellee.

No. 103,571.
|
March 4, 2011.
|
Review Denied Oct. 3, 2011.

Appeal from Shawnee County District Court; Mark S. Braun, Judge.

Attorneys and Law Firms

Gerald E. Wells, of Lawrence, for appellant.

Natalie Chalmers, assistant district attorney, Chadwick J. Taylor, district attorney, and Steve Six, attorney general, for appellee.

Before MALONE, P.J., MARQUARDT and LEBEN, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** Vaccaro M. Stano appeals the district court's decision summarily denying his K.S.A. 60–1507 motion. We affirm.

On March 16, 2005, a jury found Vaccaro Stano guilty of first-degree premeditated murder under K.S.A. 21–3401(a), an off-grid person felony. The district court sentenced Stano to a hard 25 life sentence. Stano filed a direct appeal and our Supreme Court affirmed his conviction. See *State v. Stano*, 284 Kan. 126, 154, 159 P.3d 931 (2007).

At trial, Stano's attorney, Julia Spainhour, cross-examined Topeka Police Department Detective Louis Randall about whether the Kansas Bureau of Investigation (KBI) had determined the caliber of the bullets that police recovered from the deceased, Duane Hayes. Detective Randall answered, "I don't—let me look here—I believe by reading this report, they were stating they were nine millimeter. This is the test fire that we compared another gun with." The State objected, requested a bench conference, and told the district court that neither it nor Spainhour knew of any KBI ballistics report. Spainhour then asked to discuss the issue in chambers.

During the discussion in chambers, the State noted that Detective Randall incorrectly testified that the bullets were nine millimeter when the report actually listed the bullets as ".38, .357." Spainhour, however, revealed she expected Detective Randall to testify that the KBI did not classify the bullets and never completed a ballistics report. The district court ordered Spainhour to correct Detective Randall's misstatement "then [ ] drop[ ] it until Monday morning." On Monday morning, the trial resumed but neither party revisited the issue.

After his conviction and unsuccessful direct appeal, Stano filed a K.S.A. 60–1507 motion on May 13, 2008, alleging seven trial errors; however, he only raises two of those issues on appeal. In his motion, Stano claimed that the State violated his right to confrontation under the Sixth Amendment to the United States Constitution when it introduced a KBI ballistics report but failed to follow K.S.A. 22–3437. Stano also claimed his appellate counsel was ineffective for failing to raise all of the issues listed in his 60–1507 motion on direct appeal. Stano filed an amended 60–1507 motion on July 31, 2008, alleging the "trial court denied him his Sixth Amendment right to effective assistance of counsel" by restricting his ability to cross-examine certain witnesses.

In its memorandum decision, the district court refused to consider any issues concerning Stano's Sixth Amendment Confrontation Clause rights listed in his original or amended 60–1507 motion because the issues "clearly should have been addressed during his direct appeal." Moreover, the district court noted that Stano did not offer any exceptional circumstances to excuse his failure to raise those constitutional errors in his direct appeal.

With regard to his appellate counsel's failure to raise a Confrontation Clause argument on direct appeal, the district court determined the testimony concerning the KBI report did not affect Stano's ability to assert his defense strategy and was neither exculpatory or inculpatory. Consequently, the district court reasoned that it was entirely reasonable for Stano's appellate counsel not to present this argument on appeal.

***2** However, on appeal, Stano has greatly expanded the scope of his original Confrontation Clause issue. Now, Stano argues that his trial counsel was ineffective for (1) failing to object to testimony concerning the KBI ballistics report, which discussed the caliber of bullets retrieved from the victim's body, (2) failing to call witnesses to cast doubt on the caliber of the murder weapon, and (3) failing to call the KBI agent who prepared the ballistics report.

Second, Stano claims his appellate counsel was ineffective for failing to raise on direct appeal that the State violated his right to confrontation under the Sixth Amendment by introducing testimony concerning a KBI ballistics report in violation of K.S.A. 22–3437.

SUMMARY DENIAL OF THE K.S.A. 60–1507 MOTION

An appellate court's standard of review depends on the reasoning the district court employed in ruling on the 60–1507 motion. First, the district court may determine that the motion, files, and record of the case conclusively show that the movant is entitled to no relief and summarily deny the motion. Second, the district court may determine from the motion, files, and record that a substantial issue or issues are presented, requiring a full evidentiary hearing in the presence of the petitioner. Third, the district court may determine that the motion raises a potentially substantial issue or issues of fact, supported by the files and record, and hold a preliminary hearing after appointment of counsel to determine whether in fact the issues in the motion are substantial. *Bellamy v. State,* 285 Kan. 346, 354, 172 P.3d 10 (2007).

In this case, the district court summarily denied Stano's 60–1507 motion. Therefore, this court conducts a de novo review to determine whether the motion, files, and record of the case conclusively establish that Stano is not entitled to any relief. *Trotter v. State,* 288 Kan. 112, 132, 200 P.3d 1236 (2009).

After a thorough reading of Stano's 60–1507 motion, it is clear Stano originally raised the issue of a Confrontation Clause violation as a trial error, but now raises the issue as an ineffective assistance of counsel claim for failing to call certain witnesses or object to the introduction of the KBI report.

Generally, a movant cannot raise new ineffective assistance of counsel theories in appealing the denial of a 60–1507 motion. See *Trotter,* 288 Kan. at 127, 200 P.3d 1236; *State v. Warledo,* 286 Kan. 927, 938, 190 P.3d 937 (2008).

Nevertheless, "trial errors affecting constitutional rights may be raised [in a K.S.A. 60–1507 proceeding] even though the error could have been raised on appeal, provided there were exceptional circumstances excusing the failure to appeal." Supreme Court Rule 183(c)(3) (2010 Kan. Ct. R. Annot. 256). A K.S.A. 60–1507 movant can demonstrate exceptional circumstances by persuading the court

> "that there was (1) ineffective assistance of trial counsel in failing to object regarding an issue; (2) ineffective assistance of direct appeal counsel in failing to raise the issue; or (3) newly discovered evidence or an unforeseeable change in circumstances or constitutional law unknown to counsel and the movant at the time of trial and direct appeal." *Bledsoe v. State,* 283 Kan. 81, 88–89, 150 P.3d 868 (2007).

***3** Kansas courts have defined exceptional circumstances as "unusual events or intervening changes in the law that prevented the defendant from raising the issue in a preceding 60–1507 motion." *State v. Mitchell,* 284 Kan. 374, 379, 162 P.3d 18 (2007). While ineffective assistance of counsel can constitute an exceptional circumstance, Stano has not argued on appeal that he was prevented from raising his ineffective assistance of trial counsel claim in his original 60–1507 motion. *See Rowland v. State,* 289 Kan. 1076, 1087, 219 P.3d 1212 (2009). Additionally, Stano cannot argue he received ineffective 60–1507 counsel because he filed his motion pro se.

On appeal, Stano suggests he alleged that his trial counsel was ineffective in his 60–1507 motion. Even after a liberal reading of Stano's 60–1507 motion; however, he raised his

confrontation issue as a trial error and not as an ineffective assistance of counsel claim. Specifically, Stano stated in his motion, "In the case at bar the [S]tate failed to submit to the procedural requirements of K.S.A. 22-3437(3) thereby denying petitioner's right of confrontation...." Consequently, Stano did not assert his trial counsel was ineffective in his 60–1507 motion.

Because Stano should have raised this Confrontation Clause issue in his direct appeal and the ineffective assistance of trial counsel claim in his 60–1507 motion, the district court did not err in summarily denying this portion of his 60–1507 motion.

Even if we were to consider the merits of his ineffective assistance of trial counsel claim and determine his counsel's performance was constitutionally deficient, Stano fails to explain how, but for counsel's deficient performance, the result of the proceeding would have been different. See *Harris v. State*, 288 Kan. 414, 416, 204 P.3d 557 (2009). Here, Detective Randall's corrected testimony merely informed the jury that the bullets recovered from the victim were not fired from a nine millimeter weapon. This testimony is cumulative of testimony from another witness who testified, without objection, that the recovered bullets were "medium caliber." Thus, if it was error to admit Detective Randall's testimony concerning the KBI lab report, the error had little, if any, likelihood of having changed the result of the trial.

Stano also argues his appellate counsel was ineffective for failing to include alleged deficiencies by his trial counsel in his direct appeal. After noting the standard of review for an ineffective assistance of counsel claim, Stano's entire argument for this issue in his 60–1507 motion consisted of the following:

> "All the issues presented in this petition are issues that an appellate attorney could and should have raised on appeal. Several of the issues were preserved through an objection by trial counsel. Those that were not preserved through an objection were of contitutional [*sic*] importance and therefore could have been raised on appeal without an objection at trial."

***4** In denying his ineffective assistance of counsel claim as it related to Stano's alleged violation of his confrontation rights, the district court noted,

> "Detective Randall's testimony regarding the report was neither exculpatory or inculpatory, and it did not affect Stano's ability to assert his defense strategy. Stano was not prejudiced by the testimony. Accordingly, it was entirely reasonable for appellate counsel not to present this argument on appeal."

However, on appeal, Stano claims his appellate counsel's failure to raise the issue of his Sixth Amendment right to confront the KBI technician, who drafted the report, prejudiced his direct appeal.

> "To establish ineffective assistance of counsel on appeal, defendant must show '(1) counsel's performance, based upon the totality of the circumstances, was deficient in that it fell below an objective standard of reasonableness, and (2) the [defendant] was prejudiced to the extent that there is a reasonable probability that, but for counsel's deficient performance, the appeal would have been successful.' [Citations omitted.]" *State v. Smith*, 278 Kan. 45, 51–52, 92 P.3d 1096 (2004).

The failure of appellate counsel to raise an issue on appeal is not, per se, ineffective assistance of counsel. See *Laymon v. State*, 280 Kan. 430, 439, 122 P.3d 326 (2005). However,

> " 'In an appeal from a criminal conviction, appellate counsel should carefully consider the issues, and those that are weak or without merit, as well as those which could result in nothing more than harmless error, should not be included as issues on appeal. Likewise, the fact that the defendant requests such an issue or issues to be raised does not require appellate counsel to include them. Conscientious counsel should only raise issues on appeal which, in the exercise of reasonable professional judgment, have merit.' [Citation omitted.]" 280 Kan. at 440, 122 P.3d 326.

A defendant must establish two things to succeed on a claim of ineffective assistance of counsel. First, the defendant must establish that counsel's performance was

constitutionally deficient. This requires a showing that counsel made errors so serious that his or her performance was less than that guaranteed to the defendant by the Sixth Amendment. Second, the defendant must establish that counsel's deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial. *Harris,* 288 Kan. at 416, 204 P.3d 557.

Even if Detective Randall's testimony violated Stano's Confrontation Clause rights, the error was harmless. See *State v. Nguyen,* 281 Kan. 702, Syl. ¶ 6, 133 P.3d 1259 (2006). Detective Randall's testimony concerning the caliber of the gun was cumulative. Further, the State presented testimony from an eyewitness who observed Stano grab a .38 revolver and shoot Hayes in the head. Given the strength of the prosecution's case and the cumulative nature of Detective Randall's testimony, any Confrontation Clause violation had little, if any, effect on the result at trial,

***5** Stano's appellate counsel was not ineffective for refusing to present an issue that resulted in nothing more than harmless error. See *Laymon,* 280 Kan. at 440, 122 P.3d 326. Consequently, the district court did not err in summarily denying Stano's 60–1507 motion.

Although not requested in his 60–1507 motion, Stano seeks remand to the district court for a hearing on his ineffective assistance claims pursuant to *State v. Van Cleave,* 239 Kan. 117, 716 P.2d 580 (1986). Whether to remand a case pursuant to *Van Cleave* lies within the sound discretion of the appellate court. 239 Kan. at 120, 716 P.2d 580.

The *Van Cleave* court set forth two alternate remedies for an ineffective assistance of counsel claim not raised before the trial court: (1) a motion brought pursuant to K.S.A. 60–1507 or (2) seeking remand to the trial court for determination of the issue. 239 Kan. at 119–20, 716 P.2d 580. A *Van Cleave* hearing is typically utilized when it becomes apparent during the pendency of a direct appeal that trial counsel was ineffective. *Rowland v. State,* 289 Kan. 1076, Syl. ¶ 3, 219 P.3d 1212 (2009). This procedure allows an appellate court to remand a case to the district court before the appeal is finally decided. See 289 Kan. 1076, Syl. ¶ 3, 219 P.3d 1212. Thus, a *Van Cleave* hearing is an alternative to a 60–1507 motion. Stano is not entitled to a *Van Cleave* hearing.

Affirmed.

All Citations

247 P.3d 235 (Table), 2011 WL 781554

End of Document

281 P.3d 598 (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.

Reginald McKINNEY, Appellant,
v.
STATE of Kansas, Appellee.

No. 106,074.
|
Aug. 3, 2012.
|
Review Denied June 14, 2013.

Appeal from Shawnee District Court; Cheryl Rios Kingfisher and Jan W. Leuenberger, Judges.

Attorneys and Law Firms

Nancy Ogle, of Ogle Law Office, L.L.C., of Wichita, for appellant.

Jodi Litfin, assistant district attorney, Chadwick J. Taylor, district attorney, and Derek Schmidt, attorney general, for appellee.

Before PIERRON, P.J., GREEN and LEBEN, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** Reginald McKinney appeals the trial court's summary dismissal of his K.S.A. 60–1507 motion based on ineffective assistance of counsel. McKinney argues that his trial counsel was ineffective for the following reasons: (1) for failing to object to statements about McKinney's prior bad acts; and (2) for failing to request jury instructions on the lesser included offenses of aggravated battery. McKinney also maintains that his appellate counsel was ineffective for failing to raise the issue of the lesser included instructions on his direct appeal. Finding that McKinney's trial counsel and appellate counsel were not ineffective, we affirm the trial court's judgment.

In 2005, a jury found McKinney guilty of two counts of vehicular homicide, one count of aggravated battery, and one count of endangering a child. The trial court sentenced McKinney to 120 months in prison, with 24 months of postrelease supervision. McKinney filed a direct appeal, and our court affirmed his convictions in *State v. McKinney*, No. 96,829, 2007 WL 2915581 (Kan.App.2007) (unpublished opinion), *rev. denied* 286 Kan. 1183 (2008). Our court detailed the pertinent facts as follows:

> "In 2001, McKinney and Keo'Na Emanuel had a son together named Qua Dream McKinney. McKinney and Keo'Na never married. In August 2004, McKinney, Keo'Na, and Qua Dream were living together in Topeka with Pam Emanuel, Keo'Na's grandmother. On August 12, 2004, McKinney's brother, Cleon McKinney, came to Pam's house for a visit. Later that evening, Keo'Na arrived at the house to get some clothes. When Keo'Na arrived, McKinney, Cleon, and Pam were sitting on the porch. According to Pam, McKinney went inside the house and 'called Keo'Na all kinds of names.' Keo'Na and McKinney argued inside the house for 5 to 10 minutes. Pam then asked Cleon to go inside the house to tell McKinney to leave. Pam testified that Cleon and Keo'Na briefly argued outside the house, but she could not hear what they were saying.
>
> "McKinney and Keo'Na continued to argue outside Pam's house. The argument spilled over to the home of Sonya Newton, Pam's neighbor. Qua Dream was with Newton inside her house. Keo'Na came into Newton's house to get Qua Dream and McKinney followed her into the house. While inside Newton's house, McKinney told Keo'Na that he did not want her to leave with Qua Dream.
>
> "About 10:30 p.m., Keo'Na telephoned her friend, Byron Birch, to come to Newton's house to pick her up. Birch drove his Mitsubishi over to Newton's house, and he was accompanied by his friend, Walter Divers. When Birch entered Newton's living room, McKinney confronted Birch and the two men began fighting. During the encounter, McKinney yelled at Birch and threatened to kill him. Ultimately, Newton broke up the fight and asked Birch to leave.
>
> "Birch, Divers, Keo'Na, and Qua Dream left Newton's house in Birch's Mitsubishi. However, Birch had to

return because he left his cell phone at Newton's house. As Birch was leaving Newton's house for the second time, McKinney confronted Birch again, telling him that he did not want Qua Dream to leave with Birch. Birch ignored this request and drove away in his Mitsubishi.

***2** "At this point, McKinney and Cleon began to follow the Mitsubishi in Cleon's Cadillac. Cleon was driving the Cadillac and McKinney was in the front passenger seat. In the Mitsubishi, Birch was driving, Keo'Na was in the front passenger seat holding Qua Dream, and Divers was in the back seat. As the Cadillac followed the Mitsubishi, both cars began to drive faster. After awhile, Divers became concerned about Qua Dream, so he reached into the front seat and pulled the child into the back seat.

"According to Divers, both vehicles increased speed on 17th Street, with the Cadillac less than one-half car length behind the Mitsubishi. Divers testified that he felt a bump, turned around, and saw the Cadillac trying to push the Mitsubishi off the road. He further testified that he saw the right side of the Cadillac's front bumper up against the left side of the Mitsubishi's rear bumper. Birch lost control of the Mitsubishi and crashed into a house on 17th Street.

"Regina Hill and her boyfriend, Jose Moreno, were walking to a friend's house when they witnessed the accident. Hill and Moreno were getting ready to cross 17th Street when they heard cars approaching from the east on 17th Street. Seventeenth Street has three lanes, one of which is a turning lane. The speed limit is 30 m.p.h., and Hill believed that both cars were driving faster than the speed limit. Hill saw the Mitsubishi driving in the westbound lane and the Cadillac straddling the westbound lane and the turning lane. According to Hill, it appeared that the Cadillac hit the Mitsubishi, causing the Mitsubishi to swerve off the street and hit a house.

"After the Mitsubishi crashed, the Cadillac stopped and McKinney got out of the Cadillac and told Cleon to drive away. After Cleon left, McKinney went over to the Mitsubishi and checked on Qua Dream and the driver. As a result of the accident, both Birch and Keo'Na died. Divers suffered collapsed lungs, several fractures to his pelvis, a compression fracture to one of his vertebrae, a ruptured stomach, and multiple bruises. Qua Dream was not seriously injured." 2007 WL 2915581, at *1–2.

The State charged McKinney with two counts of reckless second-degree murder, one count of reckless aggravated battery, and one count of endangering a child. At McKinney's trial, the jury heard evidence about the confrontation between the parties on August 12, 2004, the crash on 17th Street, and the opinions of the accident reconstructionists. The jury also heard testimony that on July 4, 2004, McKinney had threatened Birch to stay away from Qua Dream. As stated earlier, the jury convicted McKinney of two counts of vehicular homicide, one count of reckless aggravated battery, and one count of endangering a child, and McKinney filed a direct appeal which was unsuccessful. See *McKinney*, 2007 WL 2915581.

On October 27, 2008, McKinney filed a pro se K.S.A. 60–1507 motion, arguing ineffective assistance of both trial counsel and appellate counsel. McKinney argued that his trial counsel was ineffective for the following reasons: (1) for failing to object to statements about McKinney's prior bad acts; (2) for improper handling of evidence pertaining to Birch's blood-alcohol concentration (BAC); (3) for failing to make a foundation objection to Dr. Crider's testimony; (4) for failing to investigate Birch's BAC; and (5) for failing to request jury instructions on the lesser included offenses of aggravated battery. McKinney also maintained that his appellate counsel was ineffective for failing to request or review transcripts of voir dire and opening and closing statements of counsel, for failing to raise the issue of the lesser included instructions on his direct appeal, and for failing to argue sufficiency of the evidence.

***3** On March 23, 2011, the trial court held a preliminary hearing on the motion. At the hearing, McKinney's appointed counsel submitted each issue raised in McKinney's pro se K.S.A. 60–1507 motion; however, McKinney's appointed counsel only presented argument on the failure to object to prior bad acts evidence in violation of K.S.A. 60–455. On April 12, 2011, the trial court filed a memorandum decision denying McKinney's K.S.A. 60–1507 motion.

Standard of Review

An appellate court's standard of review depends upon which of three available options the trial court employs

in resolving a K.S.A. 60–1507 motion. First, the trial court may conclude that the motion, files, and records of the case conclusively show that the movant is entitled to no relief and summarily deny the motion. Second, the trial court may conclude from the motion, files, and records that a substantial issue or issues have been raised, requiring a full evidentiary hearing in the presence of the movant. Third, the trial court may determine that the motion raises a potentially substantial issue or issues of fact, supported by the files and records, and hold a preliminary hearing after appointment of counsel to determine whether in fact the issues in the motion are substantial. *Bellamy v. State,* 285 Kan. 346, 353, 172 P.3d 10 (2007).

At a preliminary hearing the trial court may admit limited evidence and consider counsel's arguments. It must then issue findings of fact and conclusions of law as required by Supreme Court Rule 183(j) (2011 Kan. Ct. R. Annot. 259), Thus, an appellate court applies the findings of fact and conclusions of law standard of review. Under this standard, the appellate court must determine whether substantial competent evidence supports the trial court's findings of fact and whether those findings are sufficient to support the trial court's conclusions of law. The trial court's ultimate conclusions of law are reviewed de novo. *Bellamy,* 285 Kan. at 354. But when the trial court denies relief under K.S.A. 60–1507 based solely upon counsel's legal argument at a nonevidentiary hearing and the trial court's review of the files and records of the case, an appellate court is in as good a position as the trial court to consider the merits. In this instance, appellate review is de novo. See *Barr v. State,* 287 Kan. 190, 196, 196 P.3d 357 (2008).

McKinney's Trial Counsel Was Not Ineffective

On appeal, McKinney does not raise every argument for ineffective assistance of trial counsel that he raised before the trial court. Now, McKinney argues that his trial counsel was ineffective for two reasons: (1) for failing to object to statements about McKinney's prior bad acts and (2) for failing to request jury instructions on the lesser included offenses of aggravated battery.

To support a claim of ineffective assistance of counsel, based on deficient performance of counsel, it is incumbent upon a criminal defendant to prove that (1) counsel's performance was deficient, and (2) counsel's deficient performance was sufficiently serious to prejudice the defendant and deprive the defendant of a fair trial. Judicial scrutiny of counsel's performance in a claim of ineffective assistance of counsel is highly deferential and requires consideration of the totality of the evidence before the judge or jury. The reviewing court must presume that counsel's conduct fell within the broad range of reasonable professional assistance. *Harris v. State,* 288 Kan. 414, 416, 204 P.3d 557 (2009).

Failure to Object to K.S.A. 60–455 Evidence

***4** McKinney argues that his trial counsel was ineffective for failing to object under K.S.A. 60–455 to testimony regarding a threat McKinney allegedly made to one of the victims that had died in the car accident. In particular, McKinney objected to testimony that Lori Williams heard McKinney tell Birch on July 4, 2004, "that he was Qua Dream's father and he didn't want [Birch] to interfere [with Qua Dream]." Williams also heard McKinney tell Birch that "if he couldn't have [Keo'Na] no one could." McKinney maintains that this testimony was admitted in violation of his motion in limine. McKinney concedes that his trial counsel objected to the testimony based on relevance, but maintains that his counsel should have objected to the testimony as violating K.S.A. 60–455.

The State argues that the testimony does not constitute prior bad acts evidence under K.S.A. 60–455. The State further argues that even if it does constitute prior bad acts evidence, it would have been admitted to show motive, intent, or plan, which are exceptions to K.S.A. 60–455.

The trial court found that trial counsel was not ineffective for failing to object because the evidence did not qualify as K.S.A. 60–455 evidence. Additionally, the trial court stated that McKinney had failed to show that his objection would have been successful if properly made. And finally, the trial court found that McKinney failed to show how he was prejudiced by his trial counsel's failure to object.

McKinney previously raised the issue of the trial court's error in admitting this testimony in the direct appeal of his convictions. Upon review, our court held that the evidence was relevant to show motive so there was no error in admitting the evidence. *McKinney,* 2007 WL 2915581, at *10. Also on direct appeal, McKinney argued that the evidence violated K.S.A. 60–455 and that the trial court should have given a limiting instruction. Our court held that McKinney failed to preserve this issue for appeal

by failing to object during trial. *McKinney*, 2007 WL 2915581, at *10.

Although our court did not specifically address McKinney's argument that the testimony violated K.S.A. 60–455, it did find that the evidence was relevant to show McKinney's motive which is one of the exceptions to K.S.A. 60–455. Therefore, because the testimony was properly admitted to show motive, McKinney's argument that the testimony violated K.S.A. 60–455 fails.

Thus, we agree with the trial court that McKinney cannot show there is a reasonable probability that this testimony would not have been admitted even if counsel had objected to it. The failure to do useless acts does not constitute ineffective assistance of counsel. See *Chamberlain v. State*, 236 Kan. 650, Syl. ¶ 5, 694 P.2d 468 (1985). Based on this issue, there is no basis for McKinney to be allowed an evidentiary hearing to pursue this argument. See K.S.A. 60–1507(b); *Bellamy*, 285 Kan. at 353.

Failure To Request the Lesser Included Offense Instruction For Aggravated Battery

***5** Next, McKinney contends that his trial attorney was ineffective for failing to request instructions on the lesser included offenses for aggravated battery. McKinney argues that because the jury convicted him of the lesser included offense for second degree murder, that the jury also could have convicted him of the lesser included offense of aggravated battery if the jury was properly instructed.

A criminal defendant has a right to an instruction on all lesser included offenses supported by the evidence at trial so long as the evidence, when viewed in the light most favorable to the defendant's theory, would justify a verdict in accord with the defendant's theory and the evidence at trial did not exclude a theory of guilt on the lesser offense. *State v. Boorigie*, 273 Kan. 18, 40, 41 P.3d 764 (2002). An instruction on a lesser included offense is not proper if, from the evidence, the jury could not reasonably convict the defendant of the lesser offense. *State v. Robinson*, 261 Kan. 865, 883, 934 P.2d 38 (1997).

McKinney was convicted of severity level 5 aggravated battery in violation of K.S.A. 21–3414(a)(2)(A), which defines aggravated battery as "recklessly causing great bodily harm to another person or disfigurement of another person." McKinney contends that an instruction on K.S.A. 21–3414(a)(1)(C), a severity level 7 person felony, and K.S.A. 21–3414(a)(2)(B), a severity level 8 person felony should have been given. Severity level 7 aggravated battery is defined as "intentionally causing physical contact with another person when done in a rude, insulting or angry manner with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted." K.S.A. 21–3414(a)(1)(C). Severity level 8 reckless aggravated battery is defined as "recklessly causing bodily harm to another person with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted." K.S.A. 21–3414(a)(2)(B).

Our Supreme Court has held that the aggravated battery offenses described in the subsections of K.S.A. 21–3414 are the same crime, varying only in type and degree. Consequently, any offense described in K.S.A. 21–3414 bearing a lower severity level than another offense described in that section constitutes a lesser included offense of the higher severity level offense. See K.S.A. 21–3107(2)(a); *State v. McCarley*, 287 Kan. 167, 177–78, 195 P.3d 230 (2008).

A primary distinction between the severity level 5 aggravated battery under K.S.A. 21–3414(a)(2)(A) that was charged and the two lesser included offenses that McKinney argues should have been instructed on is the infliction of great bodily harm.

> "In defining great bodily harm, the word great distinguishes the bodily harm necessary for aggravated battery from slight, trivial, minor, or moderate harm, and as such it does not include mere bruises, which are likely to be sustained in simple battery. Whether the injury or harm is great or not is generally a question of fact for the jury." *State v. Kelly*, 262 Kan. 755, Syl. ¶ 2, 942 P.2d 579 (1997).

***6** The trial court held that it was not error for McKinney's counsel to not request a lesser included instruction based on the facts of this case. The trial court found that a reasonable jury would examine the facts and find that great bodily harm occurred and would never find that mere bodily harm occurred.

In this case, the conviction for aggravated battery was based on injuries sustained by Divers. Divers suffered a head injury, collapsed lungs, two broken ribs, a cracked pelvis, a ruptured stomach, and a dislocated spine. As a

result of these injuries, Divers had to undergo surgery and remained in the hospital for 9 days. Divers also testified that he now has to use a cane because of the injuries he sustained in the accident. Applying the definition of great bodily harm set forth above, we find that the harm caused by the car accident goes far beyond mere bruising and cannot be described as slight, trivial, minor, or even moderate. Thus, the evidence presented fully supports a finding of great bodily harm under K.S.A. 21–3414(a)(2)(A).

Just the fact that the greater offense was supported by the evidence does not answer the question of whether the lesser offense should have been given. Generally, whether a victim's injury constitutes great bodily harm is a question of fact for the jury to decide. *State v. Moore*, 271 Kan. 416, 419, 23 P.3d 815 (2001). But, if the evidence shows without question that the victim suffered great bodily harm and nothing less, then there was no error in taking this determination away from the jury. See *Moore*, 271 Kan. at 420–21.

Based on the extensive injuries Divers suffered in the accident, we find that Divers suffered great bodily harm and nothing less. Therefore, it was not error for McKinney's trial attorney not to request a lesser included instruction because the evidence did not support such an instruction. Moreover, even if the lesser included instruction should have been requested, McKinney has failed to show how he was prejudiced by the lack of instruction. McKinney offers no support to show that had the request for the lesser included instruction been made that the request would have been granted. Therefore, because McKinney has failed to show how he was prejudiced by his trial counsel's failure to request the instructions, his argument fails.

McKinney's Appellate Counsel Was Not Ineffective

McKinney mainly argues that his appellate counsel was ineffective for failing to raise the issue of the lesser included instructions in his direct appeal. The State contends that this issue should be deemed waived because McKinney failed to brief this issue.

Indeed, we note that McKinney incidentally raises this issue in his brief, and he fails to cite any authority or present any argument on this issue. An issue not briefed by the appellant is deemed waived and abandoned. *State v. McCaslin*, 291 Kan. 697, 709, 245 P.3d 1030 (2011). Thus, McKinney's argument fails.

***7** Even if we were to consider McKinney's argument, we would reject it. As stated earlier, the evidence presented on the aggravated battery charge was that Divers suffered a head injury, collapsed lungs, two broken ribs, a cracked pelvis, a ruptured stomach, and a dislocated spine as a result of the accident. Based on this evidence, it is apparent that Divers suffered great bodily harm and not just mere or minor bodily harm. An instruction on a lesser included offense is not proper if, from the evidence, the jury could not reasonably convict the defendant of the lesser offense. See *Moore*, 271 Kan. at 421; *Robinson*, 261 Kan. at 883. Thus, because no reasonable jury would have convicted McKinney of mere bodily harm after hearing the extent of Divers' injuries, appellate counsel was not ineffective for failing to raise this argument on appeal.

Was There Cumulative Error?

Finally, McKinney argues that the cumulative effect of trial and appellate errors entitle him to an evidentiary hearing on his K.SA. 60–1507 motion. McKinney fails to cite any authority or present any argument on this issue; thus, we find that McKinney abandoned this issue. An issue not briefed by the appellant is deemed waived and abandoned. *McCaslin*, 291 Kan. at 709.

Affirmed.

All Citations

281 P.3d 598 (Table), 2012 WL 3171823

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.

Douglas ALDRICH, Appellee,
v.
STATE of Kansas, Appellant.

No. 109,326.
|
April 25, 2014.
|
Review Denied Aug. 28, 2014.

Appeal from Saline District Court; Janice D. Russell, Judge.

Attorneys and Law Firms

Ellen Hurst Mitchell, county attorney, and Derek Schmidt, attorney general, for appellant.

Gregory D. Bell, of Forker Suter LLC, of Hutchinson, for appellee.

Before LEBEN, P.J., McANANY and POWELL, JJ.

MEMORANDUM OPINION

LEBEN, J.

***1** The State appeals a district court order granting Douglas Aldrich a new trial after his conviction for second-degree murder. The district court determined that Aldrich's attorney had provided inadequate representation at his trial and that this sufficiently undermined confidence in the result to order a new trial.

The State claims on appeal that Aldrich's trial counsel simply made strategic choices that can't be challenged. But the district court concluded that since Aldrich's primary defense was self-defense, Aldrich's attorney should have recommended that Aldrich testify at trial but instead strongly recommended the opposite, and that this likely affected the trial's outcome. An experienced defense lawyer testified that Aldrich's attorney should have recommended that Aldrich testify and explained why this was so important in his case.

We have carefully reviewed the record and the district court's ruling. Its factual findings are supported by substantial evidence and its legal conclusions are sound. We therefore affirm its judgment that Aldrich's conviction be set aside and a new trial ordered.

FACTUAL AND PROCEDURAL BACKGROUND

Aldrich was convicted of second-degree murder in a jury trial held in October 2003; the conviction was affirmed on direct appeal. See *State v. Aldrich*, No. 92,364, 2006 WL 538267 (Kan.App.) (unpublished opinion), *rev. denied* 282 Kan. 791 (2006). After conviction, defendants may bring a habeas corpus action (through a motion filed under K.S.A. 60–1507) to present a claim that their trial attorney provided inadequate representation. Aldrich filed such a claim in September 2007.

The district court summarily denied Aldrich's K.S.A. 60–1507 motion, concluding that it hadn't been filed within time limits set by statute and that the claims had no merit anyway. Our court affirmed that decision in *Aldrich v. State*, No. 100,013, 2009 WL 1858249 (Kan.App.2009) (unpublished opinion), *rev'd* May 20, 2010, concluding that although Aldrich's motion was timely filed, it had no merit. But the Kansas Supreme Court granted review and determined that Aldrich was entitled to an evidentiary hearing.

After hearing evidence, the district court concluded that Aldrich's trial attorney had not provided adequate representation to him, which affected Aldrich's trial. Accordingly, the district court ordered a new trial. The State appealed, and the case is now once again before the Court of Appeals.

Our court summarized the underlying facts of the case—and some of the procedural history—in our 2009 opinion affirming the district court's denial of habeas relief:

> "In February 2003, the State charged [Douglas] Aldrich with one count of murder in the first degree, pursuant to K.S.A. 21–3401(a), an off-grid person felony.

"On February 8, 2003, Aldrich entered the Red Kitten Bar in Salina, Kansas. Aldrich had previously been drinking at another bar. Widely varying witness accounts established that Aldrich drank between 2–8 double shots of tequila and one beer. One witness testified that Aldrich became more intoxicated as the day progressed; however, another witness testified that Aldrich never appeared intoxicated. His behavior was described as obnoxious and loud.

***2** "Aldrich engaged in a minor confrontation with another bar patron, Pat Hanson. Aldrich's behavior also caused irritation among the bar's other patrons and employees. Despite his antagonism, none of the patrons ever asked bar employees to escort Aldrich off the premises. Jerald Bird was the bar's unofficial bouncer.

"At some point during the afternoon, Aldrich asked Bird to come with him outside the bar. A witness testified that Bird and Aldrich were arguing outside the bar. Bird told Aldrich not to reenter the bar because he was too intoxicated and upsetting the other patrons. The witness also testified that both men 'had their fists doubled up like they were going to square off at each other and hit each other, but they were quite a ways away from each other.'

"Bird returned to the bar while Aldrich remained outside. A few minutes later, Aldrich reentered the bar and asked for his sunglasses. Aldrich was given his sunglasses, and Bird demanded that Aldrich leave the bar. Eventually, Bird pushed Aldrich out the front door of the bar. Witnesses saw the two men wrestling around and saw Aldrich lunge at Bird. Bird turned around with blood spurting from his chest. One witness saw Aldrich holding a knife with blood on it. Aldrich fled. Hanson chased Aldrich to get his license plate number.

"Prior to the altercation, bar patrons had seen Aldrich with a knife. However, their accounts varied as to the description of the knife. Although various witnesses testified that Bird had a knife on his person on the day of the incident, all of the witnesses testified they never saw Bird remove his knife and attempt to use it. No knife was left at the crime scene. An inventory of Bird's personal possessions at the hospital evidenced two knives.

"Bird had a horizontal laceration of 1–1/2 inches near the center of his chest. Although Bird had a pulse when he entered the ambulance, he lost all vital signs before reaching the hospital. At the hospital, Dr. Ted Macy performed a thoractomy on Bird to treat his injuries. Despite Dr. Macy's efforts to repair the hole in Bird's heart and to defibrillate the heart to continue its beating, Bird was unable to recover from his wounds. Dr. Trent Davis, a neurologist conducted tests that showed Bird had no spontaneous brain activity and had suffered 'an anoxic brain injury from which there was no chance for recovery.' Bird's life support was terminated on February 14, 2003, and he died shortly thereafter. After conducting Bird's autopsy, Forensic Pathologist Erik Mitchell testified that Bird died 'as a consequence of a stab wound to the heart. Specifically, the mechanism or how it happened [was] that by blood loss [he] ended up with loss of oxygen to his brain.'

"Aldrich was eventually located and arrested for Bird's murder. The case proceeded to jury trial. At the close of deliberations, the jury found Aldrich guilty of the lesser charge of second-degree murder, acquitting him of the original charge of first-degree murder. After denying Aldrich's posttrial motions, the district court sentenced him to 618 months' incarceration, the aggravated presumptive sentence based upon the severity level 1 of the crime and Aldrich's criminal history score of B.

***3** "Aldrich timely appealed his conviction, this court affirmed, and on April 3, 2006, Aldrich filed a petition for review with the Kansas Supreme Court. The petition was denied on September 19, 2006. *State v. Aldrich,* No. 92,364, unpublished opinion filed March 3, 2006, *rev. denied* 282 Kan. 791 (2006) (*Aldrich I*).

"On September 20, 2007, Aldrich filed a K.S.A. 60–1507 motion through retained counsel. Specifically, Aidrich alleged ineffective assistance of trial counsel, improper admission of evidence, incomplete jury instructions, and that he had been denied the opportunity to present his theory of defense.

"The district court found that Aidrich had failed to timely file the motion because it had been filed more than 1 year after the Kansas Supreme Court's denial of Aldrich's petition for review. After reviewing the merits of the motion, the court summarily denied it, finding that the majority of Aldrich's allegations had been raised on direct appeal and that counsel had not been

ineffective, in addition to the motion being untimely." 2009 WL 1858249, at *1–2.

Aidrich appealed, challenging the district court's finding that his motion was untimely and that his counsel, Mitchell Christians, had not been ineffective. Our court found that the district court failed to account for the 3–day mailbox rule, which made Aldrich's K .S.A. 60–1507 motion timely. 2009 WL 1858249, at *3.

After concluding that the motion was timely, our court addressed Aldrich's ineffective-assistance-of-counsel arguments. We held that Aldrich's counsel, Christians, was not ineffective. Specifically, we concluded that Christians was not ineffective for failing to: pursue a causation defense; request a voluntary intoxication instruction; conduct a thorough investigation of the knife found on the victim; and expose inconsistencies between various State witnesses. 2009 WL 1858249, at *5–8.

Aidrich petitioned our Supreme Court for review. Our Supreme Court summarily reversed this court's decision and remanded the matter to us with directions to remand to the district court for an evidentiary hearing.

After that evidentiary hearing, the district court granted Aldrich's motion, reversed his conviction, and ordered a new trial. In a 13–page written opinion, the district court held that the advice Christians gave Aldrich about not testifying fell below the objective standard of reasonableness. The district court also concluded that Christians had failed to spend sufficient time investigating the case before trial and that this failure to investigate led to numerous trial errors.

The State has appealed the district court's grant of Aldrich's K.S.A. 60–1507 motion, arguing that Aldrich received adequate representation from his attorney.

THE LEGAL STANDARDS APPLICABLE TO THIS CASE

A defendant's burden to show ineffective assistance of counsel has two parts. First, he must show that the attorney's work was below minimum standards and, thus, was constitutionally deficient. Second, he must show that the attorney's substandard work prejudiced the defense. That requires a showing of reasonable probability that the result of the trial would have been different but for the attorney's inadequate work. *Mattox v. State*, 293 Kan. 723, Syl. ¶ 1, 267 P.3d 746 (2011); *Harris v. State*, 288 Kan. 414, Syl. ¶¶ 2–3, 204 P.3d 557 (2009). A reasonable probability in this context is one sufficient to undermine confidence in the proceeding's outcome. *State v. Bricker*, 292 Kan. 239, 246, 252 P.3d 118 (2011).

***4** In considering whether the attorney's work was substandard, we must avoid hindsight bias, in which an answer seems obvious after the fact but may not have been so when the situation was encountered. Thus a reviewing court must be "highly deferential" in scrutinizing attorney conduct so as to "eliminate the distorting effects of hindsight." *Moncla v. State*, 285 Kan. 826, 832, 176 P.3d 954 (2008). This deferential assessment is made "as of the time of counsel's conduct" and in light of "prevailing professional norms" among counsel. *Strickland v. Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674, *reh. denied* 467 U.S. 1267 (1984).

On appeal, where the district court has made factual findings and legal conclusions after a full evidentiary hearing, we review the factual findings to see whether substantial evidence supports them and whether they are sufficient to support the district court's legal conclusions. We then review the ultimate legal conclusions without any required deference to the district court's decision. *Bellamy v. State*, 285 Kan. 346, 354–55, 172 P.3d 10 (2007).

ANALYSIS

The District Court Did Not Err in Ordering a New Trial.

After a 2–day evidentiary hearing, the district court held that Aldrich's trial counsel, Mitchell Christians, had provided inadequate representation in four respects: (1) Christians spent too little time with Aldrich to determine what kind of witness Aldrich would be and whether he should take the stand; (2) Christians' advice not to take the stand in support of his self-defense claim was objectively unreasonable; (3) Christians spent too little time with Aldrich to determine whether Aldrich had a viable voluntary-intoxication defense; and (4) Christians' trial preparation was "slipshod" as there was no indication that he had reviewed the information that his investigator had gathered to support Aldrich's self-defense theory. The district court ordered a new trial after it found that counsel's errors had affected the jury trial's outcome.

The State has appealed and makes several allegations of error. As a preliminary matter, the State argues that Aldrich's allegations in his K.S.A. 60–1507 motion were too conclusory to warrant a hearing and that some of the specific allegations the district court upheld weren't in the motion at all. As to the substance of the district court's rulings, the State argues:

- That the evidence wasn't sufficient to conclude that Christians spent too little time with Aldrich in preparing for trial;
- That Christians' advice to Aldrich not to testify was a reasonable and strategic choice;
- That Christians did consider a voluntary-intoxication defense but chose to pursue self-defense as a matter of trial strategy; and
- That the district court applied an incorrect legal standard in deciding whether Aldrich had been prejudiced by his attorney's failures.

We have considered each of these arguments, and we have found none of them persuasive for the reasons explained below.

The Adequacy of Aldrich's K.S.A. 60–1507 Motion

***5** The State argues that two of Aldrich's claims that were accepted by the district court were not sufficiently alleged in the K.S.A. 60–1507 motion: (1) that Christians spent too little time with Aldrich in preparing for trial and (2) that Christians' advice that Aldrich shouldn't testify was unreasonable. We begin our analysis with the statements Aldrich made in his motion that relate to these claims:

- Aldrich claimed that his "counsel failed to properly consult with, or advise his client in such a manner as to ensure Mr. Aldrich could properly assist in his own defense."
- Aldrich claimed that his "counsel failed to complete a full and thorough investigation of the events which resulted in the death of Mr. Bird and the charging of Mr. Aldrich for murder."
- Aldrich claimed that his "counsel failed to introduce adequate evidence which may have supported defenses which were available to Mr. Aldrich. The failures ... include ... the failure of counsel to introduce evidence of the degree of intoxication of the defendant at the time of the alleged stabbing."
- Aldrich claimed that his "counsel failed to protect the defendant's rights ... to present a defense on his own behalf...."

Aldrich also identified various witnesses who could testify about these matters, including Christians and Aldrich.

In considering the State's argument, we find it significant that this is not the first time the adequacy of Aldrich's K.S.A. 60–1507 motion has been before the appellate courts: The State also raised arguments about the adequacy of the motion's allegations in the earlier appeal. At that time, Aldrich argued in his appellate brief that Christians had failed by not advising the defendant sufficiently to make sure Aldrich could assist in his own defense; the State said that allegation was "too general to address," citing the general rule against conclusory allegations. Our court found one allegation (a failure to pursue a defense other than self-defense) too conclusory to justify an evidentiary hearing, 2009 WL 1858249, at *5, but generally found that Aldrich simply hadn't set out claims that merited an evidentiary hearing. 2009 WL 1858249, at *5–8.

Of course, our ruling was summarily reversed by the Kansas Supreme Court, which ordered an evidentiary hearing. Aldrich was thus entitled to an evidentiary hearing on remand; lower courts must respect the decision of our Supreme Court, which became the mandate on appeal when our court (as ordered by the Supreme Court) sent the case back for an evidentiary hearing. Whether called the mandate rule or the law-of-the-case rule, the district court was required to allow Aldrich to present evidence on remand. See K.S.A. 60–2106; *State v. Collier*, 263 Kan. 629, 634, 952 P.2d 1326 (1998). Our Supreme Court has noted that the district court is expected to implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances under which it was issued. 263 Kan. at 636 (citing *Casey v. Planned Parenthood of Southeastern Pennsylvania*, 14 F.3d 848, 857 [3d Cir.1994]).

***6** In some cases, the law-of-the-case doctrine may allow further consideration of an issue not fully raised previously. For example, a court retains the power to review *its own* rulings and to correct errors until there's a final judgment. But even in that circumstance, the court

has the discretion not to revisit a matter already decided. See *Bichelmeyer Meats v. Atlantic Ins. Co.*, 30 Kan.App.2d 458, 462, 42 P.3d 1191 (2001).

Here, any flexibility that the district court may have had to revisit the sufficiency of Aldrich's K.S.A. 60–1507 motion was limited by the ruling already made by our Supreme Court that an evidentiary hearing was warranted. To the extent that it was a discretionary call whether to give further consideration to the sufficiency of the allegations the State now challenges, we believe the district court reasonably exercised its discretion by not revisiting the issue. The district court on remand heard and denied motions by the State that argued Aldrich's allegations were too vague, and the district court required Aldrich's counsel to provide a detailed statement of the claims he would pursue at trial; the State has not suggested that this statement was in any way inadequate.

We also note that in general terms, the K.S.A. 60–1507 motion hit the same subjects as the more specific allegations presented in that pretrial statement and in the evidence. Aldrich claimed in the motion that his attorney failed to properly consult with or advise him so that he could assist in his own defense. Obviously, one very important way any defendant may want to contribute to his own defense is by testifying-a decision ultimately left to the defendant. Aldrich also claimed in the motion that his attorney failed to make a thorough investigation of the case.

In context, and especially as supplemented by Aldrich's attorney at the district court's direction on remand, the State had adequate notice of the issues that would be heard. Given the unique procedural posture of this case, we find the allegations made in Aldrich's K.S.A. 60–1507 motion sufficient to support the claims presented at trial.

Time Spent

Next, the State argues that there was insufficient evidence to support the district court's finding that Christians failed to spend enough time with Aldrich to know whether Aldrich would make a good witness. The district court found that available records indicated that Christians spent less than 3 hours with his client during an extended time period before trial:

> "Over the more than 200 days Aldrich was in custody before trial, Christians only came to meet with him 11 times, and the average length of these visits was approximately 30 minutes. The actual jail records that show a log of visitors for each inmate only show 8 visits from Christians, but Aldrich testified that he thought there were 11 visits.... [T]he official jail record shows 7 visits totaling 2.76 hours, plus a visit on the day before trial for which the elapsed time was not recorded. Christians did not keep any sort of time records in his file, so there is nothing that shows he spent more than 2.76 hours with Aldrich before trial."

***7** The State contests the district court's finding that Christians only spent 2.76 hours with Aldrich before trial. The State argues that this calculation did not include phone time or time spent meeting at the courthouse. The State also argues that there is no bright-line rule as to the amount of time trial counsel should spend with a client.

But the district court didn't announce a bright-line rule; it simply concluded that the time Aldrich spent wasn't enough for a case with a first-degree-murder charge:

> "The court is not prepared to say how much time must be spent preparing for a first degree murder case, or how much time must be spent with a defendant facing a first degree murder charge, but the court is certainly able to say that 2 hours and 57 minutes is not enough.
>
> "The court acknowledges the jail log only shows how much time Christians spent visiting Aldrich in jail. The jail log does not reflect how much time Christians spent doing research, interviewing witnesses, etc. But his file contains no notes and no time sheets, so the court is left to assume his overall preparation other [*sic*] was as slipshod as was his preparation of his client for trial....
>
> "The court agrees with Aldrich: Christians' investment of time on the case was not commensurate with the seriousness of the charges facing Aldrich."

The evidence supports the district court's overall conclusion. Aldrich testified that he thought Christians had met with him 11 times before his trial. The jail logs

that were admitted into evidence showed that Christians had visited Aldrich eight times for a total of 2.76 hours.

Some testimony suggested that the jail logs may not have been completely accurate. Lisa Graham, an employee of the jail, testified that officers do not always log attorney visits. In fact, she said she knew of one time Christians had visited Aldrich that was not logged.

But even if the jail logs had some errors and didn't include phone conversations, the evidence supports the district court's overall conclusion that the time Christians invested in this case was not commensurate with the seriousness of the charges against Aldrich. Additionally, because the trial court, not our court, makes the factual findings and weighs the evidence, we must "accept as true the evidence and all inferences drawn from the evidence that tend to support the findings of the district judge." *Wilkins v. State*, 286 Kan. 971, 981, 190 P.3d 957 (2008). The evidence was sufficient to support the district court's findings.

The State also argues that caselaw does not consider lack of preparation time itself to be ineffective assistance of counsel but requires that it be tied to specific trial errors. See *State v. Cheatham*, 296 Kan. 417, 433–34, 292 P.3d 318 (2013) (holding that inadequate time spent preparing for trial must be combined with actual errors that prejudiced the defense to constitute ineffective assistance of counsel). But that is exactly what the district court did in this case: The district court attributed the trial errors that occurred to the lack of time that Christians spent investigating the case.

***8** For example, the district court tied Christians' inadequate time investment to his substantive failures to realize that Aldrich would make a good witness and provide key support to the self-defense theory of the case:

> "The fundamental flaw in the way that Christians represented Aldrich was that he spent so little time with Aldrich in the months, weeks and days leading up to trial. Had he spent sufficient time with his client, he might have realized Aldrich had a legitimate chance to prove self-defense. Had he spent more time with Aldrich, he might have realized Aldrich's testimony was the only testimony there could possibly be about what happened outside the bar. Had he spent more time with Aldrich, he might have realized Aldrich is intelligent, articulate and well-spoken and would make a good witness.... But Christians spent only three hours with Aldrich over a span of six months, so he had no opportunity to evaluate how effective Aldrich would be as a witness, and he had no opportunity to evaluate the facts enough to realize that Aldrich would be the only witness who could possibly testify about what happened outside the bar."

The district court also connected Christians' lack of preparation to his failure to present the testimony of one of the emergency-room nurses who had said she believed she had taken two knives from the victim's pocket. The district judge explained how this evidence could have been used to prove that the victim drew his knife in the confrontation:

> "It is true the file does reflect that an investigator for the Public Defender's office did some investigation and interviewed some witnesses, but there is no indication Christians ever looked over the information that the investigator gathered. In fact, it would appear he did not, because the investigator uncovered some evidence from one of the emergency room nurses that indicated Bird's knife was in his jeans pocket, rather than fastened in the sheath where he normally carried it, which may have been a fact that could have been used to prove Bird drew his knife in the confrontation."

The nurse's statement about the knives was important because the only other evidence that supported Aldrich's argument that the victim drew his knife in the confrontation was Aldrich's own statement to officers.

We recognize that although the district court concluded that "there is no indication Christians ever looked over"

the investigator's information, the investigator testified that he shared his notes and discussed his interviews with Christians, Even so, testimony supports the district court's conclusion that Christians did not understand the importance of the nurse's statement due to his inadequate investigation. Given Christians' unexplained failure to use this important evidence, the district court could find that Christians did not review the information before trial. In doing so, the district court tied Christians' failure to spend time on the case with specific trial errors.

Self-defense

***9** The district court concluded that Christians' advice that Aldrich not testify was objectively unreasonable and attributed the advice to the fact that Christians failed to spend sufficient time investigating the case to recognize that Aldrich needed to testify. The district court acknowledged that trial tactics are given a high degree of deference but then stated that "decisions about trial tactics that are made without a reasonable factual investigation do not merit the same deference." See *Wilkins*, 286 Kan. at 982 (noting that when defense counsel's decision is based on inadequate investigation, counsel's performance is not protected by the trial-strategy rule).

The State contends that the district court erred in finding that Christians was ineffective for advising Aldrich to not testify. The State maintains that Christians presented sufficient evidence of self-defense. It further contends that it was trial strategy for Christians to not have Aldrich testify and that trial strategy is virtually unchallengeable. See *State v. Gleason*, 277 Kan. 624, 644, 88 P.3d 218 (2004).

Aldrich's principal argument at the evidentiary hearing was that Christians' performance—in failing to call Aldrich as a witness to support his self-defense theory—was not only deficient but also prejudicial to his defense, which deprived him of a fair trial. Aldrich maintained that Christians was ineffective because he failed to spend sufficient time investigating the case before trial. The district court agreed with Aldrich and concluded that Christians was ineffective.

Aldrich testified to what he would have said had he been called to testify. Aldrich testified that when he re-entered the bar to get his sunglasses, the victim, Jerry Bird, grabbed Aldrich by the shoulders, spun him around, and threw him out the door. In doing so, Bird slammed Aldrich's head into the corner of the door frame, causing a cut above his eye. Bird then threw Aldrich face first on the ground in the parking lot. Aldrich testified that he was mad and afraid for his safety because he was drunk and did not know anyone else at this bar. Aldrich further testified that as he looked up he saw Bird standing over him in a "[v]ery, very aggressive posture" with a knife in his right hand. Aldrich said he got up and pulled his penknife from his pocket. Aldrich testified that Bird then reached with his left hand and grabbed Aldrich, and when he did, Bird walked into Aldrich's knife. Aldrich testified that he never lunged at Bird and that he did not intend to stab Bird. Aldrich said that when he drew his knife he believed that he was acting in self-defense. Aldrich acknowledged that Bird did not lunge at Aldrich with his knife but said that Bird did reach to grab him.

Aldrich also discussed his conversations with Christians. Aldrich said that he made it clear to Christians that he wanted to testify. Aldrich felt that he needed to testify to give his side of the story. Aldrich testified that Christians was adamant that Aldrich was not going to testify and that it was Christians' decision because he was the one who was educated in the law. Aldrich testified that Christians never told him that he had a right to testify and that Christians continuously told Aldrich that he would decide whether Aldrich was going to testify. Aldrich said Christians told him that he did not want Aldrich to testify because he did not want Aldrich " 'sitting on the witness stand massaging [his] answers in front of the jury.' "

***10** Alice Craig White testified as an expert witness for Aldrich. White is well qualified: She is the supervising attorney at the Paul E. Wilson Project for Innocence and Post–Conviction Remedies and also a trial-advocacy professor at the University of Kansas School of Law. She testified that, in her opinion, Aldrich did not receive effective assistance of counsel.

White testified that it was important for Aldrich to testify in this case to support his claim of self-defense. White emphasized that Aldrich was the only witness to the altercation outside the bar:

> "In this case in particular without the defendant's testimony there's very little evidence [to support a self-defense argument]. I mean there's absolutely no way they could meet the burden required under a self-

> defense test. The biggest issue in this case is we have the altercations or the conversations and arguments that were going on within the bar, and there were witnesses to those.... Once they leave the bar the only witness[es] to the events that occurred outside were Mr. Aldrich and the victim.... And whether this was a murder case or just an aggravated battery case we would still be—it would still be necessary for Mr. Aldrich to provide information[:] one, as to his reasonable belief, and, two, ... he's the only one that can provide the facts necessary to support that reasonable belief. Because there were no other witnesses to this altercation outside[,] he's the only one to provide it. Without his testimony, ... there's nothing to meet the burden of self-defense."

Regarding Christians' advice that Aldrich not testify, White testified that an attorney meeting prevailing standards would have advised Aldrich to take the stand in his own defense:

> "Based on my experience, I think your only option as defense counsel in this case, and I think what the professional norms would require is an understanding of the law that would have you advise your client that he has to testify. Because there's absolutely no way to meet the defense of self-defense without his testimony. You would have to advise—if you were going to meet your professional norms, you would have to advise your client 'Without your testimony I cannot meet this burden of self-defense. Because we have to show that you had a reasonable belief. And without you telling us that, or telling the jury, there's no evidence to support our defense.' "

Christians also testified. He said that self-defense was the primary theory of defense. Christians testified that he and Aldrich discussed whether Aldrich should testify, that Aldrich was adamant about testifying, and that Christians advised him against it. Christians said he felt the risks outweighed the benefits since other evidence of self-defense would be presented:

> "I was actually discouraging him from testifying simply because, simply because in my opinion we were going to have the bulk of his claim of self-defense already presented to the jury and he was not going to be subjected to cross-examination then.
>
> ***11** ....
>
> "He wanted to testify, I thought there were greater risks in having him testify, again, primarily the question of the knife, I thought was going to be very damaging. And, so, my advice to him was that there was more harm than good to be done by his testifying and he chose to agree with my advice."

Christians wanted to get self-defense before the jury without subjecting Aldrich to cross-examination, which he worried would lead to damaging testimony about the knife. Christians testified that Aldrich reluctantly agreed that he would not testify. Christians said that Aldrich's self-defense theory came in through other witnesses' testimony, but he conceded that this testimony did not directly establish whether Aldrich believed he was in imminent danger of great bodily harm.

Whether Aldrich should have testified must be considered against the legal standards for self-defense. Under K.S.A. 21–3211(b), self-defense requires that a defendant reasonably believe that deadly force is necessary to prevent imminent death or great bodily harm to himself or herself. A defendant is entitled to a self-defense instruction if there is any evidence to support it, even though the evidence consists solely of the defendant's testimony. *State v. Hill,* 242 Kan. 68, 78, 744 P.2d 1228 (1987). In order to instruct a jury on self-defense, there must be some showing of an imminent threat or a confrontational circumstance involving an overt act by an aggressor close to the time of the killing.

Ultimately, our courts have interpreted K.S.A. 21–3211(b) to require two showings. First, a subjective standard is applied to determine whether the defendant sincerely and honestly believed it was necessary to kill in order to defend himself or herself. Second, an objective standard is applied to determine whether the defendant's belief was reasonable—specifically, whether a reasonable person in the defendant's circumstances would have

perceived self-defense as necessary. *State v. Stewart*, 243 Kan. 639, 649, 763 P.2d 572 (1988).

In this case, there was no direct evidence to support the first part of the self-defense test because there was no evidence that Aldrich sincerely and honestly believed that it was necessary to kill Bird in order to defend himself. Although other witnesses did testify about the statements Aldrich had made to them claiming that this was self-defense, none of those statements came directly from Aldrich, and the testimony failed to show that Aldrich honestly believed that he had to kill Bird in order to defend himself.

Other witnesses testified that, for example, Aldrich had claimed over and over that he had acted in self-defense, Aldrich had said he didn't mean to hurt anyone, and Aldrich had said that the only reason he had stabbed Bird was because Bird had pulled out a large Bowie knife on him first. But Aldrich was the only person who could testify about the confrontation with Bird and explain whether he honestly feared for his life and believed that it was necessary to kill the victim in order to defend himself.

***12** The State emphasized in its closing argument the defense's failure to prove that Aldrich feared for his life:

> "There's no evidence that he feared for his life. There's no evidence that he thought he was going to die. There's no evidence that the defendant lunged, or that Jerry Bird even lunged at him with the knife. The only evidence you have are a couple of self-serving conclusory statements made by the defendant. 'Self-defense.' 'He pulled a knife,' 'Self-defense.' There's no evidence that Jerry Bird pulled his knife that day. In fact, when he arrived at the hospital it was still in a sealed pouch, closed in his pouch. And even if you listen to the defendant's statements, and you find them to be the truth, if you find that Jerry Bird pulled his knife on the defendant, there's no evidence that Jerry Bird came after the defendant with that knife. That he lunged at him, that he attacked him in any way. The only evidence you have are a couple of conclusory self-serving statements. He even uses the right terms. 'Self-defense.' 'Self-defense.' 'He pulled a knife.' 'Self-defense.' There is no evidence what he was thinking at that time. There is no way he could honestly believe circumstances existed which justified deadly force."

The district judge who sentenced Aldrich also emphasized the failure of the self-defense argument when he rejected a departure to a lesser sentence:

> "The other suggestion of, and I do stress that it was but a suggestion, of self-defense, is simply not borne out by any interpretation of the evidence admitted in this case. To buy into a theory of self-defense, when first of all there was to stab somebody and kill them in response to being shoved out the door of a bar is, would be, as a matter of law, excessive force. So, it would be an aggravating factor rather than a mitigating factor.
>
> "Secondly, the, the suggestion, which came in a back door by the policeman's testimony and to which there is no direct evidence that Mr. Bird allegedly drew a knife prior to Mr. Aldrich drawing his knife and stabbing Mr. Bird simply flies in the face of the physical realities of the evidence produced in this case. The surveillance tape was less than thirty seconds, or approximately thirty seconds, from the time that the altercation started, shoving Mr. Aldrich out the door until the time Mr. Bird stumbled back into the bar mortally wounded. Now, it's just a little bit ludicrous, I think, to suggest that Mr. Bird, after they had the slight altercation in the foyer area there, then reached in his pocket, unfolded his knife, got stabbed by Mr. Aldrich in self-defense, then calmly folded his knife back up and put it in his pocket and stumbled back in the bar and died in the course of thirty seconds. That just—the only knives that were found on Mr. Bird were folded up in his pockets at the hospital. This—there is no substantial or compelling, no substantial evidence to support this theory. It flies in the face of reality and there certainly is no substantial or compelling reason established by those arguments to depart from the legislatively-mandated sentence."

***13** In its brief on the present appeal, the State argues that sufficient evidence supported Aldrich's self-defense

theory and the position that Christians was not ineffective. In making this argument, the State ignores its closing argument at trial and does not mention the two-part test for self-defense, which requires both a subjective and an objective belief that it was necessary to use lethal force in self-defense. See *Stewart*, 243 Kan. at 649. Here, although there was a showing of a confrontational circumstance, there was little evidence, even from the circumstances, that a reasonable person in Aldrich's circumstances would have perceived self-defense as necessary. Moreover, there was absolutely no evidence that Aldrich had a sincere and honest subjective belief that it was necessary to kill Bird to defend himself. Consequently, the evidence presented to the jury was insufficient to support the defense. Without any direct evidence to support self-defense, the district court could properly determine, based on the facts before it and White's opinion testimony, that Christians' advice to Aldrich that he not testify fell below the objective standard of reasonableness.

Voluntary Intoxication

Next, the State contends that the district court erred in finding that Christians failed to spend sufficient time with Aldrich to determine whether Aldrich had a good voluntary-intoxication defense. The State again argues that this was a decision of trial strategy and that it is unchallengeable.

As we have already discussed, Aldrich and his counsel relied on a theory of self-defense: Aldrich agreed he had stabbed Bird but argued that he was justified in his actions because he was defending his own life. Had the jury accepted this version of things, Aldrich would have been found not guilty.

There also was evidence at trial that Aldrich was quite intoxicated at the time of the offense. That might have supported another defense—voluntary intoxication—but Aldrich and his attorney did not request a jury instruction on voluntary intoxication as a defense. Nor did the district court, on its own initiative, give such an instruction.

Voluntary intoxication may be a defense to the extent that the consumption of drugs or alcohol prevents a defendant from forming any specific intent required to commit a particular crime. *State v. Gonzales*, 253 Kan. 22, 24, 853 P.2d 644 (1993). Essentially, under this defense the defendant admits to committing the criminal acts but contends he or she was so intoxicated that the conduct was undertaken without the required criminal intent. First- and second-degree murder are specific-intent crimes. *State v. Ellmaker*, 289 Kan. 1132, 1142, 221 P.3d 1105 (2009), *cert. denied* 560 U.S. 966 (2010); *State v. Hayes*, 270 Kan. 535, 543, 17 P.3d 317 (2001).

Both Aldrich and Christians testified that they discussed presenting a voluntary-intoxication defense. Christians testified that he chose not to pursue it in addition to self-defense because he considered them to be contradictory defenses. Christians testified that although inconsistent defenses are allowed, he chose not to present them because he felt he would lose credibility with the jury. But the district court concluded that Christians failed to spend sufficient time with Aldrich to determine whether he had a valid voluntary-intoxication defense.

***14** This issue presents the closest call in this appeal. On one hand, the district court is correct that a trial-strategy decision made based on inadequate investigation is not insulated from a later claim that the representation was inadequate. See *Wilkins*, 286 Kan. at 982. On the other hand, there are sound reasons why this defense might not be pursued.

To present this defense, Aldrich probably would have had to testify. While others could present some testimony about how much Aldrich had to drink, he could present additional testimony on that point, and he could also talk about how well he was able to think and process information.

But the district court separately concluded that Aldrich's testimony was absolutely required to support his self-defense theory, a conclusion supported by White's expert testimony. It's a given, then, that an adequate defense in this case required Aldrich's testimony.

It seems reasonably clear here that self-defense was the best available defense in this case. Presenting a voluntary-intoxication defense could have conflicted with that. The intoxication defense would have been premised on Aldrich having been too intoxicated to form the intent to kill. But Aldrich had to have an honest and sincere belief that it was necessary to kill in self-defense under the primary defense theory.

To support the voluntary-intoxication defense, Aldrich would have to testify that he had trouble understanding

what was going on or processing thoughts. Yet the testimony he provided at the evidentiary hearing on his K.S.A. 60–1507 motion—testimony that provided effective support for his self-defense theory—would have been inconsistent with the voluntary-intoxication defense. Aldrich testified in detail to his actions before the stabbing, to his contact with Bird, to what Bird said to him, and to Aldrich's concern for his own safety. Aldrich was able to recount in great detail his presence in the bar and the actions he took in dealing with Bird. Given the specificity of Aldrich's recollection of events, it's not even certain that Aldrich had a viable voluntary-intoxication defense. See *Gonzales*, 253 Kan. at 24–25 (citing the defendant's detailed recollection of events before a stabbing in support of trial court's decision not to instruct jury on voluntary-intoxication defense); *State v. Minski*, 252 Kan. 806, 811–12, 850 P.2d 809 (1993) (finding no error in failure to give voluntary-intoxication-defense instruction where defendant described the events in detail). Also, after stabbing Bird, Aldrich drove for 30 minutes back to his home. And although Aldrich had never been to Salina before, he was able to find his way home on a different route than he took to get to Salina.

It's true that a defendant in a criminal case may present and rely upon inconsistent defenses. See *State v. Shehan*, 242 Kan. 127, Syl. ¶ 2, 744 P.2d 824 (1987). But presenting both defenses here would be to argue, in effect, that if the jurors disbelieved Aldrich about his honest and sincere belief that it was necessary to kill in order to defend himself, they should consider whether he was too intoxicated to know what he was doing. In presenting both defenses, the message to the jury is that Aldrich might be lying about one of the defenses but should be believed about the other. Moreover, Aldrich's detailed testimony about what happened at and outside the bar strongly suggests that his mental faculties were not so impaired that he was incapable of forming the necessary intent for murder.

***15** We accept the district court's factual findings; they are supported by substantial evidence. But we cannot agree with its conclusion that Christians' representation was inadequate because of a failure to present a voluntary-intoxication defense. Given the highly deferential approach we must take with respect to strategic choices made at trial and the district court's well-supported decision that a self-defense theory should have been pursued through Aldrich's testimony, we conclude that Christians' decision not to present a voluntary-intoxication defense was within the range of choices an attorney could reasonably make.

That does not change the result in this case; the district court's decision to order a new trial is sufficiently supported with its other findings and conclusions. Accordingly, we are remanding the case for a new trial. At that trial, Aldrich may choose to present a voluntary-intoxication defense (or he may choose not to). We simply conclude that Christians did not provide substandard representation by failing to present that defense in the prior trial.

Incorrect Standard

The State's final argument is that the district court applied the incorrect standard when it determined that Christians' inadequate representation had prejudiced Aldrich. As we noted earlier in the opinion, to show prejudice, Aldrich had to show that the errors caused a reasonable probability that the result of the trial *would* have been different if not for the attorney's inadequate work. See *Mattox v. State*, 293 Kan. 723, 725–26, 267 P.3d 746 (2011). The State emphasizes this language from the next-to-last page of the district court's written opinion: "Christians' performance fell below an objective standard of reasonableness. The court also finds that, but for Christians' unprofessional performance, there is a reasonable probability the outcome of the trial *might* have been different." (Emphasis added.)

The State is correct that the district court's statement of the applicable legal standard in the quoted sentence was incorrect. But we note that earlier in the opinion, where the district court stated the standard in detail, it accurately recited it:

> "The benchmark for judging any claim of ineffectiveness 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.' *Strickland v. Washington*, 444 U.S. 668, 686, 104 S.Ct. 2052 (1984). The court went on to explain [that] to evaluate a claim of ineffective assistance of counsel, a two part test is to be applied. First, a defendant must show that counsel's performance fell below an objective standard of reasonableness. *Strickland* at 688. Second, the defendant must show that he was prejudiced by

counsel's deficient performance, and prejudice is shown by demonstrating that there is a reasonable probability that, but for counsel's unprofessional errors, *the result of the proceeding would have been different. Strickland* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland* at 694...." (Emphasis added.)

***16** We conclude that the district court understood—and applied—the proper standard. We also note that, after accepting the district court's factual findings that are supported by substantial evidence, we then review on appeal whether the performance and prejudice parts of the *Strickland* standard were met independently, without any required deference to the district court. *Bellamy v. State,* 285 Kan. 346, 354–55, 172 P.3d 10 (2007); *Flynn v. State,* 281 Kan. 1154, 1157, 136 P.3d 909 (2006). We independently conclude that Aldrich's showing at the evidentiary hearing was sufficient to meet both parts of the *Strickland* test. Aldrich demonstrated that his trial counsel performed at a level below an objective standard of reasonableness and that this failure caused prejudice, *i.e.,* there is a reasonable probability that the outcome of the trial would have been different without the attorney's inadequate performance.

The district court's judgment is therefore affirmed.

All Citations

322 P.3d 1027 (Table), 2014 WL 1707579

End of Document

202 P.3d 108 (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.

STATE of Kansas, Appellee,
v.
Timothy G. STALLARD, Appellant.

No. 99,365.
|
March 6, 2009.
|
Review Denied Nov. 5, 2009.

West KeySummary

1 **Criminal Law**
Offering instructions

Counsel's failure to request a self-defense instruction, in a defendant's trial for battery against a corrections officer, did not render counsel's assistance ineffective. The defendant presented no evidence that he believed force was necessary to protect himself from the corrections officer. The defendant had claimed during trial that he struck one officer by accident and did not strike anyone else. K.S.A. 21–3211(a).

1 Cases that cite this headnote

Appeal from Butler District Court; Michael E. Ward Judge.

Attorneys and Law Firms

Ashley S. Oppenheim, legal intern, and Randall L. Hodgkinson, of Kansas Appellate Defender Office, for appellant.

Cheryl M. Pierce, assistant county attorney, Jan Satterfield, county attorney, and Stephen N. Six, attorney general, for appellee.

Before BUSER, P.J., ELLIOTT and GREEN, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** Timothy Stallard appeals his conviction of battery against a corrections officer, in violation of K.S.A.2003 Supp. 21–3413(a)(2) and K.S.A.2003 Supp. 21–3412. Stallard raises two issues. First, he contends he received ineffective assistance of counsel because his trial attorney failed to request self-defense instructions. Second, Stallard contends the district court erred by failing to give a limiting instruction regarding Stallard's incarceration. We affirm.

Factual and Procedural Background

On August 3, 2003, Stallard was incarcerated at the El Dorado Correctional Facility. At the time of the incident, Stallard was performing a prayer ritual using his wheelchair as a makeshift altar. At trial, Corrections Officer Mark Bollig testified that Stallard motioned to him as if there was something wrong with his wheelchair. According to Bolig, when he entered Stallard's cell, Stallard struck him in the mouth with his fist. Stallard, however, testified that he was crouched down praying with his eyes closed when he saw a flash of an image that startled him, whereupon he "accidentally bumped [Bolig] or something."

Bollig called for assistance. According to Stallard, he followed Bollig into the "day room" to explain that he had hit him by accident and then returned to his cell. Officer Jarred Watson arrived at the scene, called for further assistance, and ordered Stallard to turn around to be restrained. Watson testified that Stallard took steps towards Bollig and Watson, but when threatened with chemical spray, he backed into his cell.

Witnesses for the State testified that when other corrections officers, including Jerrod Harris, arrived at the scene, Stallard was in a fighting stance. Stallard, however,

testified that when the officers arrived, he was simply standing in his cell, "[a]nd the first thing Harris said was, 'You're going down, mother,' fill in the blanks." Stallard testified that he began to tell Harris that he did not hit Bollig, but before he could finish his sentence, Harris sprayed him with mace, causing him extreme pain. Stallard testified that he then dropped to his knees and the officers jumped on him, began to choke him, hit him several times, and kicked him in the eye.

According to the officers, Harris ordered Stallard to submit to restraints, to no avail, whereupon Harris used pepper spray on Stallard to induce compliance. Harris also used a stun device on Stallard multiple times with no immediate effect. According to the officers, during the 10–minute struggle Stallard struck Harris, who sustained a concussion upon striking his head on the bed. Stallard did not testify to striking Harris: he only described being choked, hit, kicked, and "getting pulverized" by the officers.

Stallard was charged with two counts of battery against a state corrections officer. Following the trial, the jury acquitted Stallard of battery against Bollig but convicted him of battery against Harris. Stallard filed a motion for judgment of acquittal and new trial, alleging insufficient evidence to sustain a conviction and ineffective assistance of counsel. After a hearing, the district court denied both claims. At sentencing, the district court granted Stallard's motion for a durational departure and sentenced him to 52 months in prison, to be served consecutive to his previously imposed life sentence.

***2** Stallard filed a timely appeal.

Ineffective Assistance of Counsel Claim

A claim alleging ineffective assistance of trial counsel presents mixed questions of fact and law requiring de novo review. Before counsel's assistance is determined to be so defective as to require reversal of a conviction, the defendant must establish two things. First, the defendant must establish that counsel's performance was deficient. This requires a showing that counsel made errors so serious that his or her performance was less than that guaranteed to the defendant by the Sixth Amendment to the Constitution of the United States. Second, the defendant must establish that counsel's deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial. See *Bledsoe v. State*, 283 Kan. 81, 90–91, 150 P.3d 868 (2007).

> "Judicial scrutiny of a counsel's performance in a claim of ineffective assistance of counsel must be highly deferential. There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. To show prejudice, defendant must show a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court hearing an ineffective assistance of counsel claim must consider the totality of the evidence before the judge or jury. [Citation omitted.]" *Phillips v. State*, 282 Kan. 154, 159–60, 144 P.3d 48 (2006).

Stallard contends his attorney's failure to request a self-defense instruction constituted ineffective assistance of counsel. Stallard argues this is because, if requested, the district court would have been required to give a self-defense instruction thereby creating a reasonable probability that Stallard would have been acquitted of battery against Harris. The State responds that no evidence was presented that could have supported a self-defense instruction and, as a result, Stallard's attorney was not ineffective.

K.S.A. 21–3211(a) (Furse 1995) provided: "A person is justified in the use of force against an aggressor when and to the extent it appears to [such person] and [such person] reasonably believes that such conduct is necessary to defend [such person or a third person] against such aggressor's imminent use of unlawful force."

Entitlement to a self-defense instruction was discussed in *State v. Childers*, 222 Kan. 32, 48, 563 P.2d 999 (1977), wherein our Supreme Court stated: "[I]n order to rely on self-defense as a defense, a person must have a belief that the force used was necessary to defend himself and, also, show the existence of some facts that would support such belief." In judging whether the evidence justifies a self-defense instruction, the test is not the amount of evidence, but whether there is any evidence that a defendant believed force was necessary to defend himself. 222 Kan. at 48–49, 563 P.2d 999. Furthermore, the trial court should instruct the jury on self-defense if "there is any evidence tending

to establish self-defense, even though the evidence may be slight and may consist solely of the defendant's own testimony." *State v. Hill,* 242 Kan. 68, Syl. ¶ 4, 744 P.2d 1228 (1987).

***3** At the close of the State's case-in-chief, the district judge initiated a colloquy with both counsel regarding the propriety of giving a self-defense instruction:

> THE COURT: "Now, I was looking at the statute book on whether or not self-defense would be appropriate here. It seems like in any battery case you have to look at that. But in this particular instance, having read the self-defense statutes again, *I don't think they apply in this situation,* from the standpoint—I'm simply—I'm not making a ruling. I'm just talking out loud right now, to see if you have any thoughts or if you want to consider it further. I'm thinking about jury instructions, of course."
>
> [Defense Counsel]: "We're not going to request self-defense, Your Honor." (Emphasis added.)

Upon being found guilty of the battery against Harris, Stallard filed a motion for new trial alleging ineffective assistance of counsel. The district court denied Stallard's motion after an evidentiary hearing, a review of the trial transcript, and consideration of relevant case law. In particular, the district judge noted, "I don't believe the evidence in the record supports an assertion that Harris was an aggressor under the statute, nor do I think the record supports the assertion that Harris was or was about to use unlawful force."

The district judge recalled the colloquy he had with defense counsel during the trial:

> "[A]nd when I told him at that time that I had looked at the statute and wasn't sure that [the self-defense instruction] applied, that was based upon my initial reading of the statute based on the facts of the case, and my opinion didn't change after I heard Mr. Stallard's testimony, and my opinion hasn't changed today."

The district judge concluded, "I don't believe, under the circumstances, that a self-defense instruction was appropriate, and, therefore, I cannot fault Mr. Patterson for not requesting one, and I don't believe that his failure to request one constitutes ineffective assistance of counsel."

Our independent review of the trial record persuades us that the district court did not err. Apart from the district court's rationale, we are convinced there was no evidence to show that Stallard had a belief that force was necessary to protect himself. See *Childers,* 222 Kan. at 48, 563 P.2d 999. First, there was no evidence that Stallard had such a belief. Second, Stallard never testified to any intentional striking of Bollig or Harris for any reason-let alone that it was based upon a belief that it was necessary to protect himself. To the contrary, Stallard testified the striking of Bollig was accidental, and he did not admit to any striking of Harris.

Defense counsel's decision not to request a self-defense instruction was not only appropriate given the lack of evidence of Stallard's reasonable belief in the need to defend himself, it was critical to Stallard's defense.

In closing argument, defense counsel emphasized that Stallard's conduct was not intentional. With regard to Bolig, defense counsel argued, "Was there contact? Yes. Was there intentional conduct? No. Mr. Stallard testified today that there was no intentional contact. In fact, Mr. Stallard testified that, at most, it was because he was startled, and accidental, and he tried to explain that but nobody would listen, nobody would listen."

***4** As to Harris, defense counsel emphasized that Stallard tried to talk with the responding officers but he was immediately accosted without any provocation. Defense counsel also emphasized how Stallard was essentially incapacitated by the officers, effectively unable to fight back. Finally, defense counsel explained Harris' injury as simply an accident: "Remember the slippery floor, people going down."

Defense counsel's decision to present a defense that Stallard did not intentionally strike either officer necessarily precluded a self-defense strategy. Moreover, Stallard has not met his burden to show how this strategy was deficient:

> "In general, the defendant bears the burden of demonstrating that trial counsel's alleged deficiencies were not the result of strategy. *[State v.] Rice,* 261 Kan. 567[, 932 P.2d 981 (1997)]; *State v. Goswick,* 142 Ariz. 582, 586, 691 P.2d 673 (1984) (burden rests

with the defendant to 'show that counsel's decision was not a tactical one but, rather, revealed ineptitude, inexperience, or lack of preparation'); LaFave, 3 Criminal Procedure § 11.10(c) (2d ed. 1999) ('Since *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984),] starts with an assumption of competency, it places upon the defendant the burden of showing that counsel's action or inaction was not based on a valid strategic choice.')." *Ferguson v. State,* 276 Kan. 428, 446, 78 P.3d 40 (2003).

As shown by Stallard's acquittal of the battery against Officer Bollig, defense counsel's strategy was not deficient but was partially successful.

Stallard's claim is similar to the defendant's claim in *State v. Sims,* 265 Kan. 166, 960 P.2d 1271 (1998). Cleave Sims was involved in a drive-by shooting. As characterized by the district judge, " 'With respect to the self-defense instruction, the defense is, ["]we were there but we didn't do anything ["] and, therefore, there's no testimony that would justify a self defense instruction, and I'll refuse to give it.' " 265 Kan. at 170, 960 P.2d 1271. In holding that the district court did not err in declining the defense request for a self-defense instruction, our Supreme Court cited with approval its finding in the companion case of *State v. Sims,* 262 Kan. 165, 173, 936 P.2d 779 (1997), that " '[t]here was absolutely no evidence proving the subjective component of self-defense, that [Essex] Sims honestly believed he had to kill in self-defense.' " *Sims,* 265 Kan. at 171, 960 P.2d 1271.

In the present case, as in *Sims,* 265 Kan. 166, Syl. ¶ 4, 960 P.2d 1271, there was no evidence that Stallard "honestly and sincerely believed it would be necessary" to strike the officers in order to defend himself. Moreover, Stallard's defense was that he did not commit any battery, not that he struck the officers in self-defense. Given Stallard's defense, it was not ineffective for his counsel to not request a self-defense instruction when there was no evidence to support a critical component of that theory and when self-defense was inconsistent with the defense Stallard's counsel presented to the jury.

***5** Finally, with regard to the prejudice prong of the ineffective assistance of counsel test, the district judge concluded, "[I]t's unlikely that I would have given [a self-defense instruction] even if it had been requested."

We conclude that Stallard has failed to show either that his trial counsel was ineffective or that his conduct in not requesting a self-defense instruction was prejudicial.

Failure to Give a Limiting Instruction Regarding Incarceration

We review a district court's failure to give a particular instruction under a clearly erroneous standard where a party neither requested an instruction nor objected to its omission. *State v. Cooperwood,* 282 Kan. 572, 581, 147 P.3d 125 (2006); see K.S.A. 22–3414(3). " 'Instructions are clearly erroneous only if the reviewing court is firmly convinced that there is a real possibility the jury would have rendered a different verdict if the trial error had not occurred.' [Citations omitted.]" *State v. Carter,* 284 Kan. 312, 324, 160 P.3d 457 (2007).

Stallard "does not contest the relevance" of the evidence that he was incarcerated at the time of the incident because " 'the state had to prove that he was in custody of the secretary of corrections.' K.S.A. 21–3413(a)(3)." Rather, Stallard complains that because the evidence also proved a "prior bad act," the district court should have given an instruction "limiting the use of the evidence to its proper purpose; determination of whether the state proved that Mr. Stallard was in custody of the secretary of corrections."

The State responds that Stallard's incarceration was only admitted to establish an element of proof necessary to convict Stallard of battery against Officer Harris, and there was no possibility the jury would have returned a different verdict with a limiting instruction.

At trial, evidence was admitted that Stallard was in the custody of the Secretary of Corrections. This evidence was highly probative to the charge. In fact, the State was required to prove this element of the offense under K.S.A.2003 Supp. 21–3413(a)(2), which only applies to battery against "a correctional officer or employee *by a person in custody of the secretary of corrections,* while such officer or employee is engaged in the performance of such officer's or employee's duty." (Emphasis added.)

We are not convinced that proof that a person is in the custody of the Secretary of Corrections—without more—necessarily constitutes proof of a prior bad

act as contemplated by the provisions of K.S.A. 60-455. See *State v. Jefferson,* No. 96,961, unpublished opinion filed November 21, 2007, *rev. denied* 286 Kan. 1183 (2008). As discussed in *State v. Perez-Moran,* 276 Kan. 830, 834, 80 P.3d 361 (2003), K.S.A. 75-5206(b) provides that the Secretary of Corrections may maintain custody of pretrial detainees and other persons transported under special circumstances from local detention facilities or jails. Accordingly, this statute clearly contemplates that the Secretary may confine individuals who have not been convicted of any crime. Given this statute, Stallard's underlying premise that evidence of incarceration necessarily establishes the existence of a prior bad act is not necessarily true.

***6** Moreover, assuming a limiting instruction should have been given, Stallard has failed to show how the failure to give such an instruction resulted in a real possibility the jury would have rendered a different verdict if the trial error had not occurred. See *Carter,* 284 Kan. at 324, 160 P.3d 457. Stallard does not allege the jury was advised he had committed any particular crime. Nor does Stallard point us to any argument by the prosecutor improperly suggesting that Stallard's incarceration proved his propensity to commit any crimes. Indeed, the jury's return of a not guilty verdict on one felony count suggests the jury did not impermissibly consider that Stallard was an offender predisposed to committing crimes.

Under the circumstances of this case, we find no clear error in the district court's failure to provide a limiting instruction.

Affirmed.

All Citations

202 P.3d 108 (Table), 2009 WL 596536

86 P.3d 1025 (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.

STATE of Kansas, Appellee,
v.
Anthony L. LEE-EL, a.k.a.
Anthony L. Lee, Appellant.

No. 90,052.
|
April 2, 2004.
|
Review Denied Sept. 14, 2004.

Synopsis

Background: Defendant was convicted in a jury trial in the Shawnee District Court, Nancy E. Parrish, J., of burglary and misdemeanor theft. Defendant appealed.

Holdings: The Court of Appeals held that:

[1] defendant failed to demonstrate that counsel was ineffective in failing to properly investigate charges;

[2] counsel was not ineffective in failing to object to alleged references to defendant's post-*Miranda* silence;

[3] defendant was not entitled to instruction on lesser included offense; and

[4] counsel was not ineffective in failing to request accomplice testimony instruction.

Affirmed.

West Headnotes (8)

[1] **Criminal Law**
⇐ Discovery

Burglary and theft defendant failed to demonstrate that counsel was ineffective in not making request for 911 dispatch log, where defendant failed to explain how any potential information to be gained from 911 tape or dispatch log would have been relevant or helpful in his defense. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[2] **Criminal Law**
⇐ Investigating, Locating, and Interviewing Witnesses or Others

Burglary and theft defendant failed to demonstrate that counsel was ineffective in failing to interview two purported alibi witnesses, where testimony from hearing on defendant's motion for new trial indicated that purported alibi witnesses would have provided no meaningful assistance to defense. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[3] **Criminal Law**
⇐ Investigating, Locating, and Interviewing Witnesses or Others

Burglary and theft defendant failed to demonstrate that counsel was ineffective in failing to search for witnesses who might have corroborated defendant's alibi, where defendant failed to specify or even narrow his claim that there might have been other alibi witnesses. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[4] **Criminal Law**
⇐ Preparation for Trial

Burglary and theft defendant failed to demonstrate that counsel was ineffective in failing to investigate his claim that he was actually attempting to find temporary work when the burglary occurred, where testimony from hearing on defendant's motion for new trial indicated that defendant had not signed

in at temporary work agency on the date in question. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[5] **Criminal Law**
Investigating, Locating, and Interviewing Witnesses or Others

Burglary and theft defendant failed to demonstrate that counsel was ineffective in failing to interview alleged co-perpetrator before he testified; defendant failed to show that alleged co-perpetrator's testimony would have been less damaging had counsel interviewed him prior to trial. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[6] **Criminal Law**
Introduction of and Objections to Evidence at Trial

Burglary and theft defendant failed to demonstrate that counsel was ineffective in failing to object to allegedly impermissible references to defendant's post-*Miranda* silence; counsel testified that he had strategic reasons for not objecting, the disputed references were minimal and did not serve to undermine defendant's credibility, and defendant testified at trial and thus had an opportunity to explain the challenged references. U.S.C.A. Const.Amends. 5, 6.

Cases that cite this headnote

[7] **Criminal Law**
Effect of Defendant's Objection or Defense Inconsistent with Lesser Charge

Defendant was not entitled to instruction on lesser included offense of criminal deprivation of property in prosecution for burglary and theft; theory of the defense was that defendant had nothing to do with the crimes, and thus such instruction would have been inconsistent with the defense at trial.

Cases that cite this headnote

[8] **Criminal Law**
Offering Instructions

For purposes of claim of ineffective assistance of counsel, burglary and theft defendant failed to demonstrate that he was prejudiced by counsel's failure to request accomplice testimony instruction; testimony of alleged accomplice was mainly cumulative, and jury was instructed to evaluate the weight and credibility of all witness testimony. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

Appeal from Shawnee District Court; Nancy E. Parrish, judge. Opinion filed April 2, 2004. Affirmed.

Attorneys and Law Firms

Theresa Barr, assistant appellate defender, for appellant.

Deborah L. Hughes, assistant district attorney, Robert D. Hecht, district attorney and Phill Kline, attorney general, for appellee.

Before RULON, C.J., GREENE, J., and ROGG, S.J.

MEMORANDUM OPINION

PER CURIAM.

***1** Anthony L. Lee-El appeals his convictions and sentences for burglary and misdemeanor theft, claiming ineffective assistance of counsel and errors in sentencing. We affirm.

Factual and Procedural Overview

On June 1, 2001, Diane Wells observed a car back into the driveway of her neighbors' home. The doors of the car flew open, two black men got out, the trunk went up, the men went into the garage, and in just seconds, the car pulled out of the driveway with a mower in the trunk. Wells called her neighbor, Charlotte Sakellaris, and reported her observations. Sakellaris checked her garage, confirmed a missing mower, and then called Wells back to report that

a snow blower was also missing. Sakellaris also called the police.

Shortly thereafter, Officer Lawrence Falley of the Topeka Police Department was dispatched to the reported burglary and spoke to Sakellaris and Wells. Approximately 20 to 30 minutes later, Falley noticed a car in a parking lot that matched the description of the car involved in the burglary; he also observed that there was a mower and a snow blower in the trunk, and two black males nearby. After matching the serial number on the snow blower with the serial number given him by Sakellaris, Falley took Lee-El and James Becerra into custody.

Lee-El was charged with burglary and misdemeanor theft. The jury found him guilty of both offenses, and he was sentenced to a controlling term of 21 months' imprisonment.

Lee-El then filed his motion for new trial, alleging that his trial counsel was ineffective in several regards. After the testimony of trial counsel and several other witnesses, the district court denied the motion, finding that trial counsel's performance was reasonable and, even if deficient, the alleged errors did not undermine confidence in the outcome.

Lee-El appeals.

Standard of Review

Generally, the granting of a new trial is a matter which lies within the sound discretion of the trial court, and appellate review of the trial court's decision is limited to whether the trial court abused its discretion. *State v. Kirby*, 272 Kan. 1170, 1192, 39 P.3d 1 (2002). Where the basis for such a motion is ineffective assistance of counsel, however, our review must include a de novo review of the mixed questions of law and fact encompassed within the performance and prejudice prongs of an ineffective assistance claim. *Easterwood v. State*, 273 Kan. 361, 370, 44 P.3d 1209, *cert. denied* 537 U.S. 951, 123 S.Ct. 416, 154 L.Ed.2d 297 (2002). We must determine (1) whether counsel's performance was deficient, which means counsel made errors so serious that counsel's performance was less than that guaranteed by the Sixth Amendment to the United States Constitution and (2) whether the deficient performance prejudiced the defense, which requires showing counsel's errors were so serious they deprived defendant of a fair trial. *State v. Hedges*, 269 Kan. 895, 913, 8 P.3d 1259 (2000).

Was Counsel's Performance Deficient and Prejudicial for Failure to Investigate?

***2** [1] [2] [3] [4] [5] Lee-El first complains that his counsel failed to conduct an appropriate investigation, including: (i) a request for the 911 dispatch log; (ii) an interview of two specific purported alibi witnesses; (iii) a search for other witnesses who might have corroborated the alibi; (iv) an investigation into his claim that he was actually attempting to find temporary work when the burglary occurred; and (v) an interview of Becerra before he testified.

We have examined each of these claims and find no prejudice for the following reasons:

(i) *911 Dispatch Log.* Lee-El fails to explain how any potential information to be gained from the 911 tape or dispatch log would have been relevant or helpful in any way in his defense;

(ii) *Alibi Witnesses.* The two purported alibi witnesses would have been of no meaningful assistance to the defense. Testimony during the motion hearing established that Lee-El's roommate Kathy Trusty would leave for work at a time substantially prior to the time of the offense, thus providing no alibi for Lee-El; Sandra Coutcher could only remember borrowing cigarettes from Lee-El "some morning around the time of the incident," and she could not remember the time of any such encounter, except a range of time that included times prior to the offense, thus providing no meaningful alibi for Lee-El;

(iii) *Other Witnesses.* Lee-El's failure to specify or even narrow his claim that there might have been other alibi witnesses is fatal; in fact, his counsel testified at the motion hearing that after explaining to Lee-El prior to trial what an alibi witness was, Lee-El stated that there was "nobody like that";

(iv) *Temporary Work Agency.* The testimony at the motion hearing of an employee of the temporary work agency established that everyone who comes in looking for work signs in regardless of success, and there were no signatures for Lee-El or Becerra on the date in question; and

(v) *Interview of Becerra.* Although Becerra's testimony was damaging to Lee-El's defense, Lee-El does not provide any suggestion why that testimony might have been different had counsel interviewed Becerra prior to his testimony.

Having examined and rejected each claim of inadequate investigation, we conclude that Lee-El failed to establish deficiency of counsel or prejudice by reason thereof.

Was Counsel's Performance Deficient and Prejudicial for Failure to Object to Purported Doyle *Violations?*

[6] Lee-El next claims that his counsel was deficient for failure to object to certain references to his request for an attorney, claiming that these references were impermissible statements on his post-*Miranda* silence, contrary to *Doyle v. Ohio,* 426 U.S. 610, 618, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). Initially we must determine whether the references are, in fact, *Doyle* violations.

"A *Doyle* violation occurs when the State attempts to impeach a defendant's credibility at trial by arguing or by introducing evidence that the defendant did not avail himself or herself of the first opportunity to clear his or her name when confronted by police officers but instead invoked his or her constitutional right to remain silent [citation omitted]." *State v. Edwards,* 264 Kan. 177, 195, 955 P.2d 1276 (1998).

***3** Lee-El first argues that during opening statements the State violated the rule in *Doyle.* Specifically, Lee-El complains about the following:

"Mr. Lee-El is transported to the Law Enforcement Center. He asks if he wants to speak to a detective. Mr. Lee-El agrees to speak to a detective. He goes in and talks to [investigating officer] Detective Martin.... Detective Martin comes in and identifies himself as Detective Martin. Detective Martin has been briefed on what's been going on and he says, 'I would like to talk to you about this incident.' He goes through, and you'll hear how he goes through the *Miranda* warnings and he has a card here he goes through all of the *Miranda* warnings with Mr. Lee-El to make sure he's alert, awake, knows what's going on, understands his rights. Mr. Lee-El asks about an attorney. Detective Martin clarifies that we can get you an attorney, I can let you use the phone. Mr. Lee-El says that won't be necessary, I'll talk to you. Again, Detective Martin goes through the *Miranda* warnings with him, makes sure he understands his rights, he does, asks him about the incident...."

Second, Lee-El complains about the following elicited by the State through investigating officer Martin:

"Q. Okay. Tell us about the interview with Mr. Lee-El?

"A. It was simply a fact, just as I do with all my interviews. I went in, I identified myself as a police detective by badge, by identification card. I want to make sure that they understand they are under arrest, and then I go through the *Miranda* warnings with them.... We went through each warning, and a verbal yes was given on each line of those warnings that he understood. When the last line was read, he said, 'When do I get my attorney?'

"Q. And what did you say?

"A. And, I said, 'We can get you an attorney at any time you want. We have got phones available for you, we can call an attorney.' I said, 'However, you need to understand that I'm not going to wait hours for an attorney to respond, if it takes that long. If one can come down in a reasonable time, that's fine, otherwise, we would have to do an interview after he has spoken with an attorney.'

"Q. And you gave him that option?

"A. Yes, sir, I did.

"Q. And what did he say?

"A. He said, 'I'll speak with you,' or 'I'll talk with you.'

"Q. What did you do at that point?

"A. Since he had brought the subject up of an attorney, or when he would be able to have access to an attorney, I went back through the *Miranda* warnings, wanting him to understand exactly what I had read him before. Upon completion of that, he stated he did understand each one of those warnings and that's when he said he would go ahead and talk to me."

The State argues that the above statements do not constitute a *Doyle* violation because Lee-El actually spoke with authorities and Lee-El's statements about an attorney

were so equivocal that there was no actual invocation of his right to counsel. We disagree. In *Edwards,* a detective testified that after being read his rights, the defendant initially stated he did not want to talk and wanted an attorney. As the detective was leaving the room, however, the defendant agreed to speak with him. Even though the defendant ultimately talked with the detective, our Supreme Court found that a violation of the defendant's post-*Miranda* right to silence had occurred. *Edwards,* 264 Kan. at 196, 955 P.2d 1276. Similarly, Lee-El initially expressed an interest in having an attorney, and in presenting these statements at trial, there was at least an arguable *Doyle* violation. Accordingly, we must address Lee-El's claim that his trial counsel was deficient for failure to object to the opening statement and testimony references.

***4** Lee-El's trial counsel testified at the motion hearing that he had strategic reasons for not objecting to the challenged comments. Specifically, trial counsel explained that the facts surrounding Lee-El's statement of when he would get an attorney would help explain why Lee-El went on to make improbable comments about the stolen machinery, *i.e.* to minimize the damage to Lee-El's credibility likely to result from the improbable story. Although the strategy may not have been entirely appropriate or effective, where experienced attorneys may disagree on the best tactics, deliberate decisions made for strategic reasons may not establish ineffective assistance of counsel. *State v. Betts,* 272 Kan. 369, 390, 3 P.3d 575 (2001).

Moreover, we conclude that Lee-El was not prejudiced by the statements, since they were relatively harmless for several reasons: *First,* Lee-El talked to authorities after the inquiry; accordingly, the challenged statements do not impeach Lee-El by showing he did not avail himself of the first opportunity he had to clear his name. *Second,* considering Lee-El testified at trial, he had an opportunity to explain the challenged statements and any implications for his credibility; *Finally,* the nature and extent of the statements were minimal and did not serve to undermine Lee-El's credibility as shown by their lack of prominence in closing argument. We note that in *Edwards,* the Supreme Court found for similar reasons that the *Doyle* violation was not so prejudicial as to require a new trial. 264 Kan. at 196, 955 P.2d 1276. Even if the statements were objectionable under *Doyle,* counsel's performance was not deficient given his strategic reasons for not objecting, and any deficiency was not prejudicial in any event. This claim of ineffective assistance fails accordingly.

Was Counsel's Performance Deficient and Prejudicial for Failure to Request Certain Jury Instructions?

Lee-El next claims that his counsel was ineffective for failing to request two jury instructions: (i) an instruction on the lesser included offense of criminal deprivation of property and (ii) an accomplice testimony instruction.

[7] With regard to the lesser included offense instruction, Lee-El claims that because Becerra testified that Lee-El told him they were only going to borrow the items, the jury was presented with evidence upon which it could have determined Lee-El was guilty of criminal deprivation of property as opposed to theft. Additionally, Lee-El claims that he was prejudiced by the lack of a criminal deprivation of property instruction because he was charged and convicted of burglary with the intent to commit theft; thus, had the jury convicted Lee-El of criminal deprivation of property, it could not have convicted him of the burglary charge.

At the outset we note that the requested instruction would have been somewhat inconsistent with Lee-El's defense at trial. Lee-El took the stand in his own defense and testified that Becerra had agreed to pick him up on the day of the crimes and that they intended to apply for work at the temporary employment agency. Since Becerra was late, he called the agency, got cigarettes at the gas station, and walked to the corner. When Becerra showed up, the machinery was already in the car, and Becerra told him the machinery came from his grandmother. Since the theory of the defense was that Lee-El had nothing to do with the crimes, the elements of criminal deprivation of property were wholly inconsistent. A defendant is entitled to an instruction on all lesser included offenses that are supported by the evidence at trial so long as that evidence would justify a jury verdict in accord with the defendant's theory. *State v. Harris,* 259 Kan. 689, 702, 915 P.2d 758 (1996); see *State v. Hebert,* 277 Kan. 61, 104, 82 P.3d 470 (2004).

***5** We also note that a criminal deprivation instruction was discussed at trial and the State and district court noted that Lee-El's theory of defense would not support giving the instruction. Lee-El's trial counsel agreed, stating that he did not believe there was evidence to support it.

Trial counsel testified at the motion hearing that he did not request the instruction because of its inconsistency with the theory of defense. As we have already stated, deliberate decisions made for strategic reasons do not establish ineffective assistance of counsel. *Betts*, 272 Kan. at 390, 33 P.3d 575.

Finally we note that criminal deprivation would have been a hard sell to the jury, given that one of the items in the car was a snow blower. Since the crimes occurred in early June, we doubt that any jury would choose to believe that this equipment was taken with the intent merely to borrow it for the day-especially on the same day where the lawn mower was expected to be put to productive use.

For all of these reasons, we reject Lee-El's claim that his counsel's failure to request the instruction was prejudicially deficient.

[8] Lee-El also claims that his counsel should have requested an accomplice testimony instruction, since Becerra's testimony proved damaging to the defense. The instruction at issue is PIK Crim.3d 52 .18, which provides: "An accomplice witness is one who testifies that (he) (she) was involved in the commission of the crime with which the defendant is charged. You should consider with caution the testimony of an accomplice."

Although the State claims that Becerra was not a true accomplice, we disagree. Becerra testified that he was involved in the crime; when an accomplice testifies, and whether that testimony is corroborated or not, the better practice is for the trial court to give this instruction. *State v. Moore*, 229 Kan. 73, 80, 622 P.2d 631 (1981). Accordingly we must determine whether Lee-El's defense was prejudiced by the failure of his counsel to have requested the accomplice instruction.

We view Becerra's testimony as most important in positively identifying Lee-El as involved in the theft. This aspect of his testimony, however, was at least partially corroborated by Wells, the victim's neighbor. Wells gave a generic physical description of one of the individuals seen in the neighbor's garage, and that description, by Lee-El's own admission, generally described him. The balance of Becerra's testimony was of little importance, given Wells' description of material facts. Moreover, the jury was instructed to evaluate the weight and credibility of all witness testimony, and a jury of ordinary intelligence would naturally receive with caution the testimony of a confessed accomplice without such an instruction. *Moore*, 229 Kan. at 80, 622 P.2d 631. Given the cumulative nature of the identification testimony, the general instruction given as to the weight and credibility of witnesses and the natural inclination to discredit such testimony, we conclude that no prejudice resulted from the failure to give an accomplice instruction. Our rationale is similar to *Moore;* as stated by our Supreme Court: "The necessity for many of these tautological instructions is losing force when a case is being considered by our present enlightened jurors." 229 Kan. at 80, 622 P.2d 631.

***6** We reject Lee-El's arguments that his counsel was prejudicially deficient in failing to request certain jury instructions.

Did the District Court Err in Sentencing Lee-El?

Lee-El argues that it was error for the court to consider his prior convictions in calculating his criminal history score, citing *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Lee-El's argument was rejected by our Supreme Court in *State v. Ivory*, 273 Kan. 44, 41 P.3d 783 (2002). We are duty bound to follow Kansas Supreme Court precedent, in the absence of some indication that the court is departing its position. *Mueller v. State*, 28 Kan.App.2d 760, 763, 24 P.3d 149 *rev. denied* 271 Kan. 1037 (2001), *cert. denied* 535 U.S. 997, 122 S.Ct. 1561, 152 L.Ed.2d 483 (2002). Although Lee-El suggests that *Ivory* was wrongly decided, he makes no suggestion nor does he cite any support that the Supreme Court may be departing its position in *Ivory*. Accordingly, this argument must be rejected.

Affirmed.

All Citations

86 P.3d 1025 (Table), 2004 WL 719259

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344 P.3d 970 (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.

Gayl NORTHCUTT, Appellant,
v.
STATE of Kansas, Appellee.

No. 110986.
|
March 13, 2015.

Appeal from Wyandotte District Court; Robert P. Burns, Judge.

Attorneys and Law Firms

Michael J. Nichols, of Michael J. Nichols, P.A., of Kansas City, for appellant.

Jerome A. Gorman, district attorney, and Derek Schmidt, attorney general, for appellee.

Before LEBEN, P.J., ARNOLD–BURGER, J., and BUKATY, S.J.

MEMORANDUM OPINION

PER CURIAM.

***1** Gayl Northcutt was convicted of first-degree murder and conspiracy to commit first-degree murder following David Mason's death. Northcutt filed a petition for habeas corpus relief under K.S.A. 60–1507, arguing that both the attorney who represented him at his jury trial and the attorney who represented him on his direct appeal were ineffective. To obtain habeas relief, Northcutt has the burden to show (1) that at least one of his attorneys' work fell below minimum standards and, thus, was constitutionally deficient and (2) that the substandard work prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674, *reh. denied* 467 U.S. 1267 (1984); *Sola–Morales v. State*, 300 Kan. ——, 335 P.3d 1162, 1169 (2014).

Northcutt raises eight claims of ineffective assistance of counsel. Seven of these are directed at his trial counsel: failure to pursue a voluntary-intoxication defense, failure to move to suppress Northcutt's statements to law enforcement or argue that the jury should not give them much weight, failure to inform Northcutt of his right to not testify at trial, failure to prepare Northcutt to testify, and failure to call an expert witness to challenge the State's expert regarding Mason's cause of death. He also argues that his appellate counsel was ineffective when she provided the Kansas Supreme Court with copies of statements to police that were very damaging to his case.

Northcutt has not shown that either attorney's work fell below minimum standards. First, for claims about his trial counsel, either the district judge made factual findings supported by evidence that are contrary to Northcutt's claim or the claims involve strategy choices that wouldn't have affected the result. Northcutt's claims that trial counsel failed to tell him about his right to remain silent and failed to prepare him to testify at trial are contrary to his attorney's testimony at the habeas hearing about his normal practices. Northcutt's claims that trial counsel should have moved to suppress his statements to law enforcement, presented arguments to mitigate the statements, and pursued a voluntary-intoxication defense do not justify setting aside the jury's verdicts because those strategies would not have been successful at trial. Northcutt's final claim regarding trial counsel—that he should have called an expert witness to challenge the State's expert—fails because substantial evidence suggests that the expert he said trial counsel should have called would not have offered testimony that was substantially different from the State's expert's testimony.

Second, for his claim about his appellate counsel, Northcutt argues that the attorney improperly provided the Supreme Court with copies of his statements to law enforcement. But had the attorney not provided copies of the statements, the Supreme Court would have been prevented from properly evaluating the merits of an issue Northcutt raised on his direct appeal—whether there was sufficient evidence to support his conviction for conspiracy to commit first-degree murder. See *State v. Davis*, 281 Kan. 169, 178, 130 P.3d 69 (2006); *Williams v. Quarks*, No. 90,013, 2003 WL 22697578, at *1 (Kan.App.2003) (unpublished opinion), *rev. denied* 277 Kan. 928 (2004). So there was nothing improper in

providing copies of statements admitted at Northcutt's trial to replace the original lost copy and thus to allow for full appellate review of Northcutt's case.

***2** Since Northcutt has not shown that his attorneys provided ineffective representation, we affirm the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2007, a jury found Gayl Northcutt guilty of first-degree murder of David Mason and conspiracy to commit first-degree murder. Northcutt appealed his convictions. On the initial, direct appeal from a conviction, the appellate court looks at the evidence in the light most favorable to the State, since the jury found in the State's favor. *State v. Frye*, 294 Kan. 364, 374–75, 277 P.3d 1091 (2012). Applying that standard in Northcutt's direct appeal, the Kansas Supreme Court summarized the facts of Northcutt's case in the light most favorable to the State:

> "The record reveals that Mason died the night of March 15, 2006, and that Mason had spent much of that day with Northcutt. Virtually all of the evidence regarding what occurred that day came from Northcutt's two custodial interviews and his trial testimony. Although there are common themes and details in his various statements, there are also variances.
>
> "In his first interview with police, Northcutt explained that after spending most of March 15 with Mason, he went home mid-afternoon. That evening he went to Mason's apartment, which Mason shared with Northcutt's younger brother, John. At the apartment, Mason and Northcutt 'got into a kind of pushing, shoving argument.' Northcutt explained he had confronted Mason about a dispute between Mason and his brother regarding rent money and because Mason owed Northcutt for some expensive camera equipment that Mason had borrowed and not returned, claiming the equipment had been stolen from him. Northcutt told Mason to 'take care of business' and then shoved Mason. Mason fell and hit his head on a metal bed rail. Mason then stood up, slipped, fell down, and again hit his head on the bed rail. Later in the interview, Northcutt admitted that he shoved Mason both times Mason fell. After Mason fell against the bed rail the second time, Northcutt left Mason where he had fallen and walked out of the room. Northcutt returned to Mason's apartment the next day and found Mason dead.
>
> "Police interviewed Northcutt a second time after they interviewed his brother, John. In the second interview, Northcutt implicated his brother as a participant in the fight and stated that both he and his brother went to Mason's apartment with the intent to kill Mason. In explaining the events, Northcutt told police he left his house with rope that had a 'gear shifting knob' attached to it. He described the knob as about the size and weight of a pool ball. After entering the apartment, Northcutt pulled Mason out of a chair, pushed him against a wall, and 'conked' him on the head. Mason started screaming, and John increased the volume on the television to cover the sound. The fight continued as Mason attempted to run away from Northcutt. Northcutt admitted to hitting Mason twice in the back of the head and to punching Mason in the chest.
>
> ***3** "Another version of events was offered by Northcutt during his trial, which was separate from his brother's trial. In testifying in his own defense, Northcutt told the jury that he and Mason spent the day of March 15 together, riding in Mason's car, going to a lake, and getting drunk. Sometime during their outing, Mason fell off a boat dock and cut his arm, and Northcutt helped him put a bandage on it. They returned to Mason's apartment around 3 p.m. so Mason could go to the bank and get $500 he owed to Northcutt. When they arrived at the apartment, Mason went inside, and Northcutt walked three blocks to his mother's house.
>
> "Defense counsel asked Northcutt about the problems between Mason and Northcutt and between Mason and John. Northcutt testified that there were issues between John and Mason concerning rent and utilities. As for Northcutt's situation, he testified that in addition to loaning money to Mason, he had loaned his expensive camera equipment to Mason around 1986 or 1987, and Mason had told him it had been stolen. Northcutt estimated the value of the equipment as around $30,000. On March 15, John called Northcutt and informed Northcutt that Mason was using Northcutt's supposedly-stolen camera. Northcutt testified that he told his brother that if Mason has 'got my camera I wanted to get it back, and if he's taking pictures of me, I said I'm going to kick his butt .' The brothers also talked about the disagreement between Mason and

John regarding rent and utility payments. Northcutt testified:

" 'I told John, I said well, I would confront [Mason] about it, but I said that's really none of my concern, that's between you and him. John wanted to move out and I said well, you can't move over here.... I'll let you park your bags over here if you want, but as far as that, I said I'll confront [Mason] about certain issues, you know, and—if you want, you know, because John's kind of scared to talk to him.'

"When Northcutt made this offer, John reported that Mason was not at the apartment. Northcutt told John to call him when Mason returned, which John did a short time later. Northcutt immediately went over to Mason's apartment.

"Northcutt rode his bicycle and brought with him a climber's 'impelling rope' that he routinely used to suspend his bicycle in trees to prevent it from getting stolen. This impelling rope, according to Northcutt, was about 18 inches long, had a clip, and had a gearshift knob on one end for weight. The impelling rope was attached to a longer rope that was about 35 feet long. When he arrived at Mason's residence, he discovered the branches on the trees were too tall to reach, so he could not hang his bicycle. He put the bicycle under the back porch and carried the impelling rope inside.

"Northcutt testified that he came up behind Mason, who was sitting at the computer, and 'kind of kicked him in the butt' and asked if he had his camera. At that point, Mason jumped up, bringing some computer cords with him. The two men got 'tangled up' in the cords. Northcutt said his impelling rope got wrapped around Mason's hand, so he tried to unwrap it. But, according to Northcutt, Mason was 'half drunk' and kept pulling at the impelling rope at the same time Northcutt was working on it, which caused the heavy ball to keep hitting both of them. They got untangled, but Mason started 'yelling and screaming' because the bandage ripped off his arm in the struggle and his cut was bleeding. At that point, John came into the room and turned up the volume on the television.

***4** "The arguing continued, and Northcutt tried to 'chase them around' the apartment in an attempt to bandage Mason's arm. Eventually, Mason sat at the kitchen table but then ran to his bedroom. Northcutt followed and when he opened Mason's bedroom door, Mason pulled Northcutt's hand. Their hands slipped apart, and Mason fell backwards, hitting his head on the bed railing. According to Northcutt, Mason's head was bleeding, so Northcutt told him to sit while Northcutt got a first aid kit. Mason tried to get up but fell again, hitting his head on the bed's footboard. Mason got on the bed, saying, 'I just want rest.' At that point, Northcutt left the apartment.

"Northcutt testified that he returned to Mason's apartment the next day. John, who had spent the night at his girlfriend's house, arrived at the same time. The two went inside and found Mason dead. He was lying face down in the living room. Northcutt told the jury that he did not know what happened but thought people would think 'I done something wrong' because of his fight with Mason the previous night. A couple of days later, Northcutt told John 'we're going to have to do something' about Mason. They used some plastic and a moving dolly to transport Mason to the bedroom floor. Sometime later, Northcutt decided to bury Mason behind their mother's house and leave town.

"When asked by defense counsel if he intended to kill Mason, Northcutt testified, 'No, I did not.' He also denied conspiring with John to kill Mason and indicated that he did not know how Mason died.

"Several other witnesses testified during the trial. Although most of this testimony relates to matters that are not at issue on appeal, some additional points are significant to our discussion, including police testimony that there was a large blood stain on the bedroom floor and a forensic pathologist's testimony regarding autopsy results. The pathologist testified he could not determine the cause of death because of the level of decomposition resulting from the body being wrapped in plastic for nearly a month before police uncovered the grave. Despite the decomposition, the pathologist could discern four head lacerations that were consistent with blows by a pool ball-sized object. These injuries by themselves were not necessarily fatal but could have been part of the 'mechanism of death.'

"An additional witness' testimony provides circumstantial evidence relevant to our consideration, as will be more fully discussed. That witness—a neighbor who lived in the upstairs portion of the duplex—testified that she met John and Northcutt on the sidewalk and, about 10 minutes after entering

her apartment, heard a loud argument coming from downstairs. She recognized the voices of John, Mason, and one or two others. She heard Mason tell John that he was going to kick him out of the apartment because John was not helping pay the rent. Then, the television downstairs got very loud, and a short time later she heard the slam of a door. From her apartment window she saw John driving away in Mason's car, screeching the tires as he left the driveway. This was unusual because Mason did not let others drive his car. The neighbor testified that this was the last time she saw Mason's car at the apartment." *State v. Northcutt*, 290 Kan. 224, 226–30, 224 P.3d 564 (2010).

***5** In December 2010, Northcutt filed a pro se motion for habeas relief under K.S.A. 60–1507, arguing that both his trial and appellate counsel had been ineffective. Northcutt later acquired an attorney, who filed an amended motion that alleged his trial counsel had been ineffective in seven ways:

- failing to move to suppress statements Northcutt made to law enforcement on the basis that Northcutt was intoxicated and could not have knowingly waived his right to remain silent;
- failing to move to suppress statements Northcutt made to law enforcement on the basis that he waived his right to remain silent because he was promised leniency by law enforcement;
- failing to argue to the jury that the statements Northcutt made to law enforcement should not be given much weight because Northcutt had been intoxicated when he made them;
- failing to pursue a voluntary-intoxication defense;
- failing to tell Northcutt about his right to remain silent and not testify at trial;
- failing to prepare Northcutt to testify at trial; and
- failing to call an expert witness to challenge the State's expert regarding Mason's cause of death.

It also alleged that appellate counsel was ineffective because she provide the Kansas Supreme Court with copies of incriminating statements Northcutt made to law-enforcement officers that were missing from the record on appeal.

In November 2013, Judge Robert Burns, who presided at Northcutt's criminal trial, conducted an evidentiary hearing on the motion for habeas relief. Northcutt and his trial attorney, Bill Dunn, both testified. After Northcutt presented his case, the State moved to dismiss the petition, arguing that Northcutt had not proven the allegations set out in his motion. The district court dismissed the petition, holding that trial counsel's performance was not constitutionally deficient and that even if it had been, his attorney's work did not prejudice his defense. The district court did not address appellate counsel's performance.

Northcutt has appealed to this court.

ANALYSIS

I. *Northcutt's Trial Counsel Was Not Constitutionally Ineffective*

We begin with Northcutt's arguments that Dunn's representation at trial fell below minimum standards. To obtain habeas relief, Northcutt has the burden to show two things set out in *Strickland v. Washington*, 466 U.S. at 687:(1) that his attorney's work was below minimum standards and, thus, was constitutionally deficient; and (2) that his attorney's substandard work prejudiced his defense. *Sola–Morales*, 335 P.3d at 1169. Courts often refer to these two parts of the *Strickland* test as the "performance prong" and the "prejudice prong." *Mattox v. State*, 293 Kan. 723, 726, 267 P.3d 746 (2011).The benchmark for judging Northcutt's claim is whether his attorney's conduct " " 'so undermined the proper functioning of the adversarial process' " " that the district court could not rely on his trial " "having produced a just result ." " *Edgar v. State*, 294 Kan. 828, 837, 283 P.3d 152 (2012).

***6** When the district court has conducted an evidentiary hearing as it did here, we review its factual findings to see whether they are supported by substantial evidence; if they are, we must accept them. *Miller v. State*, 298 Kan. 921, 928, 318 P.3d 155 (2014). Substantial evidence is enough legal and relevant evidence that a reasonable person could accept it as being adequate to support a conclusion. *State v. May*, 293 Kan. 858, 862, 269 P.3d 1260 (2012). We do not reweigh the evidence, pass on the credibility of witnesses, or resolve conflicts in the evidence. *Flynn v. State*, 281 Kan. 1154, 1163, 136 P.3d 909

(2006). After accepting the district court's factual findings that are supported by substantial evidence, we then must determine whether the defendant has met the two-part showing required under *Strickland.* That determination presents a legal issue that we must review independently, without any required deference to the district court. *Miller,* 298 Kan. at 928; *State v. Adams,* 297 Kan. 665, 669, 304 P.3d 311 (2013).

When a court considers the performance prong of the *Strickland* test, it should not view the attorney's performance through the corrective lens of hindsight. *Rowland v. State,* 289 Kan. 1076, 1086, 219 P.3d 1212 (2009). Instead, we presume that the attorney's performance fell within the wide range of reasonable professional assistance and consider the entire range of possible reasons the attorney might have made the decisions that he or she did. See *Cullen v. Pinholster,* 563 U.S. ——, 131 S.Ct. 1388, 1407, 179 L.Ed.2d 557 (2011); *State v. Kelly,* 298 Kan. 965, 970, 318 P.3d 987 (2014). The test is not what the best or even a good attorney would have done but whether some reasonable attorney could have acted, under the circumstances, as the defense attorney acted at trial. *Hardwick v. Benton,* 318 Fed. Appx. 844, 846 (11th Cir.2009).

Many ineffective-assistance-of-counsel claims rest on whether counsel's decisions were made in pursuit of some reasonable defense strategy: An attorney's strategic decisions are essentially not challengeable if the attorney made an informed decision based on a thorough investigation of the facts and the applicable law. *State v. Cheatham,* 296 Kan. 417, 437, 292 P.3d 318 (2013); *Edgar,* 294 Kan. at 839; *Thompson v. State,* 293 Kan. 704, 716, 270 P.3d 1089 (2011). Even so, the failure to complete a thorough investigation is a ground for establishing ineffective assistance of counsel. *Shumway v. State,* 48 Kan.App.2d 490, 512, 293 P.3d 772, *rev. denied* 298 Kan. —— (October 1, 2013); *McHenry v. State,* 39 Kan.App.2d 117, 123, 177 P.3d 981 (2008); *State v. James,* 31 Kan.App.2d 548, 553–55, 67 P.3d 857, *rev. denied* 276 Kan. 972 (2003). The attorney's strategy itself must also be reasonable. *In re Care & Treatment of Ontiberos,* 295 Kan. 10, 33, 287 P.3d 855 (2012); *Wilson v. State,* 51 Kan.App.2d ——, 340 P.3d 1213, 1223–24 (2014), *petition for rev. filed* December 30, 2014.

***7** If the defendant does not satisfy the performance prong of the *Strickland* test, there is no need to proceed to the second step and analyze the prejudice prong. See *State v. Bricker,* 292 Kan. 239, 250, 252 P.3d 118 (2011). When a court does consider the prejudice prong, it determines whether the defendant has shown a reasonable probability that the result of the trial would have been different but for the defense attorney's inadequate work. *Miller,* 298 Kan. at 934. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." 298 Kan. at 934.

On appeal, Northcutt raises the same claims that he raised in his amended motion before the district court. Because just one such claim would justify relief if Northcutt meets both prongs of the *Strickland* test, we consider each of his claims in turn.

A. *Failure to Move to Suppress Statements Northcutt Made to the Police on the Basis That Northcutt Was Intoxicated When He Made Them*

Northcutt's first claim is that Dunn should have filed a motion to suppress Northcutt's statements to police based on the fact that he was intoxicated when he made the statements. At the hearing on his habeas petition, Northcutt indicated that he was intoxicated when the police interviewed him about Mason's death. He told the district court that he had been drinking "quite a bit" that day, had consumed a beer with dinner, and had finished a six-pack of beer (possibly sharing it with others) before the police interviewed him.

If Dunn had filed the motion to suppress, the State would have needed to show the district court that Northcutt's statements were voluntary. *State v. Bridges,* 297 Kan. 989, 1004, 306 P.3d 244 (2013). In determining whether a defendant's statements to law enforcement were voluntary, the district court usually looks at "the totality of the circumstances surrounding the statement and determines its voluntariness by considering the following nonexclusive factors: (1) the accused's mental condition; (2) the manner and duration of the interview; (3) the accused's ability to communicate on request with the outside world; (4) the accused's age, intellect, and background; (5) the officer's fairness in conducting the interview; and (6) the accused's fluency with the English language." *State v. Gibson,* 299 Kan. 207, 214, 322 P.3d 389 (2014). The ultimate issue is whether the defendant's statements reflect a free and independent will. See *State v. Gilliland,* 294 Kan. 519, 529, 276 P.3d 165 (2012).

The fact that Northcutt had been drinking does not itself prove his statements were involuntary. See *Gilliland*, 294 Kan. at 529. But Northcutt argues that his mental condition was seriously impaired by the alcohol he consumed before speaking with the police.

The district court found as a factual matter that Northcutt was not intoxicated when he spoke to police and that his statement about drinking a six-pack of beer before the interview was not credible. The district court relied on Officer Curtis Nicholson's testimony from a hearing held to determine whether Northcutt's statements to police would be admitted at trial—often called a *Jackson v. Denno* hearing by attorneys and courts. *See Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). Officer Nicholson said that Northcutt had told him he had consumed only a beer or two before he spoke with the police. Officer Nicholson's testimony is substantial evidence to support the district court's finding that Northcutt was not intoxicated when he spoke with police, as is the fact that Northcutt was able to give details about the altercation with Mason in his police interviews. *Northcutt*, 290 Kan. at 227; see *State v. Cribbs*, 29 Kan.App.2d 919, 927, 34 P.3d 76 (2001) (finding that a defendant's confession providing details "that would have escaped a person made senseless by intoxicants" was voluntary).

***8** Northcutt notes that at the *Denno* hearing Dunn did not ask Officer Nicholson whether the one or two beers Northcutt consumed impaired his mental faculties. But there is no evidence here that one or two beers would have so impaired his mental faculties as to make his statement involuntary. Accordingly, we find that Dunn's failure to file a motion to suppress based on intoxication was not ineffective under the performance prong of the *Strickland* test.

B. *Failure to Move to Suppress Statements Northcutt Made to the Police on the Basis That They Were Coerced*

Northcutt next argues that his statements to law enforcement were involuntary because they were induced by promises of leniency. He contends that Dunn should have tried to suppress his statements to police based on the fact that they were coerced.

As a legal matter, the officers' fairness in conducting the interview is one factor that courts consider when determining whether statements were voluntary. *Gibson*, 299 Kan. at 214. Coercion by law enforcement can be mental as well as physical. *State v. Garcia*, 297 Kan. 182, 195, 301 P.3d 658 (2013). If statements are induced by fear or hope of benefit or leniency, they will be excluded as involuntary. 297 Kan. at 196. For a statement to be involuntary as a product of a promise of leniency, the promise must concern action to be taken by a public official; must be likely to cause the accused to make a false statement to obtain the promised benefit; and must be made by a person the accused reasonably believes has the power or authority to execute it. 297 Kan. at 196.

At the hearing on the habeas motion, Northcutt told the court that police had made a general promise of more lenient treatment if he would make a statement to them:

> "[Northcutt's Habeas Attorney: D]id you ever talk to Mr. Dunn about the fact that you believed you were promised some leniency before you made your statement? Your statement to the detectives?
>
> "[Northcutt:] I informed Mr. Dunn that the police did make that statement, yes, sir. And he said it would be very difficult to prove ... it'd b[e] my word against their word.
>
> "[Northcutt's Habeas Attorney:] What did you tell him about that promise of leniency?
>
> "[Northcutt:] That it would be better for me to go ahead and make a statement to the police and to show that I was acting in good faith, that they would go a lot lenient, more lenient on me. It would go a lot easier if I would go ahead and make a statement to the police.
>
> "[Northcutt's Habeas Attorney:] Is that the extent of what was told to you?
>
> "[Northcutt:] Yes, sir."

As a factual matter, however, the district court found that Northcutt was not promised leniency in exchange for his statements. The district court based this finding on the written waiver of rights that Northcutt signed before his interview with the police. *State v. Sharp*, 289 Kan. 72, 89, 210 P.3d 590 (2009) (stating that whether law enforcement made promise of leniency is a factual finding). The waiver said that "no promises or threats have been made to me and no pressure or coercion of any kind has been used against me." Officer Nicholson testified that Northcutt had signed the waiver before they started talking.

***9** Northcutt argues that the district court should not have relied on the boilerplate language in the waiver of rights since some of his conversations with the police were not recorded. But we must accept the district court's factual findings if they are supported by substantial evidence, and the waiver of rights is evidence that a reasonable person could accept as being adequate to support the district court's conclusion. *Miller*, 298 Kan. at 928.

Perhaps more significantly, all that Northcutt has testified to is that police officers made a generalized statement that things "would go a lot easier" and that "they would go a lot [more] lenient" if he talked with the officers. But to render a defendant's statement involuntary, the officers must promise some specific action by a public official. *Garcia*, 297 Kan. at 196; *State v. Harris*, 284 Kan. 560, 579–80, 162 P.3d 28 (2007). No promise of specific action was made here. Rather, the general statements made by police here were like others that the Kansas Supreme Court has concluded were not so definite or coercive as to render a confession involuntary. See *Harris*, 284 Kan. at 579–80 (citing cases).

In addition, the district court had more evidence than the written waiver. The court also had Officer Nicholson's testimony at the *Denno* hearing that neither he nor any other member of the police department made any promises to Northcutt and that he did not discuss anything with Northcutt before the conversation about his rights. The district court clearly did not accept Northcutt's testimony as proof that any promise of leniency had been offered to Northcutt, and other evidence supported the district court's conclusion that no improper promises were made. There was not a strong basis to support a motion to suppress Northcutt's statements to police based on a claim of coercion, and Northcutt has not shown that Dunn's failure to move to suppress his statements to law enforcement on that basis was ineffective under the performance prong of the *Strickland* test.

C. *Failure to Argue to the Jury That Northcutt Was Intoxicated When He Confessed*

Northcutt's next claim is that even if he was not so intoxicated that his confession was involuntary, Dunn still should have mitigated the effect of the confession by emphasizing to the jury that Northcutt was intoxicated when he confessed. He says it is common knowledge that people who are intoxicated exaggerate or make outlandish or false statements.

But courts give wide latitude to a defense attorney's choice of which arguments to emphasize during closing argument:

> "[C]ounsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage. Closing arguments should 'sharpen and clarify the issues for resolution by the trier of fact,' [citation omitted] but which issues to sharpen and how best to clarify them are questions with many reasonable answers." *Yarborough v. Gentry*, 540 U.S. 1, 5–6, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003).

***10** Dunn did not explain why he failed to argue during closing that Northcutt was intoxicated when he spoke with police. But Dunn did say that he didn't think intoxication was "a big issue" in the case and that when he was working on the case, he probably had not thought that Northcutt "was all that drunk when he gave the statement."

It appears that Dunn strategically avoided talking about Northcutt's statements to law enforcement in light of the fact that he didn't have many strong arguments to use to attack them. The weak arguments he had would have only drawn attention to the statements, which were very damaging. In addition, of course, Officer Nicholson testified at trial that Northcutt had consumed only a beer or two before he spoke with law enforcement. As a result, the argument that alcohol made him likely to exaggerate or lie to the police was weak. If Dunn had used the argument at closing, the State could have emphasized Nicholson's testimony during its rebuttal argument, highlighting both Northcutt's incriminating statements and Nicholson's testimony that Northcutt was not intoxicated. Dunn's failure to argue that Northcutt was intoxicated when he spoke with police (and to instead focus on the holes in the State's theory on Mason's death) fell within the wide latitude allowed in deciding which strategy to use during closing argument. Dunn's failure to argue that Northcutt was intoxicated was not ineffective assistance of counsel.

Northcutt also says that the district court's finding on this issue—that his statement to police was voluntary—did not address Dunn's failure to use the intoxication

to mitigate the effect of the statements. But the district court made an overall finding that Dunn's performance was not constitutionally deficient, which applied to all of Northcutt's arguments, including his claim that Dunn should have argued Northcutt was intoxicated when he spoke with police. Moreover, if Northcutt found the district court's factual findings or legal conclusions inadequate, he needed to object to them to preserve the issue for appeal. *Fischer v. State,* 296 Kan. 808, 825, 295 P.3d 560 (2013) (objecting gives the trial court an opportunity to correct any findings or conclusions that are argued to be inadequate). Northcutt did not object to the district court about its conclusions of law or factual findings.

D. *Failure to Pursue a Voluntary–Intoxication Defense*

Northcutt next contends that his attorney should have presented a voluntary-intoxication defense. Voluntary intoxication is a defense to a crime if a defendant was so intoxicated that his or her ability to form the requisite intent for the crime was impaired. *State v. Hilt,* 299 Kan. 176, 192–94, 322 P.3d 367 (2014). In other words, the voluntary-intoxication defense negates the intent element of specific-intent crimes:

> "An act committed while in a state of voluntary intoxication is not less criminal by reason thereof, but when a particular intent or other state of mind is a necessary element to constitute a particular crime, the fact of intoxication may be taken into consideration in determining such intent or state of mind." K.S.A. 21–3208(2).

***11** In theory, a voluntary-intoxication defense can be used to defend each of the crimes Northcutt was charged with: Both first-degree murder and conspiracy to commit first-degree murder are specific-intent crimes. K.S.A. 21–3302; K.S.A. 21–3401; *State v. Dominguez,* 299 Kan. 567, 591–92, 328 P.3d 1094 (2014); *State v. Wilson,* 30 Kan.App.2d 498, 501, 43 P.3d 851, *rev. denied* 274 Kan. 1118 (2002); *State v. Campbell,* 217 Kan. 756, 770, 539 P.2d 329 (1975). Northcutt contends that Dunn should have investigated his state of mind on the day he allegedly killed Mason and then should have raised a voluntary-intoxication defense.

Some evidence at trial did indicate that Northcutt was intoxicated on the day of the alleged crime. Northcutt told the jury that he had gotten "pretty well drunk" that day and that he had been "drunk" while arguing with Mason. Mason's neighbor, who met Northcutt right before the crime allegedly occurred, also testified that Northcutt appeared "drunk or tipsy." At the habeas hearing, Northcutt told the district court that on the day Mason died, he had consumed at least 23 beers. Northcutt indicated that he and Mason had taken a case of beer to the lake but that Northcutt had consumed nearly all of it because Mason was drinking vodka.

But Dunn told the court that he did not remember discussing the voluntary-intoxication defense with Northcutt and that he probably would have chosen not to present it because he did not consider it a viable defense here. To successfully use the defense, Dunn would have needed to show that Northcutt was intoxicated enough that his mental faculties were impaired, not just that he consumed alcohol. *Hilt,* 299 Kan. at 193; *State v. Kidd,* 293 Kan. 591, 594–95, 265 P.3d 1165 (2011); *State v. Brown,* 291 Kan. 646, 656–57, 244 P.3d 267 (2011). And our Supreme Court has found that when defendants can remember details about their alleged crimes, those details suggest that their mental faculties were not impaired at the time of the crime. See *State v. Hernandez,* 292 Kan. 598, 607, 257 P.3d 767 (2011); *State v. Brown,* 258 Kan. 374, 386–87, 904 P .2d 985 (1995); *State v. Payton,* 229 Kan. 106, 112–14, 622 P.2d 651 (1981).

For example, in *State v. Gonzales,* 253 Kan. 22, 24–26, 853 P.2d 644 (1993), the defendant had consumed most of 24 beers just before he allegedly stabbed someone. The Supreme Court found that despite the amount of alcohol he had consumed, his mental faculties were not impaired enough that he was incapable of forming the intent required for murder because he could recall in detail all events leading up to the stabbing and the victim's exact words earlier in the evening. Accordingly, even though the court must give a voluntary-intoxication jury instruction if that theory is supported by the evidence, the court in *Gonzales* held the evidence supporting the defense was so weak that the district court properly refused to give that instruction. 253 Kan. at 26. In finding that the defendant was capable of forming intent, the Supreme Court contrasted the case with *State v. Gadelkarim,* 247 Kan. 505, 507–09, 802 P.2d 507 (1990), where a defendant testified at trial that he did not remember what happened when he allegedly killed his girlfriend or making incriminating statements to the police the next morning when his blood-alcohol concentration was still very high.

***12** Like the defendant in *Gonzales,* Northcutt was able to recall the details of the events leading up to the alleged murder. At trial, he testified about spending the day with Mason before the crime allegedly occurred—drinking at the lake, going to Cabela's for a sandwich, getting in a minor car accident, Mason falling into the river, and then walking home from Mason's house. He then described the events immediately before his altercation with Mason, explaining that he had ridden his bike back to Mason's home, had met Mason's neighbor, and had placed his bike under Mason's porch because the tree limbs were too high to use to hang his bike, as was his normal practice. Northcutt also remembered his altercation with Mason in great detail. He said that he and Mason had argued and had gotten tangled up in computer cords and the rope he usually used to hang his bike. Mason said, "Oh, God, give me a break," and had slipped and fallen backward two times, hitting his head on the bed each time. He also said that Mason had gone to bed and had been breathing when he left Mason's house.

The fact that Northcutt provided such a detailed recollection of the events of that night months after it happened demonstrates that his mental faculties were intact that night. If Dunn had pursued the voluntary-intoxication defense, the district court would have found that the evidence at trial did not support it and would have refused to instruct the jury on it, just as the court did in *Gonzales.* As a result, Northcutt has not shown that Dunn's failure to pursue the defense was ineffective under the performance prong of the *Strickland* test.

E. *Failure to Inform Northcutt of His Right Not to Testify at Trial*

Northcutt also claims that he and Dunn never discussed his right to remain silent at trial, so Northcutt did not have enough information to make an informed decision about whether to testify. See U.S. Const. amend V; Rule 226, Kansas Rules of Professional Conduct 1.2(a) (2014 Kan. Ct. R. Annot. 470) ("In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to ... whether the client will testify."). At the habeas hearing, Northcutt testified that Dunn had insisted he testify at trial:

> "[Northcutt's Habeas Attorney:] I think we've already addressed the fact that you did testify at your own trial; is that correct?
>
> "[Northcutt:] Yes, sir.
>
> "[Northcutt's Habeas Attorney:] And do you recall having any conversation with Mr. Dunn prior to trial about that decision?
>
> "[Northcutt:] Yes, I do.... [I]t was a brief conversation. The State had just rested their case, and we—he called for a brief recess and we went into the hallway ... to converse, and Bill Dunn insisted that I had to take the stand at that time, and this was all done in the hallway outside the presence of the jury.
>
> "[Northcutt's Habeas Attorney:] Had you ever had any conversations with him prior to trial about testifying or not testifying?
>
> ***13** "[Northcutt:] No, sir. I never had any conversation about that whatsoever.
>
> "[Northcutt's Habeas Attorney:] Did he ever advise you that you had the right to testify, but that you also did not have to testify?
>
> "[Northcutt:] I was not advised of my rights in any respect. Lacking in knowledge of the law, you know, I expect Counsel to keep me informed of that.
>
> "[Northcutt's Attorney:] Okay. Do you recall any conversations about your testimony and how that might play in your trial strategy?
>
> "... I believe Mr. Dunn had testified that he had reasons that he thought it'd be good for you to testify, and it was part of his strategy, I guess, for lack of a better word. Do you recall having any conversations with him about that?
>
> "[Northcutt:] He never really gave me any reasons why I was to testify. He just said that I was going to have to take the stand.
>
> "[Northcutt's Attorney:] Okay.
>
> "[Northcutt:] For what reasons I told him that I didn't think it was a good idea, but he kept insisting that the only evidence that was going to—that they would be able to produce would be coming from me taking the stand."

Northcutt says that he was not aware that he did not have to testify because the trial court did not advise him of his right to remain silent either.

The trial court had no obligation to advise Northcutt of his right to remain silent. See *United States v. Yono*, 605 F.3d 425, 426 (6th Cir.2010); *Nguyen v. Archuleta*, 369 F. Appx. 889, 892–93 (10th Cir.2010); *Dodge v. State*, No. 101,267, 2010 WL 3731171, at *5–6 (Kan.App.2010) (unpublished opinion), *rev. denied* 292 Kan. 964 (2011). Some courts have cautioned that a judge's comment could have the unintended effect of swaying the defendant's decision about whether to testify. *Yono*, 605 F.3d at 426. But defense counsel has a duty to advise the client about whether to testify and to explain the advantages and disadvantages of doing so. *Dodge*, 2010 WL 3731171, at *6.

Dunn claimed he could not specifically remember informing Northcutt of his right not to testify but that it was his normal practice to do so. He said that having the jury see that Northcutt was likeable was also part of his trial strategy:

> "[Northcutt's Habeas Attorney:] Do you recall any conversations that you may have had with [Northcutt] about whether he should or should not testify or about his right to testify?
>
> "[Dunn:] I don't recall any specific conversations.
>
> "[Northcutt's Habeas Attorney:] Do you believe that you advised him that he had a right not to testify?
>
> "[Dunn:] It would be very contrary to my normal practice if I failed to advise him that he had a right to testify and equally a right not to testify, and that if he chose not to testify no one could force him to take the stand.
>
> 1"[Northcutt's Habeas Attorney:] Okay. Do you recall ever discussing with him as a matter of trial strategy whether or not you thought it would be a good idea for him to testify?
>
> ***14** "[Dunn:] Again, I don't have specific recollection, but I've been trying to think about this case, and ... maybe its speculation, but I'm imagining that what we thought was this: We knew we had to get over that statement. Gayl had an explanation for that statement, as I recall, and we wanted to get that in front of a jury. I also felt, as a matter of trial tactics, and maybe it was misguided, but I'd come to know [Northcutt] and I thought [he] had a lot of kind of quirky, likeable things about himself and I felt that if the jury got to know him a little bit through testimony that it would be a good thing, so I'm sure, if [Northcutt] asked my opinion, I'd say to him, sure. I just imagine I would have said yeah, you probably ought to take the stand."

On cross-examination, Dunn again stated that he always informs his clients that they have the right not to testify:

> "[State:] [Y]ou indicated that it's your practice to discuss with a criminal defendant the fact that they have a right not to testify?
>
> "[Dunn:] Every time.
>
> "[State:] Okay. You believe you did it in this case?
>
> "[Dunn:] I believe I did.
>
> "[State:] Okay. You believe that the fact that this defendant took the stand and testified, that that was under an informed decision of his own?
>
> "[Dunn:] I think that we—yes, I do think that.
>
> "[State:] [I]t's not as if you force your clients to take the stand, right?
>
> "[Dunn:] I would never force anyone to take the stand."

The district court relied on the fact that it was Dunn's normal practice to advise his clients of their right not to testify and found as a factual matter that Dunn *did* advise Northcutt of this right. Dunn's testimony about his normal practices is evidence that a reasonable person could accept as being adequate to support the conclusion that Dunn advised Northcutt of his right not to testify, even if Dunn also encouraged Northcutt to testify for strategic reasons. The Eleventh Circuit reached a similar conclusion in a habeas case where the defendant argued that his trial counsel had prevented him from testifying at his trial but trial counsel testified that her ordinary practice was to advise her clients about the consequences of testifying. *McGriff v. Dep't of Corrections*, 338 F.3d 1231, 1237–38 (11th Cir.2003); see also *Reynolds v. United States*, 233 F. Appx. 904, 905 (11th Cir.2007) (unpublished opinion). Because there is substantial evidence that Dunn advised Northcutt of his

right not to testify at trial, Dunn's performance in talking to Northcutt about this right to remain silent was not ineffective.

F. *Failure to Prepare for Northcutt's Trial Testimony*

Northcutt next claims that in addition to failing to discuss his options about testifying, Dunn also failed to prepare Northcutt for his testimony at trial in two ways: (1) Dunn failed to prepare questions to ask Northcutt on direct examination that would allow him to tell his story in a coherent manner; and (2) Dunn didn't help Northcutt become comfortable presenting his story to a jury. Once again, the district court found to the contrary as a factual matter, concluding that Northcutt "had prepared for trial with Mr. Dunn" and that additional preparation would not have made a difference at trial. The court noted Dunn had indicated that he does not coach his witnesses and that telling Northcutt what to say would have been inappropriate.

***15** Substantial evidence supports the district court's findings on this issue.

First, a review of the trial transcript shows that Dunn asked Northcutt questions at trial in a reasonable order that would have permitted him to tell his version of events in a coherent manner. Dunn started his examination by asking Northcutt about his achievements in the military then moved on to his employment history and personal interests, including duck training. He likely presented these lines of questioning for strategic reasons, to show the jury that Northcutt was quirky and likeable. Dunn then asked Northcutt about his relationship with Mason and walked Northcutt through his version of the events of the day Mason died and of the disposal of the body in chronological order. Dunn's job was to advise Northcutt about the pros and cons of testifying and to prepare him to testify if he chose to do so. But the defense attorney is not in control of whether the defendant actually testifies well or makes a good impression on the jury. See *State v. Orr*, 262 Kan. 312, 337–39, 940 P.2d 42 (1997).

Second, evidence supports the district court's finding that Dunn spent time preparing Northcutt to testify. At the hearing on the habeas petition, Dunn testified that while he seldom scripted or rehearsed testimony with his clients, he typically talked to them about their testimony and what they might expect on cross-examination. He stated that he would be particularly likely to do so in a high-stakes first-degree murder case like Northcutt's. Dunn also stated that in a case where the defendant had made incriminating statements to the police, he would have spent time preparing to address them.

Northcutt specifically argues that Dunn should have questioned him directly about why his testimony about Mason's death differed from what he had told the police. No one asked Dunn about this specific point at the habeas hearing, but the record on appeal shows that this decision fit with Dunn's trial strategy, which was to focus on the holes in the State's theory of Mason's death and to avoid drawing attention to Northcutt's statements to police.

In sum, there were valid strategy reasons for the questions Dunn asked, and substantial evidence supports the district court's factual conclusion that Dunn spoke with Northcutt about his testimony and prepared him for it. Accordingly, Dunn's preparation for Northcutt's testimony did not constitute ineffective performance.

G. *Failure to Call an Expert Witness*

Northcutt's final contention that Dunn was ineffective is that Dunn failed to call an expert witness that his family had hired before trial—forensic pathologist Corrie May, M.D. Northcutt says that Dr. May's testimony would have cast doubt on the expert testimony offered by the State's witness, Dr. Erik Mitchell, the forensic pathologist who performed Mason's autopsy.

At the habeas hearing, Northcutt offered into evidence a handwritten report allegedly authored by Dr. May, but Dr. May did not testify. The court admitted the report to preserve it for the record but took issue with its authenticity because it was handwritten with numerous revisions and because a note on the top of the report —"Rec. in mail from Bill Dunn 5/22/07"—listed a date *after* the jury convicted Northcutt. The court stated, "I don't find any basis to base my decision in any way on what's contained [in the report]." It later found that the report reached essentially the same conclusions as Dr. Mitchell had at trial. The handwritten report is the only indication of what Dr. May might have said at trial, and neither Northcutt nor Dunn confirmed that Dr. May wrote the report.

***16** Even if we assume that Dr. May did write the report, substantial evidence supports the district court's finding that Dr. May reached essentially the same conclusions

as Dr. Mitchell. At trial, Dr. Mitchell indicated that the four lacerations on the back of Mason's head were soft-tissue injuries. He could not tell the precise mechanism of Mason's death because his body had decayed. But he thought bruising, swelling, or small areas of hemorrhaging of the brain could have been the mechanism of death. He found that the injuries were consistent with being struck on the head by a cue-ball-type object attached to a rope and that Mason's death would be consistent with those injuries.

While the report apparently written by Dr. May does not perfectly mirror Dr. Mitchell's testimony, it was consistent with his statements. The report said that a closed-head injury was a possibility and that blows that did not fracture the skull could still produce a serious brain injury not associated with heavy bleeding—such as bruising of the brain—that can cause death by brain swelling and brainstem herniation. It also stated that Northcutt's gear shift or other weapons could have produced the injuries. It said that Mason's cause of death was "related to [b]lunt trauma to [the] head" and that the manner of death was "homicide."

The report does not clearly state how Dr. May would have cast doubt on Dr. Mitchell's testimony, and Northcutt has not adequately explained how she would have. The similar conclusions in Dr. Mitchell's trial testimony and the report are evidence that a reasonable person could accept as being adequate to support the district court's conclusion that—assuming Dr. May wrote the report—she reached essentially the same conclusions as Dr. Mitchell. Accordingly, Dunn's decision not to call her as a witness did not constitute ineffective performance under *Strickland.*

II. *Northcutt's Appellate Counsel Was Not Constitutionally Ineffective*

Northcutt also argues that his counsel on direct appeal, Meryl Carver–Allmond, was constitutionally ineffective because she provided the Kansas Supreme Court with copies of exhibits that were meant to be included in the record on appeal but had been lost. The Supreme Court described the incident as follows:

> "At Northcutt's trial, audiotapes of the two custodial interviews were played to the jury. In both interviews, Northcutt admitted to beating Mason, and in the second interview he confessed that he and his brother had gone to Mason's apartment with the intent to kill Mason. Consequently, the audiotapes are important to the analysis of Northcutt's factually-based appellate arguments. Yet, when this court began its review of the case, the audiotapes of the interviews—trial exhibits 57 and 58—were not in the record on appeal.
>
> "During oral arguments, the court questioned counsel regarding the burden of creating an adequate record on appeal. At that point, both counsel were alerted to the absence of the tape recordings from the record. In response, both counsel advised the court the exhibits had been designated for inclusion in the record on appeal through a supplemental designation, which was also not in this court's record. It was later reported to the court that the original exhibits could not be located. Northcutt then filed a 'Motion to Order Transmission of the Record on Appeal.' In support of the motion, Northcutt's appellate counsel stated that she had received the tapes after the appeal had been docketed, relied on the tapes in preparing Northcutt's appellate brief, and then returned the tapes to the Wyandotte County District Court Clerk's office. Although the parties' statements of facts did not significantly differ, Northcutt argued his constitutional due process and equal protection rights would be violated if this court did not have the opportunity to review the tapes.
>
> ***17** "After the motion was filed, the Clerk of the Appellate Courts, with the cooperation of counsel, located copies of the audiotapes and a police department transcript of the recorded interviews. Based on the availability of these substitutes, this court 'ordered [the parties] to notify this court within (10) days if there is any objection to the court's addition of the audio copies and transcripts to the record on appeal, as substitutes for the unavailable exhibits. If objection is made, the party should also address why this matter should not be remanded for a hearing regarding the unavailability of the exhibits and alternatives for preservation of a record on appeal. See Rule 3.02 (2009 Kan. Ct. R. Annot. 22); Rule 3.04 (2009 Kan. Ct. R. Annot. 26).'
>
> "The State responded, indicating it did not object to the addition to the record. Northcutt did not file an objection. Hence, the audiotapes and transcript were submitted to the court as part of the record on appeal. As a result of this procedure and Northcutt's waiver of any objection, the record is complete, Northcutt's

motion is moot, and this appeal is ready for decision." *Northcutt*, 290 Kan. at 225–26.

In a letter to Northcutt, CarverAllmond explained that if the tapes were lost, he would have the burden of recreating them for the Supreme Court to consider on appeal:

> "I have filed a motion asking the Supreme Court to order the Wyandotte County Clerk's Office to either produce the tapes to declare that they are lost so we can proceed without them. From my quick research, it appears that if the tapes are actually lost, we will have the burden of recreating them, which I can do from the copies I made. Then your appeal should proceed to a decision as normal."

Northcutt contends that Carver–Allmond should not have provided the court with copies of his statements to police because they were very damaging to his case.

He apparently made the same argument to Carver–Allmond because in another letter, she explained why she had provided the court with copies of his statements:

> "I felt it was better to reproduce the tapes because it is the appellant's burden to provide a record on appeal that shows there was error in the district court. Although the tapes were, obviously, very bad for your case, without them the appellate court would have been free to essentially assume that everything the State said was true. Although the murder conviction was always going to be almost impossible to overturn, I thought the tapes might help with the conspiracy conviction."

The district court did not make any factual findings or legal conclusions regarding Carver–Allmond's decision to provide the Supreme Court with copies of Northcutt's statements. Because the parties do not dispute the facts regarding her actions and this court has unlimited review of legal conclusions, however, we have unlimited review of this issue and can still review the matter in this appeal. *Miller*, 298 Kan. at 928; *Edgar*, 296 Kan. at 519–20.

***18** The test for ineffective appellate counsel is much the same as the test for trial counsel: the defendant must show (1) that his attorney's work was below minimum standards and, thus, was constitutionally deficient and (2) that his attorney's substandard work prejudiced his defense to the extent that there is a reasonable probability that the appeal would have been successful if not for counsel's deficient performance. *Miller*, 298 Kan. at 929–30; *Holmes v. State*, 292 Kan. 271, 274, 252 P.3d 573 (2011). When determining whether appellate counsel's conduct fell below minimum standards, this court " " 'must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.' " " *Miller*, 298 Kan. at 931.

On Northcutt's direct appeal, Carver–Allmond argued that there was insufficient evidence to support Northcutt's conviction for conspiracy to commit first-degree murder. *Northcutt*, 290 Kan. at 231. If she had not provided the Supreme Court with copies of Northcutt's statements to police, it would not have been able to properly evaluate his claims on appeal, particularly his sufficiency-of-the-evidence claim. See *State v. Davis*, 281 Kan. 169, 178, 130 P.3d 69 (2006); *Williams v. Quarles*, No. 90,013, 2003 WL 22697578, at *1 (Kan.App.2003) (unpublished opinion), *rev. denied* 277 Kan. 928 (2004). As the party claiming error, Northcutt had the burden of designating a record on appeal that showed he was prejudiced. *Bridges*, 297 Kan. at 1001. Without a full record of the evidence presented to the jury, the Kansas Supreme Court could have denied Northcutt's claim that the evidence wasn't sufficient to convict him on the simple basis that he hadn't provided a complete record on appeal.

To avoid that result and to allow Northcutt's claim to be considered on its merits, Carver–Allmond did her job and made sure that the record was both accurate and complete. That allowed the Kansas Supreme Court to review Northcutt's direct appeal on its merits. What Carver–Allmond did was appropriate and certainly did not constitute ineffective assistance of counsel.

In sum, Northcutt has not shown that either attorney's performance fell outside the wide range of reasonable professional assistance. We therefore affirm the district court's judgment.

All Citations

344 P.3d 970 (Table), 2015 WL 1310712

End of Document

209 P.3d 764 (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.

Douglas ALDRICH, Appellant,
v.
STATE of Kansas, Appellee.

No. 100,013.
|
June 26, 2009.
|
Review Granted May 20, 2010.

West KeySummary

1 Criminal Law
Self-defense;defense of another

Defense counsel was not ineffective for failing to pursue a causation defense in addition to self-defense in a trial for first-degree murder. Witnesses testified that the defendant admitted to stabbing the victim in self-defense. There was no evidence of an intervening cause of death, and an autopsy report stated that the victim died as a consequence of a stab wound. U.S.C.A.Const.Amend. 6.

Cases that cite this headnote

Appeal from Saline District Court; Daniel L. Hebert, Judge.

Attorneys and Law Firms

Jared T. Hiatt, of Clark, Mize & Linville, Chartered, of Salina, for the appellant.

Ellen Mitchell, county attorney, and Steve Six, attorney general, for the appellee.

Before MALONE, P.J., PIERRON and GREENE, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** Douglas Aldrich timely appeals the district court's summary denial of his K.S.A. 60-1507 motion. We affirm.

In February 2003, the State charged Aldrich with one count of murder in the first degree, pursuant to K.S.A. 21-3401(a), an off-grid person felony.

On February 8, 2003, Aldrich entered the Red Kitten Bar in Salina, Kansas. Aldrich had previously been drinking at another bar. Widely varying witness accounts established that Aldrich drank between 2-8 double shots of tequila and one beer. One witness testified that Aldrich became more intoxicated as the day progressed; however, another witness testified that Aldrich never appeared intoxicated. His behavior was described as obnoxious and loud.

Aldrich engaged in a minor confrontation with another bar patron, Pat Hanson. Aldrich's behavior also caused irritation among the bar's other patrons and employees. Despite his antagonism, none of the patrons ever asked bar employees to escort Aldrich off the premises. Jerald Bird was the bar's unofficial bouncer.

At some point during the afternoon, Aldrich asked Bird to come with him outside the bar. A witness testified that Bird and Aldrich were arguing outside the bar. Bird told Aldrich not to reenter the bar because he was too intoxicated and upsetting the other patrons. The witness also testified that both men "had their fists doubled up like they were going to square off at each other and hit each other, but they were quite a ways away from each other."

Bird returned to the bar while Aldrich remained outside. A few minutes later, Aldrich reentered the bar and asked for his sunglasses. Aldrich was given his sunglasses, and Bird demanded that Aldrich leave the bar. Eventually, Bird pushed Aldrich out the front door of the bar. Witnesses saw the two men wrestling around and saw Aldrich lunge at Bird. Bird turned around with blood spurting from

his chest. One witness saw Aldrich holding a knife with blood on it. Aldrich fled. Hanson chased Aldrich to get his license plate number.

Prior to the altercation, bar patrons had seen Aldrich with a knife. However, their accounts varied as to the description of the knife. Although various witnesses testified that Bird had a knife on his person on the day of the incident, all of the witnesses testified they never saw Bird remove his knife and attempt to use it. No knife was left at the crime scene. An inventory of Bird's personal possessions at the hospital evidenced two knives.

Bird had a horizontal laceration of 1-1/2 inches near the center of his chest. Although Bird had a pulse when he entered the ambulance, he lost all vital signs before reaching the hospital. At the hospital, Dr. Ted Macy performed a thoractomy on Bird to treat his injuries. Despite Dr. Macy's efforts to repair the hole in Bird's heart and to defibrillate the heart to continue its beating, Bird was unable to recover from his wounds. Dr. Trent Davis, a neurologist conducted tests that showed Bird had no spontaneous brain activity and had suffered "an anoxic brain injury from which there was no chance for recovery." Bird's life support was terminated on February 14, 2003, and he died shortly thereafter. After conducting Bird's autopsy, Forensic Pathologist Erik Mitchell testified that Bird died "as a consequence of a stab wound to the heart. Specifically, the mechanism or how it happened [was] that by blood loss [he] ended up with loss of oxygen to his brain."

***2** Aldrich was eventually located and arrested for Bird's murder. The case proceeded to jury trial. At the close of deliberations, the jury found Aldrich guilty of the lesser charge of second-degree murder, acquitting him of the original charge of first-degree murder. After denying Aldrich's posttrial motions, the district court sentenced him to 618 months' incarceration, the aggravated presumptive sentence based upon the severity level 1 of the crime and Aldrich's criminal history score of B.

Aldrich timely appealed his conviction, this court affirmed, and on April 3, 2006, Aldrich filed a petition for review with the Kansas Supreme Court. The petition was denied on September 19, 2006. *State v. Aldrich,* No. 92,364, unpublished opinion filed March 3, 2006, *rev. denied* 282 Kan. 791 (2006) (*Aldrich I*).

On September 20, 2007, Aldrich filed a K.S.A. 60-1507 motion through retained counsel. Specifically, Aldrich alleged ineffective assistance of trial counsel, improper admission of evidence, incomplete jury instructions, and that he had been denied the opportunity to present his theory of defense.

The district court found that Aldrich had failed to timely file the motion because it had been filed more than 1 year after the Kansas Supreme Court's, denial of Aldrich's petition for review. After reviewing the merits of the motion, the court summarily denied it, finding that the majority of Aldrich's allegations had been raised on direct appeal and that counsel had not been ineffective, in addition to the motion being untimely.

Aldrich's first argument on appeal is that the district court erred in summarily dismissing his K.S.A. 60-1507 motion as untimely. In essence, this argument focuses upon interpretation of K.S.A. 60-1507(f), which provides a 1-year deadline for filing K.S.A. 60-1507 motions. Interpretation of a statute is a question of law over which an appellate court has unlimited review. *Genesis Health Club, Inc. v. City of Wichita,* 285 Kan. 1021, 1031, 181 P.3d 549 (2008). The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. *Winnebago Tribe of Nebraska v. Kline,* 283 Kan. 64, 77, 150 P.3d 892 (2007). An appellate court's first task is to "ascertain the legislature's intent through the statutory language it employs, giving ordinary words their ordinary meaning. [Citation omitted.]" *State v. Stallings,* 284 Kan. 741, 742, 163 P.3d 1232 (2007). If a statute is plain and unambiguous, this court must not resort to statutory construction. "It is only if the statute's language or text is unclear or ambiguous that we move to the next analytical step, applying canons of construction or relying on legislative history construing the statute to effect the legislature's intent." *In re K.M.H.,* 285 Kan. 53, 79, 169 P.3d 1025 (2007), *cert. denied* --- U.S. ----, 129 S.Ct. 36, 172 L.Ed.2d 239 (2008).

In relevant part, K.S.A. 60-1507(f) requires that a K.S.A. 60-1507 motion be brought within 4 year of "[t]he final order of the last appellate court in this state to exercise jurisdiction on a direct appeal or the termination of such appellate jurisdiction" or "the denial of a petition for writ of certiorari to the United States supreme court or

issuance of such court's final order following granting such petition." The 1-year time limitation on bringing an action prescribed by K.S.A. 60-1507(f)(1) may be extended by the district court to prevent a manifest injustice. K.S .A. 60-1507(f)(2). "Although 'manifest injustice' has not been defined in the context of K.S.A. 60-1507(f)(2), this court has interpreted the phrase in other contexts to mean 'obviously unfair' or 'shocking to the conscience.' [Citations omitted.]" *Ludlow v. State,* 37 Kan.App.2d 676, 686, 157 P.3d 631 (2007). Pursuant to Kansas Supreme Court Rule 8.03 (2008 Kan. Ct. R. Annot. 65), any party who feels aggrieved by a decision of the Court of Appeals may petition the Supreme Court for discretionary review. If the Supreme Court denies review, the decision of the Court of Appeals "shall be final as of the date of the decision denying review, and the mandate shall be issued by the Clerk forthwith." Rule 8.03(f) (2008 Kan. Ct. R. Annot. 68).

***3** Aldrich timely appealed, and a panel of this court filed *Aldrich I* on March 3, 2006, affirming the conviction. On April 3, 2006, Aldrich filed a petition for review with the Kansas Supreme Court. The petition was denied on September 19, 2006, and a mandate was issued on September 20, 2006. On September 20, 2007, Aldrich filed a K.S.A. 60-1507 motion through retained counsel. Aldrich urges us to adopt an interpretation that the mandate issued by the appellate clerk on September 20, 2006, constitutes the final order of the last appellate court. The State counters that these provisions instead define the last order of an appellate court as the Supreme Court's denial of Aldrich's petition for review.

In *Wilson v. State,* 40 Kan.App.2d 170, 192 P.3d 1121 (2008), the court considered the interpretation of these provisions. Wilson was convicted by a jury of first-degree murder. After a direct appeal to the Kansas Supreme Court, Wilson's conviction was affirmed on March 17, 2006, in *State v. Wilson,* 281 Kan. 277, 130 P.3d 48 (2006) and the mandate was issued on April 10, 2006. Although the factual circumstances of the filing of Wilson's K.S.A. 60-1507 motion are somewhat confusing, this court held that Wilson had until March 20, 2007 (1 year plus 3 days for the mailbox rule from March 17, 2006), to timely file his K.S.A. 60-1507 motion. 40 Kan.App.2d at 175, 192 P.3d 1121. Therefore, the court held that it was the date of the Kansas Supreme Court's opinion affirming Wilson's conviction, not the issuance of the mandate, that provided the requisite timeline for K.S.A. 60-1507(f). The court further found that a judgment is final when the Kansas Supreme Court rejects a petition for review, not when the mandate is issued thereafter. 40 Kan.App.2d at 175, 179, 192 P.3d 1121. This reasoning echoes the precedent of the Tenth Circuit Court of Appeals in considering writs of habeas corpus pursuant to See 40 Kan.App.2d at 179; , 192 P.3d 1121 28 U.S.C. 2244(d) (2006); *Duhworth v. Evans,* 442 F.3d 1265, 1268 (10th Cir.2006).

In *Pouncil v. State,* No. 98,276, unpublished opinion filed May 30, 2008, *rev. denied* 286 Kan. 1179 (2008), Pouncil was convicted of two counts of aggravated intimidation of a victim. On direct appeal, the court affirmed his conviction in *State v. Pouncil,* No. 76,876, unpublished opinion filed August 14, 1998, *rev. denied* 266 Kan. 1114 (1998). Pouncil filed a K.S.A. 60-1507 motion on February 16, 2006. The district court summarily dismissed the motion as untimely. This court affirmed the dismissal, stating that the final order of the last appellate court was issued on November 12, 1998, when the Kansas Supreme Court denied Pouncil's petition for review. Slip op. at 2-4.

These cases do suggest that the final decision concerning a defendant who first pursues a direct appeal to the Kansas Court of Appeals and then submits a petition for review with the Kansas Supreme Court, that is subsequently denied, occurs on the date on which the Supreme Court denies the defendant's petition for review. See K.S.A. 60-1507(f); Rule 8.03(F); *Wilson,* 40 Kan.App.2d at 175, 192 P.3d 1121; *Pouncil,* slip op. at 4. On September 19, 2006, the Kansas Supreme Court denied Aldrich's petition for review. A mandate was issued to reflect this decision on September 20, 2006. Consequently, Aldrich's 1-year timeframe for filing his K.S.A. 60-1507 motion began when the Supreme Court denied his petition for review on September 19, 2006, and elapsed on September 19, 2007. However, this calculation does not account for an application of the 3-day mailbox rule that was applied in *Wilson.* Aldrich's K.S.A. 60-1507 motion was, therefore, timely field.

***4** There are three options for the district court faced with a K.S.A. 60-1507 motion. First, the court may determine that the motion, files, and records of the case conclusively show that the movant is entitled to no relief and summarily deny the motion. Second, the court may determine from the motion, files, and record that a substantial issue or issues are presented, thus requiring a full evidentiary hearing with the presence

of the movant. Finally, the court may determine that a potentially substantial issue or issues of fact are raised in the motion, supported by the files and record, and hold a preliminary hearing after appointment of counsel to determine whether the issues in the motion are, in fact, substantial. *Bellamy v. State,* 285 Kan. 346, 353, 172 P.3d 10 (2007).

In the event the district court determines that the issue or issues are not substantial, the court may proceed to a final decision without the presence of the movant. If the issue or issues are substantial, involving events in which the movant participated, the court must proceed with a hearing involving the presence of the movant. *Swenson v. State,* 284 Kan. 931, 935, 169 P.3d 298 (2007).

It is generally erroneous to deny a K.S.A. 60-1507 motion without an evidentiary hearing if the motion alleges facts outside the 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. [Citation omitted.] The motion must set forth a factual background, names of witnesses, or other sources of evidence demonstrating movant's entitlement to relief. [Citation omitted.]" *State v. Holmes,* 278 Kan. 603, 629, 102 P.3d 406 (2004). The standard of review when the district court fails to appoint counsel and summarily denies a K.S.A. 60-1507 motion is de novo. *Bellamy,* 285 Kan. at 354, 172 P.3d 10; see K.S.A. 60-1507(b);

A claim alleging ineffective assistance of counsel presents mixed questions of fact and law requiring de novo review. *Bledsoe v. State,* 283 Kan. 81, 91, 150 P.3d 868 (2007). Before counsel's assistance is determined to be so defective as to require reversal of a conviction, the defendant must establish two things. First, the defendant must establish that counsel's performance was deficient. This requires a showing that counsel made errors so serious that his or her performance was less than that guaranteed to the defendant by the Sixth Amendment to the United States Constitution. Second, the defendant must establish that counsel's deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial. *Bledsoe,* 283 Kan. at 90, 150 P.3d 868.

Judicial review of counsel's performance must be highly deferential:

> "There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. To show prejudice, defendant must show a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court hearing an ineffective assistance of counsel claim must consider the totality of the evidence before the judge or jury. [Citation omitted.]" *Phillips v. State,* 282 Kan. 154, 159-60, 144 P.3d 48 (2006).

***5** The defendant bears the burden of proving that the representation of his trial counsel was deficient by a preponderance of the evidence. *State v. Barahona,* 35 Kan.App.2d 605, 611, 132 P.3d 959, *rev. denied* 282 Kan. 791 (2006). In order to do so, a defendant "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. [Citation omitted.]" *State v. Gleason,* 277 Kan. 624, 644, 88 P.3d 218 (2004). A defendant's mere "speculative allegations are insufficient to mandate an evidentiary hearing" and are not sufficient basis for relief from conviction. *Barahona,* 35 Kan.App.2d at 611, 132 P.3d 959.

Generally, trial counsel "has the responsibility for making tactical and strategic decisions." *Flynn v. State,* 281 Kan. 1154, 1165, 136 P.3d 909 (2006). Examples of strategic or tactical decisions include preparation, scheduling, the type of defense to present, what witnesses to call, whether and how to conduct cross-examination, what jurors to accept, and what trial motions should be made. *State v. Rivera,* 277 Kan. 109, 117, 83 P.3d 169 (2004); *State v. Ward,* 227 Kan. 663, 666, 608 P.2d 1351 (1980). Trial counsel's strategic choices "made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Gleason,* 277 Kan. at 644, 88 P.3d 218. Criminal defendants are only vested with decision-making authority in three aspects of their cases: (1) what plea to enter; (2) whether to waive jury trial; and (3) whether to testify on their own behalf. *Rivera,* 277 Kan. at 116-17, 83 P.3d 169.

Aldrich's first allegation of trial counsel's ineffective assistance involves his assertion that trial counsel solely pursued a theory of self-defense over Aldrich's alleged objections. Specifically, Aldrich asserts that trial counsel was ineffective for failing to object to the admission of

evidence regarding the causation of Bird's death and for declining to cross-examine two State witnesses regarding causation. Aldrich further alleges that trial counsel was ineffective because he failed to introduce evidence that Bird "was not legally dead at the time that the decision to remove life support was made."

Trial counsel was not ineffective for failing to pursue Aldrich's requested causation defense in lieu of or in addition to self-defense for several reasons. First, all of the State's witnesses who had a conversation with Aldrich after the incident testified that Aldrich admitted to stabbing Bird in an act of self-defense. Therefore, the most plausible theory of defense was indeed self-defense. Second, Aldrich can make no more than a conclusory assertion that another defense was available or that he objected to trial counsel's decision to pursue self-defense to negate the charges. Such a conclusory assertion cannot justify an evidentiary hearing.

There is no evidence that there was an intervening cause of death, such as hospital negligence, or that a family member prematurely removed Bird from life-sustaining treatment. Trial evidence conclusively demonstrated that Bird sustained a horizontal laceration of 1-1/2 inches near the center of his chest. As a result of blood loss related to his laceration, Bird lost all vital signs before reaching the hospital. Although he received surgical treatment for these injuries at the hospital, he was unable to recover from his wounds. Bird was on life support until his family received a report from a neurologist indicating that he no longer had spontaneous brain activity because he had suffered "an anoxic brain injury from which there was no chance for recovery." At this point, the family terminated Bird's life support, and he died. Bird's autopsy affirmed that he had died "as a consequence of a stab wound to the heart. Specifically, the mechanism or how it happened [was] that by blood loss [he] ended up with loss of oxygen to his brain."

***6** As this court noted on direct appeal, it is not hard to imagine why trial counsel would have chosen to pursue a theory of self-defense over an unfounded allegation that the victim's family members withdrew medical treatment when Bird had a chance of recovery. *Aldrich I,* slip op. at 4. Generally, trial counsel "has the responsibility for making tactical and strategic decisions" such as what type of defense to present. *Flynn,* 281 Kan. at 1165, 136 P.3d 909; *Rivera,* 277 Kan. at 117, 83 P.3d 169. This tactical decision was sound and should not be challenged by this court. An unfounded defense that attempted to shift the burden of Bird's death to his family would have been repulsive to the jury, especially in contrast to Aldrich's own admission that he had stabbed Bird. As a consequence, trial counsel was not ineffective on this issue, and the district court did not err in summarily denying Aldrich's motion.

Aldrich's second allegation of ineffective assistance of counsel involves trial counsel's failure to request a jury instruction on voluntary intoxication. Prior to submitting the case to the jury for deliberation, the district court provided jury instructions on self-defense, first-degree murder, as well as the lesser included crimes of second-degree murder, voluntary manslaughter, and involuntary manslaughter. The court's instructions did not include a voluntary intoxication instruction. Defense counsel did not object to this omission.

An appellate court reviewing a district court's failure to give a particular instruction applies a clearly erroneous standard where a party neither suggested an instruction nor objected to its omission. *State v. Cooperwood,* 282 Kan. 572, 581, 147 P.3d 125 (2006); see K.S.A. 22-3414(3). Jury instructions are only clearly erroneous if " 'the reviewing court is firmly convinced there is a real possibility that the jury would have rendered a different verdict if the error had not occurred.' [Citations omitted.]" *State v. Carter,* 284 Kan. 312, 324, 160 P.3d 457 (2007).

A defendant " 'may rely on the defense of voluntary intoxication where the crime charged requires specific intent, and an instruction thereon is required if there is evidence to support the defense.' [Citation omitted.]" *State v. Brown,* 258 Kan. 374, 386, 904 P.2d 985 (1995); see also K.S.A. 21-3208(2).

A defendant is entitled to have the jury instructed on his or her theory of defense even if the evidence is only slight. *Brown,* 285 Kan. at 386, 172 P.3d 1; *State v. Hayes,* 270 Kan. 535, 542-43, 17 P.3d 317 (2001). However, a jury instruction on involuntary intoxication is only warranted if there is evidence "that shows the defendant was intoxicated to the extent that his or her ability to form the requisite intent was impaired.... [Citations omitted.]" *Brown,* 258 Kan. at 386, 904 P.2d 985. The defendant bears the burden of showing "that he or she was so intoxicated that his or her mental faculties were impaired by the

consumption of alcohol or drugs. [Citation omitted.]" 258 Kan. at 386, 904 P.2d 985.

*7 The district court did not clearly err in failing to provide a voluntary intoxication jury instruction. Aldrich had the burden to show that not only was he intoxicated at the time of the crime, but also that his mental state was so impaired by his intoxication that he lacked the ability to form the requisite specific intent. He failed to do so. Aldrich failed to present any witnesses to support a defense of voluntary intoxication, and he did not testify in his own defense. The State's case-in-chief presented no evidence to corroborate Aldrich's alleged severe intoxication. Although there was evidence presented at trial to indicate that Aldrich was intoxicated at the time of the incident, none of the State's witnesses provided any evidence that Aldrich lacked the mental faculties to understand his actions. Therefore, Aldrich failed to establish the requisite elements to have justified a voluntary intoxication jury instruction. As a consequence, trial counsel was not ineffective for failing to request this instruction because such an instruction would not have been reasonable. Also, there appears to be no reasonable possibility that such an instruction would have had an effect on the trial's outcome.

Aldrich's last argument on appeal is that trial counsel was ineffective because he failed to conduct a full and thorough investigation of the facts leading up to the Bird's death. Specifically, Aldrich argues that trial counsel failed to conduct a sufficient investigation regarding a bloody knife found on Bird's person at the hospital and to expose the discrepancies between the testimony of Bird's friends regarding whether Bird had one or two knives in his possession on the day of the incident.

The district court did not err in summarily denying Aldrich's motion on this issue. Aldrich's first allegation in relation to the knife is that trial counsel was ineffective because he failed to investigate the blood found on Bird's knife. This argument is immaterial and did not deny Aldrich's right to a fair trial. Even under Aldrich's theory of self-defense, he never alleged that Bird cut him with a knife. At trial, Salina Police Department Investigator James Feldman testified that Aldrich made a voluntary statement to police that he did not mean to stab Bird, but that "Bird came at him with a big Bowie knife, [Aldrich] was just defending himself." Aldrich's only reported injury was a scrape over his left eye from being pushed through the bar door by Bird. Even following Aldrich's theory of self-defense, Bird never cut Aldrich with a knife. As a consequence, any blood found on the knife is irrelevant to Aldrich's theory of self-defense.

Aldrich also alleges that trial counsel failed to expose inconsistencies between various State witnesses regarding the number or location of knives on Bird's person during the incident. Generally, trial counsel "has the responsibility for making tactical and strategic decisions." *Flynn*, 281 Kan. at 1165, 136 P.3d 909. Whether and how to conduct cross-examination is an example of such strategic or tactical decisions. *Rivera*, 277 Kan. at 117, 83 P.3d 169; *Ward*, 227 Kan. at 666, 608 P.2d 1351. These decisions are virtually unchallengeable after "thorough investigation of law and facts relevant to plausible options." *Gleason*, 277 Kan. at 644, 88 P.3d 218.

*8 The district court did not err in summarily denying Aldrich's 60-1507 motion on this ground. Trial counsel's cross-examination techniques were tactical decisions that are virtually unchallengeable. Moreover, there was no evidence that trial counsel's cross-examination techniques fell below a standard of reasonable professional competence. Trial counsel cross-examined several of the State's witnesses for evidence of Bird's possession or placement of knives on the day of the incident. Most of this evidence established that while Bird had at least one knife on his person, he never removed it to use against Aldrich. Because cross-examination inquiries revealed nothing more than evidence tending to refute Aldrich's theory of self-defense, trial counsel was most effective in limiting the cross-examination on the issue as much as he did. If not, such cross-examination would have been likely to further reduce Aldrich's chances of a not guilty verdict.

Even if trial counsel was deficient in cross-examination, Bird's possession and placement of knives was not important to Aldrich's theory of self-defense. Aldrich's self-defense theory hinged upon his statement that Bird was the aggressor and came at him with a big Bowie knife. Aldrich stated that as a result of Bird's alleged advance, he stabbed Bird in self-defense. Even if we defer to Aldrich's version of the incident, as the jury refused to do, whether Bird had multiple knives in his possession had no effect. Aldrich's theory of self-defense only included Bird's possession of one knife-one allegedly in his hand. Therefore, there was no ineffective assistance of counsel,

and the district court did not err in summarily denying Aldrich's motion.

Affirmed.

All Citations

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356 P.3d 436 (Table)
Unpublished Disposition
This decision without published opinion
is referenced in the Pacific Reporter.
See Kan. Sup. Ct. Rules, Rule 7.04.
Court of Appeals of Kansas.

Daniel PEREZ, Appellant,

v.

STATE of Kansas, Appellant.

No. 112,328.

|

Sept. 18, 2015.

|

Review Denied July 7, 2016.

Appeal from Wyandotte District Court; Wesley K. Griffin, Judge.

Attorneys and Law Firms

Gerald E. Wells, of Jerry Wells Attorney–at–Law, Lawrence, for appellant.

Edmond Brancart, chief deputy district attorney, Jerome A. Gorman, district attorney, and Derek Schmidt, attorney general, for appellee.

Before HILL, P.J., BUSER, J. and WILLIAM R. MOTT, District Judge, assigned.

MEMORANDUM OPINION

PER CURIAM.

***1** In this habeas corpus proceeding, Daniel Perez contends the district court committed reversible error when it summarily denied his K.S.A. 60–1507 motion. Perez claims his trial counsel was ineffective by failing to advance a duress or compulsion defense. Finding no reversible error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A jury convicted Perez of first-degree felony murder (K.S.A.21–3401); criminal discharge of a firearm at an occupied dwelling (K.S.A.21–4219), and conspiracy to commit criminal discharge of a firearm at an occupied dwelling (K.S.A.21–3302). On April 24, 2008, the district court imposed a sentence of life imprisonment for first-degree felony murder, 59 months' imprisonment for criminal discharge of a firearm at an occupied dwelling and 32 months' imprisonment for conspiracy to commit criminal discharge of a firearm at an occupied dwelling. The sentences were ordered to run concurrently.

Our Supreme Court detailed the facts underlying Perez's convictions in *State v. Perez,* 294 Kan. 38, 39–41, 261 P.3d 532 (2012):

"In the spring of 2007, rival street gangs Florencia and Familia Loca (FL) were engaged in a series of violent confrontations in Kansas City. Carlos 'Papa' Moreno was a leader of the Florencia gang. Valentino Hernandez, known as Listo, and Jos Franco, known as Filero, were two leaders of FL. Perez, born on August 17, 1990, and Luis Gonzalez, also a juvenile, were lower ranking 'soldiers' of FL.

"On April 1, 2007, Filero's house was the target of a street-side shooting. Filero believed that Florencia was responsible for the shooting and wanted revenge. Two days later, on April 3, 2007, Perez and Gonzalez went to Filero's house to check in with the gang leaders. When they arrived, Listo indicated they were being sent on 'a mission' to shoot up Moreno's house. Perez initially refused the mission, resulting in an argument with Listo. Filero then entered the room with a pistol-grip shotgun and told Gonzalez to do the shooting. Gonzalez responded that he was too small to handle the shotgun. Eventually Filero and Listo left the room. When they were alone, Perez told Gonzalez that he did not want to get into trouble with the gang leaders for failing to follow orders. Perez then informed Listo and Filero that he would complete the mission. Gonzalez also agreed to help.

"Perez, Gonzalez, and Filero went on a dry run of the shooting mission and Filero showed Perez and Gonzalez where Moreno lived. When they returned to Filero's house, Listo was wiping down a shotgun with oil in order to remove fingerprints. Perez put on black gloves and took the shotgun from Listo. About 8:30 p.m., Perez and Gonzalez drove to Moreno's house in Gonzalez' car. Gonzalez stopped the car in a nearby alley and Perez got out and walked toward Moreno's house. Gonzalez was unable to see Moreno's house from the alley, but he heard

four or five gunshots coming from the direction of the house. Perez then ran back to the car, threw the shotgun in the backseat, and jumped into the passenger seat. Perez and Gonzalez then left the alley and returned to Filero's house.

***2** "Moreno later testified that on April 3, 2007, he was watching television in his bedroom when he heard several gunshots. He stated that he crawled out of the bedroom and picked up his 2–year–old niece, Yelena Guzman, who was playing in the front room near the door. Moreno noticed that Yelena was bleeding and he carried her toward the back of the house. Yelena later died of a gunshot wound to the head. Kansas City police officers recovered four shotgun shells and one shotgun slug at Moreno's house. Three of the shots had penetrated the front door.

"On July 19, 2007, the police interviewed Gonzalez and he implicated Perez in the shooting. Gonzalez later agreed to testify against Perez in exchange for being prosecuted as a juvenile for his involvement in the crimes.

"The State charged Perez with first-degree felony murder, criminal discharge of a firearm at an occupied dwelling, and conspiracy to commit criminal discharge of a firearm at an occupied dwelling. On September 11, 2007, the State moved to try Perez as an adult. After hearing the evidence and considering the factors enumerated in K.S.A. 382347, the district court authorized adult prosecution. Perez raised no procedural objections in district court to the State's motion for adult prosecution.

"At the jury trial, Gonzalez testified against Perez. Gonzalez described the events leading up to the shooting on April 3, 2007, and he testified that Perez intended to hit 'Papa' in the shooting. Cory Cisneros, another FL gang member, also testified that he was at Filero's house on April 3, 2007. Cisneros testified that he overheard Filero order Perez and Gonzalez to shoot Moreno's house. He testified that he saw Perez, Gonzalez, and Filero leave to do a dry run of the mission. Cisneros testified that later that evening he witnessed Perez and Gonzalez return from the shooting and overheard them say, 'we got 'em.' The State also introduced into evidence the transcripts of recorded telephone calls Perez made to his mother while he was in jail. During one telephone call, his mother asked Perez if he was guilty and he replied, 'of course, yes.' In another telephone call, his mother asked Perez if Gonzalez' story was accurate and he replied, 'more or less.'

"Perez did not testify at trial but his defense was that he was not the shooter and that he was being set up to take the fall for higher ranking gang members, Filero and Listo. Perez called three witnesses who testified that Perez was trying to distance himself from gang activity. Perez challenged Gonzalez' credibility and pointed out his testimony was in exchange for a favorable plea agreement."

On direct appeal, Perez challenged his convictions on numerous grounds. Finding no reversible error, our Supreme Court affirmed the jury's verdicts. 294 Kan. at 48–49. Almost 1 year later, on March 12, 2013, Perez filed the pro se K.S.A. 60–1507 motion that is the subject of this appeal.

Relevant to this appeal, in his K.S.A. 60–1507 motion Perez alleged his trial attorney provided constitutionally deficient representation by failing to present a "duress defense." Perez contended that duress was a viable defense because although he was attempting to "part ways with this gang setting and affiliation" and "even argued ... that he wanted ***NO*** part in committing such crime[s]," the adult gang leaders forced him to comply with their instructions. According to Perez, he was "just a [scared] child at the time" who did not want a " '[v]iolation,' " *i.e.,* a punishment for noncompliance which consists of " 'a punch in the mouth all the way to death.' " Perez argued that his attorney severely prejudiced his defense by neglecting to inform the jury that his actions were guided by threats and coercion.

***3** In response, the State advocated for a summary denial of Perez' motion. The State contended that Perez' attorney did not provide deficient performance because "the defense of compulsion or duress" was not available to Perez. According to the State, Perez could not claim such a defense because he had several opportunities to avoid committing the crimes without undue exposure to death or serious bodily harm and such a defense would have conflicted with his defense at trial that he did not commit the shooting.

On July 2, 2013, the district court summarily denied Perez' motion, finding that he had "failed to cite or accurately state any basis for relief or any good cause showing why

he [was] being held unlawfully." With respect to Perez' arguments regarding his counsel's failure to present a duress defense, the district court explained:

> "[Perez]'s final contention is that trial counsel erred when he failed to use the duress defense. Perez spends a considerable amount of time throughout his entire motion discussing the idea that he felt compelled or forced to commit the crimes or he would face serious consequences from adult gang leaders. K.S.A. 21–5206 details this defense and begins by stating that it can be utilized in crimes other than murder or voluntary manslaughter. Perez would not have been eligible to use this theory in the most serious charge herein. Kansas cases have further interpreted the statute and have held that the defense cannot be used by a party who had a reasonable opportunity to escape the compulsion or avoid doing the act without being exposed to the serious or fatal harm. A threat of future injury does not suffice. [Citation omitted.] As is reflected in the State's response, the facts established in the trial do not meet this standard. [Perez] had a viable opportunity to avoid the shooting at the time he left the car driving by the juvenile accomplice and walked to the residence to complete the shooting. In addition, his defense was that he' ... was not at the scene of the shooting.' [Citation omitted.] The denial of involvement in the shooting is contrary to the compulsion defense. The allegations in this aspect of [Perez]'s pro se motion are insufficient."

Perez filed a timely appeal.

FAILURE TO PRESENT A COMPULSION DEFENSE

On appeal, Perez candidly concedes that three of the claims he raised in his K.S.A. 60–1507 motion are no longer viable. He contends, however, that his fourth claim-a rather narrowly drawn complaint of ineffective assistance of counsel is meritorious. In particular, Perez concedes that his trial counsel was statutorily prohibited from raising the defense of compulsion, codified at K.S.A. 21–3209, as an affirmative defense to the crime of murder. Yet, Perez insists that a compulsion defense was fully available to him on the remaining lesser felony charges, criminal discharge of a firearm at an occupied dwelling and conspiracy to commit criminal discharge of a firearm at an occupied dwelling. As a result, in this appeal, Perez only seeks a reversal and remand for a new trial involving these two lesser charges.

***4** At the outset, we should also note that Perez focuses upon the merits of his K.S.A. 60–1507 motion alleging his attorney's ineffectiveness, and he does not challenge the district court's determination that it was unnecessary to hold an evidentiary hearing. Consequently, the propriety of the district court's decision not to conduct an evidentiary hearing, but to summarily rule on the motion, is not before us. See *State v. Boleyn*, 297 Kan. 610, 633, 303 P.3d 680 (2013) (issues not briefed by the appellant are deemed waived and abandoned).

When, as in this case, the district court summarily denies a movant's K.S.A. 601507 motion, we conduct a de novo review to determine whether the motion, files, and records of the case conclusively establish that the movant is not entitled to relief. See *Edgar v. State*, 294 Kan. 828, 836–37, 283 P.3d 152 (2012). For Perez to prevail on an ineffective assistance of counsel claim, he must satisfy the constitutional standards set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674, *reh. denied* 467 U.S. 1267 (1984). See *Thompson v. State*, 293 Kan. 704, 715, 270 P.3d 1089 (2011).

Under the *Strickland* test, the movant must establish (1) that counsel's performance was constitutionally deficient, which requires a showing that counsel made errors so serious that his or her performance was less than that guaranteed by the Sixth Amendment to the United States Constitution, and (2) counsel's deficient performance

prejudiced the defense, which requires a showing that counsel's errors were so severe as to deprive the defendant of a fair trial. *Miller v. State*, 298 Kan. 921, 929–35, 318 P.3d 155 (2014).

On appeal, Perez, who did not testify at trial, contends "the testimony of Luis Gonzales and Corey Cisneros ... provide more than an adequate factual basis of a compulsion defense," because their testimony "supports a reasonable conclusion that had [he] failed to follow the orders of Listo and Filero, he would have been physically harmed or killed under the rules of the gang."

We agree the trial testimony showed that Perez was a soldier in the Familia Loca gang, he was familiar with the gang's violent proclivities and he understood the gang's procedures to enforce discipline upon its members, including the use of physical violence. For example, to even join the Familia Loca gang, a prospective member was required to be beaten by three other gang members in an initiation ritual known as being "jumped in" to the gang. Soldiers in the gang, like Perez, were obligated to follow the rules of the gang's leaders or be disciplined with a "violation" which could involve a range of discipline, from a punch in the mouth to the most serious consequence, death.

Rather than show the predicate factual basis for a compulsion defense under K.S.A. 21–3209, however, we are persuaded this evidence established that the compulsion defense was not available to Perez.

***5** At the time Perez committed his offenses, K.S.A. 21–3209 provided:

"(1) A person is not guilty of a crime other than murder or voluntary manslaughter by reason of conduct which he performs under the compulsion or threat of the imminent infliction of death or great bodily harm, if he reasonably believes that death or great bodily harm will be inflicted upon him or upon his spouse, parent, child, brother or sister if he does not perform such conduct.

"(1) The defense provided by this section is *not available to one who willfully or wantonly places himself in a situation in which it is probable that he will be subjected to compulsion or threat.*" (Emphasis added.)

In considering this statute, our Supreme Court has stated that under K.S.A. 213209(2), " '*a person who connects himself or herself with criminal activities or is otherwise indifferent to known risks cannot use compulsion as a defense.*' (Emphasis added.)" *State v. Littlejohn*, 298 Kan. 632, 652, 316 P.3d 136 (2014) (quoting *State v. Scott*, 250 Kan. 350, Syl. ¶ 6, 827 P.2d 733 [1992]).

As the State points out, under K.S.A. 21–3209(2), Perez may not, "invite the compulsion, if it is found to exist, and then be heard to complain of it." We agree. And Perez does not advance any arguments to refute the notion that he willfully or wantonly placed himself in a situation where it was probable he would be subjected to compulsion or threat.

Based on the facts as set out in Perez' motion, our Supreme Court's factual rendition, and the record on appeal, we conclude, as a matter of law, that a compulsion defense was not available to Perez with regard to the two lesser felony charges because he willfully or wantonly associated himself with criminal activities by being a member of the Familia Loca gang. See K.S.A. 21–3209(2); *Scott*, 250 Kan. 350, Syl. ¶ 6. As a result, Perez' counsel was not ineffective for failing to present a compulsion defense.

Additionally, even if K.S.A. 21–3209(2) did not excuse Perez' attorney from presenting a compulsion defense, we find there was substantial competent evidence to support the district court's finding that Perez "had a viable opportunity to avoid the shooting at the time he left the car driven by the juvenile accomplice and walked to the residence to complete the shooting." This finding is important because our Supreme Court has stated: " 'The doctrine of compulsion cannot be invoked as an excuse by one who had a reasonable opportunity to escape the compulsion or avoid doing the act without undue exposure to death or serious bodily harm. A threat of future injury is not enough.' " *State v. Baker*, 287 Kan. 345, 352, 197 P.3d 421 (2008). As a result, even without the applicability of K.S.A. 21–3209(2), the defense of compulsion was not available under the facts of this case.

Although we do not find that trial counsel was ineffective, for the sake of completeness, we have also considered whether Perez has shown prejudice due to his attorney's failure to present a compulsion defense with reference to the two lesser felonies. To establish prejudice, the movant must show a reasonable probability that, but for counsel's

deficient performance, the outcome of the proceeding would have been different, with a reasonable probability meaning a probability sufficient to undermine confidence in the outcome. *Miller,* 298 Kan. at 934.

***6** As noted earlier, Perez' defense at trial was that he was not the shooter and he was being set up to take the fall for higher ranking members of the Familia Loca gang. If proven, this defense would have exonerated Perez of all three crimes. But, as Perez concedes on appeal, if he had employed the compulsion defense at trial, he would not have been able to claim compulsion with regard to the most serious of the three charges—felony murder.

Assuming for purposes of argument that the district court allowed Perez to submit a jury instruction on compulsion with regard to the two lesser felonies and argue it to the jury, Perez' counsel would have been in the unenviable position of arguing inconsistent theories of defense. In other words, with regard to the murder charge, defense counsel would have argued that Perez was not the shooter but with regard to the lesser felonies, defense counsel would have argued that Perez was the shooter but that he shot Yelena as a consequence of compulsion.

It is an understatement to observe there is no reasonable possibility that presentation of these two inconsistent theories of defense would have resulted in a different jury outcome. See 298 Kan. at 934. In addition to Perez failing to show that his trial counsel was ineffective, he has also failed to prove any prejudice. See 298 Kan. at 934–35. Accordingly, we hold the district court did not err when it summarily denied Perez' K.S.A. 60–1507 motion.

Affirmed.

All Citations

356 P.3d 436 (Table), 2015 WL 5458660

253 P.3d 386 (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.

Greg MOORE, Appellant,
v.
STATE of Kansas, Appellee.

No. 104,267.
|
June 24, 2011.
|
Review Denied Dec. 2, 2011.

Appeal from Sedgwick District Court; Timothy H. Henderson, Judge.

Attorneys and Law Firms

Sarah Ellen Johnson, of Capital Appellate Defender Office, for appellant.

Kristafer R. Ailslieger, deputy solicitor general, for appellee.

Before MALONE, P.J., PIERRON and ARNOLD–BURGER, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** Greg Moore was convicted of capital murder of a Harvey County Sheriff's deputy, attempted capital murder of four other people, aggravated kidnapping, and criminal possession of a firearm. He was sentenced to life without parole. In this appeal from the denial of his K.S.A. 60–1507 motion alleging ineffective assistance of his trial and appellate counsels, Moore argues that the district court was required to conduct a full evidentiary hearing on each of his claims. Finding that there were no substantial fact issues raised in the motion that could not be frilly determined based on a review of the record, we affirm.

FACTS

The underlying facts of Moore's case are set out in our Supreme Court's decision in *State v. Moore*, 287 Kan. 121, 194 P.3d 18 (2008); therefore, we will only restate them to the extent necessary for this analysis.

Moore filed a habeas corpus motion under K.S.A. 60–1507 alleging ineffective assistance of both his trial and appellate counsel. The district court held a preliminary hearing and found that Moore's arguments were without merit.

ANALYSIS

Moore argues that the district court erred in dismissing his motion without conducting a full evidentiary hearing. An appellate court's standard of review depends upon which of three available options the district court employs in resolving a K.S.A. 60–1507 motion. First, the district court may determine that the motion, files, and records of the case conclusively show that the movant is entitled to no relief and summarily deny the motion. Second, the district court may determine from the motion, files, and record that a substantial issue or issues are presented, requiring a full evidentiary hearing in the presence of the movant. Third, the district court may determine that the motion raises a potentially substantial issue or issues of fact, supported by the files and record, and hold a preliminary hearing after appointment of counsel to determine whether, in fact, the issues in the motion are substantial. *Bellamy v. State*, 285 Kan. 346, 353, 172 P.3d 10 (2007).

In this case, the district court conducted a preliminary hearing on the K.S.A. 60–1507 motion. At a preliminary hearing, the district court may admit limited evidence and consider counsel's arguments. It must then issue findings of fact and conclusions of law as required by Supreme Court Rule 183(j) (2010 Kan. Ct. R. Annot. 255). Thus, in reviewing the district court's decision we must determine whether substantial competent evidence supports the district court's findings of fact and whether those findings are sufficient to support the district court's conclusions of law. The district court's ultimate conclusions of law are reviewed de novo. *Bellamy*, 285 Kan. at 354. Additionally, "[p]ursuant to K.S.A. 60–1507 and Rule 183, the district

court must conduct an evidentiary hearing unless the motion, files, and records of the case conclusively show that the movant is not entitled to relief." 285 Kan. at 357.

***2** To establish that he is entitled to relief based on ineffective assistance of trial counsel, the defendant must show that (1) counsel's assistance fell below a reasonable standard of effectiveness, and (2) that counsel's deficient conduct prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), adopted in Kansas in *Chamberlain v. State*, 236 Kan. 650, Syl. ¶¶ 3–4, 694 P.2d 468 (1985). To establish prejudice, the defendant must show that but for counsel's errors there is a reasonable probability that the result of the trial would have been different. 466 U.S. at 694.

On appeal, Moore argues that his trial counsel was ineffective in five areas: (1) trial counsel failed to support a defense of voluntary intoxication; (2) trial counsel failed to support a defense of imperfect self-defense; (3) trial counsel failed, in several instances, to object to testimony; (4) trial counsel prejudiced Moore during opening arguments; and (5) trial counsel failed to investigate evidence that could have led to the impeachment of a prosecution witness. He also argues that his appellate counsel was ineffective for failing to review voir dire.

We will examine each claimed error separately.

A. *Failure to support the theory of involuntary intoxication*

After the crime, nine vials of Moore's blood were taken. The vials were never tested for the presence of drugs. One of Moore's theories of defense as to the crimes that involved intent and premeditation (capital murder and attempted capital murder) was voluntary intoxication. Moore argues that if the blood samples had been tested he could have mounted a much stronger defense for voluntary intoxication.

In his direct appeal, Moore argued that the district court erred in failing to give an instruction on voluntary intoxication. The evidence at trial was that Moore's residence was littered with beer and liquor containers; he had a history of alcohol and drug abuse; and his behavior became mean, violent, and paranoid when he was under the influence. It was undisputed that he acted in a mean, violent, and paranoid manner at the time of the crime. In addition, Moore was known to have recently used methamphetamine. Our Supreme Court found that there was enough circumstantial evidence of voluntary intoxication to warrant an instruction; and therefore, one should have been given. However, it found that the error was harmless given the enormous amount of evidence against Moore, as well as the testimonial evidence that showed he had the necessary capability to form intent. *Moore*, 287 Kan. at 133–34.

Trial counsel attempted to have a toxicology expert testify at trial. The expert was supposed to interpret urine tests performed on Moore the day of the crime which indicated a large, almost lethal, amount of methamphetamine in his system. The trial court denied the request on the basis that such tests could not conclude the quantity of drugs taken on the day of the crime, if any, or the level of impairment Moore was under on the day of the crime. At least two witnesses, one of whom spoke with Moore for several hours on the day of the crime, testified that they did not observe any impairment; Moore appeared to clearly understand what was going on; and he communicated coherently. The trial court's ruling was challenged and upheld on appeal. 287 Kan. at 136–37. In spite of this, Moore wants this court to conclude that a blood test would have provided a more precise measurement of the amount of methamphetamine in his system than the urine test. Furthermore, he asks us to conclude that the trial court would have admitted the blood test result. Moreover, Moore asks us to conclude that the admission of the blood test result would have compelled the trial court to give a voluntary intoxication instruction, and finally, that a voluntary intoxication instruction would have changed the result of the trial. Therefore, it was error for his counsel not to get the blood vials tested.

***3** In order to decide this claim of error, the district court did not need to look any further than the record. The issue of whether Moore's trial counsel was ineffective for failing to conduct a blood test could be fully determined by the record. The district court determined that even if Moore's attorney was deficient in failing to test the blood vials, there was no prejudice. It based its finding on the Supreme Court's ruling in *Moore* that because the evidence against him was so overwhelming, it was harmless to fail to allow the toxicologist to testify regarding drugs in Moore's system and harmless to fail to give a justified voluntary intoxication instruction. We agree. Moore is unable to establish, given the overwhelming evidence against him

as highlighted by the Supreme Court in Moore, that, but for the counsel's errors, there is a reasonable probability that the result of the trial would have been different. See *Strickland,* 466 U.S. at 694.

We find that there is substantial competent evidence in the record to support the district court's findings of fact and conclusions of law regarding Moore's ineffective assistance of counsel claim concerning the failure to support the theory of voluntary intoxication.

B. *Failure to support the theory of imperfect self-defense*
Moore next argues that his counsel was ineffective for failing to support his imperfect self-defense theory.

The statutory doctrine of imperfect self-defense is set out at K.S.A.21–3211(a): "A person is justified in the use of force against another when and to the extent it appears to such person and such person reasonably believes that such force is necessary to defend such person or a third person against such other's imminent use of unlawful force." It is not a complete defense to criminal liability; it simply allows one who successfully asserts it to be convicted of a lesser included offense to homicide, *i.e.,* voluntary manslaughter. K.S.A. 21–3403.

At trial, Moore's counsel asked for, but was denied, an instruction on voluntary manslaughter through the use of the imperfect self-defense. Our Supreme Court upheld the trial court's decision, finding that the record did not support a conclusion that Moore had an honest belief that the uniformed officers who entered his home were aggressors threatening imminent use of ' "unlawful" ' force. 287 Kan. at 131.

In his K.S.A. 60–1507 motion, Moore argues that his attorney was ineffective when he failed to investigate why Deputy Kurt A. Ford (who was killed) was carrying a rifle magazine that was missing several rounds. If it could be determined that Ford fired the first shot, the jury would be more likely to believe that Moore had a reasonable belief that he needed to shoot Ford in self-defense. Therefore, Moore's attorney was ineffective for not investigating Ford's weapon.

In order to decide this claim of error, the district court did not need to look any further than the record. The district court found that based on *Strickland,* 466 U.S. at 691, a decision not to investigate must be directly assessed for reasonableness, " 'applying a heavy measure of deference to counsel's judgment.' " The district court pointed out that there was absolutely no evidence in the record to suggest that Ford fired his rifle at all; therefore, there was no objective reason for Moore's attorney to investigate. A review of the record supports this finding and reveals that the evidence presented at trial indicated only casings fired from a .45 caliber pistol, a .380 caliber pistol, and a .40 caliber firearm were found. Ford was carrying a .223 caliber rifle. Deputy Chris Eilert testified that Ford did not fire his weapon.

***4** Because there was no evidence that Ford fired his rifle and there was overwhelming evidence that he did not fire his rifle, Moore's counsel was not ineffective for failing to investigate a claim which was without merit.

The district court also found that even if counsel was deficient, based on the Supreme Court's holding in *Moore,* Moore was not prejudiced. The Supreme Court held that an imperfect self-defense instruction was not warranted because the evidence was clear that Moore knew that he was holding a hostage; he knew that the people outside the door were police officers and wanted to enter to protect the hostage; and that Moore fired at the officers despite this fact. As such, Moore could not have harbored an honest but unreasonable belief that deadly force was necessary. 287 Kan. at 133.

We find that there is substantial competent evidence in the record to support the district court's findings of fact and conclusions of law regarding Moore's ineffective assistance of counsel claim concerning the failure to support the imperfect self-defense theory.

C. *Failure of trial counsel to object during testimony*
Moore next argues that his trial counsel failed on several occasions to object during witness testimony. In his K.S.A. 60–1507 motion, Moore argued that his trial counsel failed to object to leading questions, improper speculation, hearsay, and lack of foundation for the admission of evidence. The district court found that Moore's trial counsel was not required to raise every possible objection at trial and that Moore had failed to establish that any of the objections he challenged would have been sustained or would have made a difference in the outcome if they had been raised.

There was no need for a full evidentiary hearing to determine whether Moore's trial counsel was deficient for failing to object at trial. The trial record provided the only possible evidence of this deficiency.

A convicted defendant making a claim of ineffective assistance of counsel must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court then determines whether the acts or omissions alleged were outside the wide range of professionally competent assistance. There is a strong presumption that counsel's performance falls within the wide range of reasonable professional assistance. *Chamberlain*, 236 Kan. 650, Syl. ¶ 3. Finally, the defendant must show that that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Chamberlain*, 236 Kan. 650, Syl. ¶ 3.

Regardless of whether trial counsel was ineffective for failing to make the suggested objections, Moore has failed to indicate before the district court or in his appellate brief that there was a reasonable probability that, but for the failure to object in each of the listed instances, the trial result would have been different. Consequently, Moore is not entitled to relief and there is substantial competent evidence in the record to support the district court's findings of fact and conclusions of law on this issue.

D. *Trial counsel conceded Moore's guilt*

***5** Next, Moore makes several arguments that his trial counsel's conduct prejudiced him. Moore argues that his counsel failed to present a coherent theory of defense and conceded guilt during his opening statement. Moore's argument that counsel failed to present a coherent defense strategy is related back to his trial counsel's failure to present evidence to support the defense theories of voluntary intoxication and imperfect self-defense. These issues have already been addressed above.

As to the allegation that Moore's trial counsel conceded guilt, Moore relies on the following portion of his opening statement:

> "Now, the bottom line is Greg's gonna bear responsibility for pulling that trigger and firing the fatal bullet that killed Deputy Ford. He's responsible for that fatal shot. However, it was not an act of malice or spite. It was a situation where you had a man who was in his house and he thought he was gonna die that night. He had the honest belief that he was going to die and be shot to death by the police if they came into his house or if he came out."

There was no need for a full evidentiary hearing to determine whether Moore's trial counsel was deficient for making this statement. The trial record provided the only evidence necessary for review.

While the appellant normally bears the burden of proving that the ineffective assistance of his counsel resulted in prejudice, in certain circumstances, prejudice is presumed. *State v. Carter*, 270 Kan. 426, 435, 14 P.3d 1138 (2000). When defense counsel acts in such a way as to function as the government's advocate, prejudice is presumed. 270 Kan. at 435–36.

The federal Tenth Circuit Court of Appeals has provided some guidance on this issue and found that only when an admission of guilt is a complete admission of guilt, can prejudice be presumed. *United States v. Gonzalez*, 596 F.3d 1228, 1238–39 (10th Cir.2010). To determine whether an admission of guilt is complete, the court must ask " 'whether, in light of the entire record, the attorney remained a legal advocate of the defendant who acted with undivided allegiance and faithful, devoted service to the defendant.' [Citation omitted.]" 596 F.3d at 1239.

In this case, the district court found that the evidence of Moore's guilt was overwhelming and suggested that defense counsel must also take into account the penalty phase, because Moore's case was a potential death penalty case. By conceding that Moore fired the gun, for which there was overwhelming evidence anyway, he would be in a better position to avoid the death penalty.

A review of the record reveals that while counsel conceded that Moore pulled the trigger, he never conceded Moore was guilty of the crimes with which he was charged.

Moore was charged in count one with capital murder for firing the fatal shot that killed Deputy Ford. Capital

murder requires intent and premeditation. K.S.A. 21–3439. Moore's trial counsel argued that Moore was not guilty of capital murder. In his opening argument, trial counsel argued that Moore honestly believed that he was going to be killed when police entered the house. In addition, Moore's trial counsel argued that when Moore was on drugs, he was depressed and would get into fights, and on the night of the incident, Moore tested positive for methamphetamine. Moore's trial counsel did not concede guilt, but instead he argued there was no intent to commit murder.

***6** The evidence that Moore fired at police was overwhelming. The Supreme Court found as much. *Moore*, 287 Kan. at 134. Multiple eyewitnesses saw Ford wounded as he went through the door. Alveda Sparks, the hostage, also testified that Moore believed they would die in a gunfight with the police. The Kansas Bureau of Investigation (KBI) found a Colt .45 caliber pistol and a Baikal .380 caliber pistol in the residence. Forensic evidence linked bullets fired at police, including the bullet that killed Ford, to the type of guns found in Moore's residence. Moore's long-time friend also testified that he called Moore and Moore told him that he had shot the cops that had come into his house.

Moore's trial counsel maintained, through the trial, that Moore was not guilty because he did not have the requisite intent to commit capital murder. Moore's trial counsel could not have argued that Moore did not kill Ford or that he had not fired at police. The sheer magnitude of the evidence suggested otherwise. Moore's trial counsel never conceded Moore's guilt and always maintained that he lacked the requisite intent and premeditation to be guilty of capital murder. If Moore did not have the intent required for the crimes, the jury would have been required to acquit him of the charge, even if he had pulled the trigger. Therefore, trial counsel did not concede guilt and was not deficient in this regard.

We find that there is substantial competent evidence in the record to support the district court's findings of fact and conclusions of law that Moore's trial counsel was not ineffective for admitting in opening statement that Moore pulled the trigger.

E. *Failure of trial counsel to investigate witness statements for impeachment evidence*

Moore argues that trial counsel was ineffective for failing to investigate police statements that could have been used to impeach a State witness. At trial, Detective Townsend Walton testified that Moore called him after Moore had shot two officers and told Walton that he was "reloaded and ready for more blood." Moore claimed in his K.S.A. 60–1507 motion that he did not believe he had called Walton and that this could be confirmed by viewing cell phone records. Moore argues that the claimed statement was used as the basis to establish that his actions were premeditated and intentional.

There was no need for a full evidentiary hearing to determine whether Moore's trial counsel was deficient for failing to investigate Moore's cell phone records. The trial record provided all the evidence necessary for the district court's review.

The district court found that even if Moore's claim was true, an investigation would, at best, have found impeachment evidence against Walton that would not have changed the result of trial. Moore cites *McHenry v. State*, 39 Kan.App.2d 117, 123, 177 P.3d 981 (2009), in which this court found that where defense counsel had failed to contact any prosecution witnesses and had failed to contact any of the witnesses the defendant had asked him to contact, counsel's representation was deficient.

***7** However, unlike *McHenry*, in this case, Moore can point to only a single witness he believes should have been further investigated. Additionally, even assuming the best case scenario for Moore—that Walton lied about receiving the phone call—there were other witnesses who testified that Moore made similar statements to them. The testimony of the other witness would remain intact. Therefore, it is not reasonably probable that, but for the investigation of this witness, the outcome of the trial would have been different.

We find that there is substantial competent evidence in the record to support the district court's findings of fact and conclusions of law regarding Moore's claim that his counsel was ineffective for failing to investigate one police statement.

F. *Ineffective assistance of appellate counsel*

Finally, Moore claims that his appellate counsel was ineffective for failing to review the voir dire prior to filing Moore's direct appeal. To establish that his appellate

counsel was ineffective, Moore must show that (1) his appellate counsel's conduct fell below an objective standard of reasonableness, and (2) but for counsel's deficiencies, there was a reasonable probability that appeal would have succeeded. *State v. Smith*, 278 Kan. 45, 51–52, 92 P.3d 1096 (2004).

There was no need for a full evidentiary hearing to determine whether Moore's appellate counsel was deficient for failing to order and review the voir dire transcript. The trial record provided all the evidence necessary for the district court's review.

In his motion, Moore argued that appellate counsel was ineffective for waiting to have the voir dire transcribed until after the appeal was docketed; therefore, missing potential errors committed during the voir dire process. However, in his motion, Moore did not point to any specific errors that would have been uncovered in the transcript.

The district court found that appellate counsel was not required to raise every possible issue on appeal, and, in addition, Moore had failed to allege any specific error in the voir dire.

Although on appeal Moore raises several potential errors during the voir dire, he did not raise these errors with the district court. Issues not raised before the lower court cannot be raised on appeal. *State v. Warledo*, 286 Kan. 927, 938, 190 P.3d 937 (2008). Even if we were to consider the newly raised voir dire errors, Moore provides no analysis of the law surrounding these issues and how his appellate counsel's failure to raise them on appeal prejudiced him.

We find that there is substantial competent evidence in the record to support the district court's findings of fact and conclusions of law regarding the insufficiency of Moore's claim that his appellate attorney was ineffective.

Finding no error, we affirm.

All Citations

253 P.3d 386 (Table), 2011 WL 2555655

End of Document

208 P.3d 808 (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.

Leburn TIMMERMAN, Appellant,
v.
STATE of Kansas, Appellee.

No. 100,003.
|
June 12, 2009.
|
Review Denied May 18, 2010.

West KeySummary

1 Criminal Law
Lesser included offense instructions

Defense counsel's failure to ask for an instruction on the lesser-included offense of theft of lost or mislaid property did not constitute ineffective assistance of counsel in felony theft trial. The defendant was on parole and his attorney reasonably believed that any conviction, whether a felony or a misdemeanor, could send him back to prison as a parole violation. The defendant's attorney put together a trial strategy that would have resulted in an outright acquittal had the jury believed the defendant's testimony that he did not learn the computer had been stolen from the hospital until after the time period the state used in its charge against him.

Cases that cite this headnote

Appeal from Sedgwick District Court; Anthony J. Powell, Judge.

Attorneys and Law Firms

Michael P. Whalen, of Law Office of Michael P. Whalen, of Wichita, for appellant.

Kristi L. Barton, assistant district attorney, Nola Tedesco Foulston, district attorney, and Steve Six, attorney general, for appellee.

Before HILL, P.J., ELLIOTT and LEBEN, JJ.

MEMORANDUM OPINION

LEBEN, J.

***1** Leburn Timmerman argues that he deserves a new trial on his conviction for felony theft because his attorney didn't request a jury instruction for a lesser included misdemeanor offense. The district court found that the course the attorney steered at trial was a reasonable one; it offered a chance at an outright acquittal, while letting the jury consider the lesser included misdemeanor would have "probably almost guaranteed" a conviction. As we defer to the district court's factual findings and an attorney's work is strongly presumed to be acceptable, the record contains ample support for the district court's conclusion that Timmerman's attorney provided an adequate, professionally competent defense.

The underlying facts of the case are straightforward. Timmerman worked for a construction company that did a construction project at a hospital. Timmerman testified that he had found the computer next to a pile of trash in the hospital and concluded that the hospital no longer wanted it, although others testified that the computer had been in a cabinet in a hospital room. Timmerman also testified that about 2 weeks after he took the computer home, he overheard someone at work saying that a computer had been stolen from the hospital; he suspected it might be the one he had, though he didn't return it to the hospital. But the State presented testimony that Timmerman had told an acquaintance "he couldn't pawn [the computer] because it was hot," indicating that he knew the computer was stolen, not trash. The State also presented testimony that the computer had been located in a new hospital wing lacking any large piles of trash and that when the computer was found in Timmerman's possession, it was accompanied by the computer's operating manual.

Timmerman contends that his attorney's failure to ask for an instruction on the lesser included offense of theft of lost or mislaid property constitutes ineffective assistance of counsel. At the time of Timmerman's trial, Kansas courts considered misdemeanor theft of lost or mislaid property to be a lesser included offense of felony theft. See *State v. Getz*, 250 Kan. 560, 566, 830 P.2d 5 (1992); but see *State v. Alderete*, 285 Kan. 359, 362, 172 P.3d 27 (2007) (noting that new caselaw tests diminish the authority of caselaw before 1998 for determining what crimes are lesser included offenses). Timmerman's argument rests on the distinction that theft of lost or mislaid property is a misdemeanor. Since Timmerman was on parole, another conviction could jeopardize his parole status.

At the evidentiary hearing on his 60-1507 motion, he testified that his parole officer told him that it wouldn't be considered a parole violation if he committed a misdemeanor, but his parole would be revoked if he committed a felony. But no one, not even Timmerman, testified that Timmerman told his attorney that he could avoid a parole violation if he was convicted only of a misdemeanor.

The district court expressed some skepticism about Timmerman's testimony that his parole wouldn't be revoked if he was convicted only of a misdemeanor: "[W]e don't really have any way of knowing for sure what would have happened to your parole. It's very possible your parole could have been revoked [anyway]." The district court's skepticism seems reasonable; the Department of Corrections has administrative regulations that govern how much time the prisoner must serve in prison and what issues are subject to a hearing when an offender's parole is, or may be, revoked due to the commission of a misdemeanor offense. See K.A.R. 45-500-3(a)(5)(B) (when parole is revoked because of a misdemeanor conviction, the parole board determines how much of the remaining time of postrelease supervision must be served in prison); K.A.R. 45-500-2(e) (when parole conditions have been violated by the commission of a new misdemeanor, the only question for consideration at the hearing is whether that conviction warrants revocation).

***2** But the key considerations on this point are not in doubt because no evidence shows that Timmerman ever told his attorney what the parole officer had said. The district court concluded that the attorney's "strategy was to get an acquittal ... because you were on parole [and] a conviction would not have been a good thing." Based on Timmerman's own testimony at the trial, the district court concluded that "it was probably almost guaranteed" that he would have been convicted of the misdemeanor offense *at least* had a lesser included instruction been given. After all, Timmerman admitted that he had heard a computer had been stolen, but he did nothing to return it. In these circumstances, with a defendant on parole, the district court concluded that the strategy of trying for an outright acquittal was reasonable.

At trial, Timmerman's attorney argued to the jury that Timmerman did not intend to steal the computer when he took it from the hospital. Under the instructions given to the jury, the State had to prove that Timmerman intended to permanently deprive the hospital of the use of the computer and that the theft took place between specified dates. Timmerman's attorney argued that Timmerman learned that the computer wasn't trash *after* the time period specified in the State's charge and reflected in the jury instructions. Thus, had the jury believed Timmerman's testimony, he would have been acquitted of the felony theft as the State had charged it because Timmerman would have lacked the intent during the necessary time period.

When an evidentiary hearing has been held on a claim that defense counsel was ineffective, we review the district court's factual findings to see whether substantial evidence supports them. We then determine whether those findings are sufficient to support the district court's legal conclusion, which we review without any required deference to the district court's judgment. *State v. Overstreet*, 288 Kan. 1, Syl. ¶ 11, 200 P.3d 427 (2009).

The facts we have recited in our opinion regarding the work of Timmerman's counsel either reflect factual findings of the district court or evidence that was not rebutted. When we consider whether those facts support the district court's legal conclusion that Timmerman's attorney made a reasonable strategy decision and performed competently, we review the attorney's work with deference so that we may avoid what our Supreme Court has called "the distorting effects of hindsight." Thus, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Overstreet*, 288 Kan. 1, Syl. ¶ 9, 200 P.3d 427.

Given the district court's factual findings and the other unrefuted evidence presented to it, there is ample support from which to conclude that Timmerman's attorney acted reasonably. Timmerman was on parole, and his attorney reasonably believed that any conviction, whether a felony or a misdemeanor, could send him back to prison as a parole violation. Timmerman's attorney put together a trial strategy that would have resulted in an outright acquittal had the jury believed Timmerman's testimony that he didn't learn the computer had been stolen until after the time period the State used in its charge against him.

***3** Even if Timmerman's attorney had in some way provided substandard representation, Timmerman also must show that he was prejudiced by the attorney's failure. To do so, Timmerman would have to show that there was a reasonable probability that his trial would have turned out differently had his attorney not provided substandard representation. See *Overstreet,* 288 Kan. 1, Syl. ¶ 10, 200 P.3d 427. For the jury to have convicted Timmerman of the lesser offense, it would have been required to believe Timmerman's testimony that he thought the computer-accompanied by the operating manual and still with what one witness called a "glossy shine"-was left out as trash and that he only learned later that the computer had been reported as stolen. Since the jury's verdict indicated it did not believe Timmerman's testimony, only pure speculation would lead us to conclude that the jury would have convicted Timmerman of the lesser offense instead of felony theft even if the alternative choice had been given to the jury. We would also have to speculate to conclude that Timmerman's parole would not have been revoked had he been convicted only of a misdemeanor offense.

We do not speculate on appeal, and we conclude that Timmerman's attorney provided representation within the range of reasonable professional assistance. The judgment of the district court is affirmed.

All Citations

208 P.3d 808 (Table), 2009 WL 1692027

End of Document

87 P.3d 375 (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.

Mitchell DAVIS, Appellant,
v.
STATE of Kansas, Appellee.

No. 89,688.
|
April 9, 2004.
|
Review Denied Sept. 15, 2004.

Synopsis
Background: Defendant, whose convictions for aggravated burglary, aggravated robbery, and other offenses were affirmed on appeal, 874 P.2d 1156, filed motion to vacate, set aside, or correct sentence. The Sedgwick District Court, Paul W. Clark, J., summarily denied motion, and defendant appealed.

[Holding:] The Court of Appeals held that evidentiary hearing on motion was not required.

Affirmed.

West Headnotes (7)

[1] **Criminal Law**
⇐ Excuse for Delay;Extension of Time and Relief from Default

Court of Appeals would retain appeal from summary denial of motion for post-conviction relief; although state alleged that Court lacked jurisdiction to hear appeal due to untimely notice of appeal and Court of Appeals has previously held that there can be no denial of effective assistance of counsel for failure to timely file appeal in post-conviction proceeding, by voluntarily establishing post-conviction relief procedure that includes right to counsel and right to appeal state has implicated due process clause such that attorney, who is appointed under statutorily created post-conviction relief procedure, who performs below minimum standard has violated his client's right to due process. U.S.C.A. Const.Amends. 6,14.

Cases that cite this headnote

[2] **Criminal Law**
⇐ Post-Conviction Relief

Although journal entry dismissing motion to vacate, set aside, or correct sentence and trial court's oral pronouncements were insufficient to comply with rule requiring findings of fact and conclusions of law on all issues, remand was not required, given that movant failed to object on this basis at trial court and record provided Court of Appeals with sufficient information to meaningfully review issues raised on appeal. Sup.Ct. Rules, Rule 183(j).

Cases that cite this headnote

[3] **Criminal Law**
⇐ Necessity for Hearing

Evidentiary hearing on motion to vacate, set aside, or correct sentence was not required, where files and records of case conclusively showed that movant was not entitled to relief. K.S.A. 60-1507.

Cases that cite this headnote

[4] **Criminal Law**
⇐ Counsel

Ineffective assistance of counsel claims were properly raised on motion to vacate, set aside, or correct sentence; although state argued that claims should have been raised on direct appeal, issue of attorney effectiveness was not raised in district court and could not have been

raised for first time on direct appeal. U.S.C.A. Const.Amend. 6; K.S.A. 60-1507.

Cases that cite this headnote

[5] **Criminal Law**
Trial in General;Reception of Evidence

Trial counsel's alleged failure to challenge sufficiency of evidence supporting aggravated burglary conviction did not constitute ineffective assistance, where defendant's claim focused on absence of motion for judgment of acquittal, trial counsel moved for judgment of acquittal at close of state's evidence, and defendant failed to allege that any failure to move for acquittal prejudiced him. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[6] **Criminal Law**
Robbery and Burglary

Aggravated robbery and aggravated battery charges were not multiplicitous, and thus, charging defendant with both offenses was proper, where aggravated robbery charge was based on defendant's act of pointing gun at victim's head and removing money from victim's pouch and aggravated battery charge was based on aiding and abetting theory related to codefendant's shooting of victim after defendant and codefendants searched victim's house for drugs and money.

Cases that cite this headnote

[7] **Criminal Law**
Lesser Included Offense Instructions

Trial counsel's failure to request jury instruction on aggravated battery as lesser included offense of attempted first-degree murder did not constitute ineffective assistance; although aggravated battery was lesser included offense of attempted first-degree murder, evidence presented at trial demonstrated that defendant intended to murder victim, rather than merely to injure him, such that instruction on lesser included offense was not mandated by evidence and it could not be said that it was ineffective trial strategy to take "all or nothing" tact. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

Appeal from Sedgwick District Court; Paul W. Clark, judge. Opinion filed April 9, 2004. Affirmed.

Attorneys and Law Firms

Roger L. Falk and Christopher Hughes, of Roger L. Falk & Associates, P.A., of Wichita, for appellant.

Boyd K. Isherwood, assistant district attorney, Nola Foulston, district attorney, and Phill Kline, attorney general, for appellee.

Before PIERRON, P.J., LEWIS and JOHNSON, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** Mitchell Davis appeals the summary denial of his K.S.A. 60-1507 motion, claiming that the findings below do not permit effective appellate review, that the district court erred in not conducting an evidentiary hearing on his motion, and that he was denied his right to effective assistance of counsel. We affirm.

The underlying criminal prosecution involved two incidents. The first occurred at the residence of Michael Ballance, who was an acquaintance of Gerard Fields. Fields, Davis, and three other individuals went to Ballance's home, robbed him at gunpoint, and shot him. The next day, upon learning that Ballance had survived the gunshot wounds, Davis and Fields set out for Ballance's residence to finish the job. Discovering Ballance was not home, the pair proceeded to another residence which was ostensibly a target for another burglary. When they arrived at the residence, Davis stated, " 'Hey, man, check this out. Your friend was easy to get to and so are you." ' Davis drew a firearm, shot Fields in the wrist and neck, and immediately fled.

Davis was convicted of aggravated burglary, aggravated robbery, aggravated battery, attempted murder, and two counts of unlawful possession of a firearm. His direct appeal to the Kansas Supreme Court was unsuccessful in *State v. Davis*, 255 Kan. 357, 874 P.2d 1156 (1994). Davis filed this 60-1507 motion in February 2001, which was set for a nonevidentiary hearing and subsequently denied.

JURISDICTION

[1] The district court appointed Davis an attorney, who represented Davis at the 60-1507 nonevidentiary hearing. The journal entry summarily denying the motion was filed June 6, 2001. Appointed counsel received the journal entry and mailed it to Davis on June 13th. Davis asked his attorney to file a notice of appeal. The attorney had mistakenly calendared the deadline as July 13, 2001, and filed the notice of appeal on July 10, 2001, more than 30 days after the journal entry filing date. We issued a show cause order directing the parties to address whether the untimely notice of appeal deprived this court of jurisdiction. Ultimately, the motions panel retained the appeal and issued an order stating its reasons for doing so.

The order retaining the appeal did not direct the parties to brief the jurisdictional issue. Nevertheless, the State reasserts and briefs the issue of whether we have jurisdiction to hear this appeal because of the untimely notice of appeal, pointing to our duty to question jurisdiction *sua sponte*. See *State v. Snodgrass*, 267 Kan. 185, 196, 979 P.2d 664 (1999).

The order retaining the appeal acknowledged that this court has previously held that "there [can] be no denial of effective assistance of counsel for failure to timely file an appeal in post-conviction proceedings." *Robinson v. State*, 13 Kan.App.2d 244, 250, 767 P.2d 851, *rev. denied* 244 Kan. 738 (1989). *Robinson* relied on *Pennsylvania v. Finley*, 481 U.S. 551, 555-56, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987), which held that States have no constitutional obligation to provide postconviction relief and is often cited for the general proposition that a person has no constitutional right to counsel during a state habeas corpus proceeding. However, we noted that by voluntarily establishing a procedure for postconviction relief, including the right to counsel and the right to appeal, our State has implicated the provisions of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. See *Lujan v. State*, 270 Kan. 163, 166, 14 P.3d 424 (2000) (question of movant's right to be present at 60-1507 hearing answered by due process analysis). The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful fashion. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). An attorney, appointed under a statutorily created postconviction relief procedure that includes the right to appeal, who performs below a minimum standard, has violated his or her client's right to due process. See *Evitts v. Lucey*, 469 U.S. 387, 394, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985).

***2** We decline to change our previous decision to retain this appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[2] Davis argues the journal entry dismissing his motion, together with the district court's oral pronouncements, were insufficient to comply with Supreme Court Rule 183(j) (2003 Kan. Ct. R. Annot. 213). In addition to asserting that the district court's findings were sufficient, the State complains that Davis has not preserved this issue for appeal by failing to object below.

A review of the journal entry and the district court's oral statements at the hearing confirms Davis' assertion that the district judge failed to address all of the issues raised in his motion and, thus, the findings are noncompliant with Supreme Court Rule 183(j). However, generally, absent an objection in the district court, omissions in findings will not be considered on appeal. See *Galindo v. City of Coffeyville*, 256 Kan. 455, 467, 885 P.2d 1246 (1994). We remand notwithstanding the absence of an objection below only when the district court's findings are so inadequate as to preclude meaningful appellate review. See *Gilkey v. State*, 31 Kan.App.2d 77, 78, 60 P.3d 351, *rev. denied* 275 Kan. ---- (2003).

The record on appeal provides us with sufficient information to meaningfully review the issues raised on appeal. We decline to remand for further findings.

EVIDENTIARY HEARING/INEFFECTIVE ASSISTANCE OF COUNSEL

[3] Davis argues that the district court erred in refusing to hold an evidentiary hearing. "An evidentiary hearing on a K.S.A. 60-1507 motion is not required if the motion and the files and records of the case conclusively show that the movant is not entitled to relief." *Price v. State*,

28 Kan.App.2d 854, 855, 21 P.3d 1021, *rev. denied* 271 Kan. 1037 (2001). Therefore, to determine whether an evidentiary hearing should have been held, we need to review Davis' complaints to determine whether he has raised a substantial issue or a factual issue. See *Lujan*, 270 Kan. at 170-71, 14 P.3d 424; *Wright v. State*, 5 Kan.App.2d 494, 495, 619 P.2d 155 (1980).

Davis' motion alleged several instances of deficient performance by both trial and appellate counsel. On appeal, Davis limits his arguments to the following: (1) trial counsel's failure to challenge the sufficiency of the evidence to support the aggravated burglary conviction; (2) the failure of trial counsel and appellate counsel to challenge the purported multiplicitous charges of aggravated battery and aggravated robbery; and (3) trial counsel's failure to request an aggravated battery instruction as a lesser included offense of attempted first-degree murder and appellate counsel's failure to raise the lesser included offense instruction issue on appeal. Davis' other claims of ineffective assistance are deemed waived or abandoned. See *Pope v. Ransdell*, 251 Kan. 112, 119, 833 P.2d 965 (1992).

We apply the familiar two-prong test to analyze a claim of ineffective assistance of counsel, as stated in *State v. Brown*, 266 Kan. 563, 577, 973 P.2d 773 (1999) (quoting *Chamberlain v. State*, 236 Kan. 650, Syl. ¶ 3, 694 P.2d 468 [1985]):

> ***3** " 'A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction requires that the defendant show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial." '

We determine whether the attorney's performance provides reasonably effective assistance, considering all the circumstances. *Chamberlain*, 236 Kan. 650, Syl. ¶ 3, 694 P.2d 468. The same test applies when analyzing the ineffectiveness of appellate counsel. *Littlejohn v. State*, 29 Kan.App.2d 506, 507, 28 P.3d 448 (2001).

[4] At the outset, the State argues that Davis' ineffective assistance claims should have been brought in Davis' direct appeal. The State's reliance on *Maggard v. State*, 27 Kan.App.2d 1060, 11 P.3d 89, *rev. denied* 270 Kan. 899 (2000), is misplaced. Prior to the direct appeal, the issue of attorney effectiveness was not raised in the district court and could not have been raised for the first time on appeal. See *State v. Van Cleave*, 239 Kan. 117, 118-19, 716 P.2d 580 (1986). Davis had two alternatives in presenting his ineffective assistance of counsel claim: (1) a motion brought pursuant to K.S.A. 60-1507 or (2) a motion seeking remand to the trial court for determination of the issue. See 239 Kan. at 119-20, 716 P.2d 580; see also *State v. Mann*, 274 Kan. 670, 691-92, 56 P.3d 212 (2002) (discussing *Van Cleave* alternatives). Davis selected an approved method of presenting his complaint, and the State's argument to the contrary is without merit.

[5] Davis' claim that his trial counsel was ineffective for failing to challenge the sufficiency of the evidence supporting aggravated burglary focuses on the absence of a motion for judgment of acquittal. We note first that trial counsel did move for a judgment of acquittal at the close of the State's evidence. We do not view the attorney's performance as deficient. Further, Davis fails to allege that any failure to move for acquittal prejudiced him in any manner.

[6] Davis' complaints involving his attorneys' shortcomings dealing with multiplicity fail simply because under the facts of this case, aggravated robbery and aggravated battery were not multiplicitous.

Multiplicity is characterized as the charging of a single offense in several counts of a complaint or information. *State v. Kessler*, 276 Kan. 202, 204, 73 P.3d 761 (2003). "The primary concern with multiplicity is that it creates the potential for multiple punishments for a single offense." *State v. Garcia*, 272 Kan. 140, 143, 32 P.3d 188 (2001). If the same act of violence provides the basis for conviction of both aggravated robbery and aggravated battery, the crimes are multiplicitous under the law in effect at the time of Davis' crimes. See *State v. Warren*, 252 Kan. 169, 182, 843 P.2d 224 (1992).

Here, however, the State argued that Davis committed aggravated robbery by pointing a gun at Ballance's head, ordering him to the floor, and removing his money from a waist pouch. The group then searched the house for

drugs and more money. As they were preparing to leave the premises, one of the other robbers shot Ballance. The aggravated battery charge against Davis was predicated on an aiding and abetting theory. In short, the two charges were factually separate offenses and, thus, not multiplicitous.

***4** [7] Finally, Davis contends that his attorneys did not address the need for an instruction for aggravated battery as a lesser included offense of attempted first-degree murder. At the time Davis committed the crimes, the two-prong test from *State v. Fike,* 243 Kan. 365, 368, 757 P.2d 724 (1988), was still viable. Davis' overt act of shooting Fields in the wrist and neck supported the crime of attempted first-degree murder and also necessarily proved the aggravated battery. As a result, aggravated battery was a lesser included offense in this case. See *State v. Morfitt,* 25 Kan.App.2d 8, 15-16, 956 P.2d 719, *rev. denied* 265 Kan. 888 (1998).

The State maintains that Davis' trial counsel was not ineffective for failing to request the instruction because (1) the evidence only supported the greater offense of attempted first-degree murder or (2) the decision to refrain from requesting any lesser included instructions was a matter of trial strategy.

In *State v. Gibbons,* 256 Kan. 951, 955, 889 P.2d 772 (1995), the Kansas Supreme Court observed: "Where there is no substantial evidence applicable to the lesser degrees of the offense charged, and all of the evidence taken together shows that the offense, if committed, was clearly of the higher degree, instructions relating to the lesser degrees of the offense are not necessary. [Citation omitted.]" The evidence presented at trial clearly demonstrated that Davis intended to murder Fields rather than merely injure him. The lesser included instruction for aggravated battery was not mandated by the evidence, and we cannot say that it was ineffective trial strategy to take an "all or nothing" tact. An evidentiary hearing would add nothing to this analysis, and the district court did not err in finding that counsel was not ineffective with regard to the lesser included offense issue.

Affirmed.

All Citations

87 P.3d 375 (Table), 2004 WL 794437

End of Document

171 P.3d 674 (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.

Cedric BAKER, Appellant,
v.
STATE of Kansas, Appellee.

No. 97,199.
|
Dec. 7, 2007.
|
Review Denied May 28, 2008.

Appeal from Douglas District Court, Robert W. Fairchild, judge. Opinion filed December 7, 2007. Affirmed.

Attorneys and Law Firms

Edward G. Collister, Jr., of Collister, Kampschroeder & Stoller, of Lawrence, for appellant.

Brenda J. Clary, assistant district attorney, Charles E. Branson, district attorney, and Paul J. Morrison, attorney general, for appellee.

Before MALONE, P.J., ELLIOTT, J., and BUKATY, S.J.

MEMORANDUM OPINION

PER CURIAM.

***1** Cedric Baker appeals the district court's denial of his K.S.A. 60–1507 motion. We affirm.

In October 1998, Baker was convicted of one count of aggravated assault, one count of aggravated robbery, one count of burglary of an automobile, one count of conspiracy to commit aggravated robbery, and one count of kidnapping. Baker's convictions were based on an aiding and abetting theory. The district court sentenced Baker to 134 months' imprisonment. The Court of Appeals affirmed Baker's convictions. *State v. Baker,* No. 82,593, unpublished opinion filed May 19, 2000, *rev. denied* 269 Kan. 934.

In August 2001, Baker filed a K.S.A. 60–1507 motion. The district court appointed counsel to represent Baker. Baker's attorney filed a brief which raised the following issues: (1) whether Baker's convictions for kidnapping, aggravated assault, and aggravated robbery were multiplicitous; (2) whether the jury should have been instructed on criminal restraint as a lesser included offense of kidnapping; (3) whether Baker's protection against double jeopardy was violated when he was convicted at a second trial after the district court improperly declared a mistrial for the first trial; (4) whether Baker's right to a speedy trial was violated; and (5) whether Baker's trial and appellate counsel were ineffective.

Baker's motion languished in the district court for several years. In June 2005, the district court held an evidentiary hearing on Baker's motion. In May 2006, the district court filed its decision denying Baker's claims. Baker timely appeals. Additional facts will be discussed.

When an evidentiary hearing has been conducted in the district court, the standard of review for an appeal from a denial of a K.S.A. 60–1507 motion is for the appellate court to determine whether the factual findings of the district court are supported by substantial competent evidence and whether those findings are sufficient to support its conclusions of law. *Bledsoe v. State,* 283 Kan. 81, 88, 150 P.3d 868 (2007). Substantial competent evidence is evidence possessing both relevance and substance and which provides a substantial basis of fact from which the issues can reasonably be determined. *Evenson Trucking Co. v. Aranda,* 280 Kan. 821, 836, 127 P.3d 292 (2006).

Double jeopardy

Baker argues that the trial court improperly declared his first jury trial a mistrial because he did not request a mistrial and it was not necessary to do so. Based on the trial court's error, Baker contends that he was subjected to double jeopardy when he was convicted after a second jury trial.

On July 13, 1998, Baker's jury trial began. Baker was represented at the trial by Shelley Bock, appointed counsel. On July 14, 1998, Baker told the trial court that Bock had failed to subpoena a witness Baker thought was important to his defense. The trial court told Baker to discuss the issue with Bock to determine whether the witness was important. On July 15, 1998, Baker again told the court that he was unhappy with how Bock was defending him. Baker told the court that he and Bock had argued the night before about Baker's case. Baker also told the court that he did not trust Bock. The following exchange then occurred between the trial court and Baker:

***2** "THE COURT: ... You know, you need to try to cooperate with Mr. Bock, you know. Again I'm not going to stop the trial and appoint a new attorney I mean, you know, you could be sitting in jail for months waiting for me to, you know, waiting for us to get it back to another trial. Is that what you're asking me to do, you want me to stop it?

"THE DEFENDANT: If it's necessary.

"THE COURT: So far I have not heard anything that's necessary other than the two of you may not be in agreement on the defense that needs to be presented."

Bock then told the court that there were difficulties between him and Baker, which made it difficult for Bock to defend Baker. Shortly thereafter, the trial court declared a mistrial:

> "THE COURT: Okay, I have considered the defendant's request for a mistrial, and since both the defendant and his attorney are unanimous that the defendant will not get a fair trial without mistrial I am going to go ahead and grant it much to my dismay and disgust. But I don't want the defendant to have to be placed in the situation of having not had ... a fair trial."

After the mistrial was declared, Bock withdrew as Baker's counsel. A second jury trial began on October 7, 1998, at which time Baker was represented by attorney James George. At the conclusion of the trial, Baker was convicted of all charges.

In its decision denying Baker's K.S.A. 60–1507 motion, the district court found that "the [trial] court's reason for granting a mistrial was because the communication and trust level between [Baker] and his attorney had deteriorated to the point that to proceed with the trial could well have resulted in the petitioner failing to receive an adequate defense." The district court concluded that, in light of these concerns, the trial court properly declared a mistrial and Baker was not subjected to double jeopardy.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits a person from being twice placed in jeopardy for the same offense. The protection of the Double Jeopardy Clause contains three components, "shield[ing] an accused from: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." *State v. Mertz*, 258 Kan. 745, Syl. ¶ 3, 907 P.2d 847 (1995). The Double Jeopardy Clause is applicable to the states through the Fourteenth Amendment to the United States Constitution. Section 10 of the Kansas Constitution Bill of Rights provides the same protection as the Double Jeopardy Clause. *State v. Wittsell*, 275 Kan. 442, 445–46, 66 P.3d 831 (2003).

Depending on whether a defendant objected to the termination of his or her first trial, courts apply different standards to determine whether a defendant was placed in double jeopardy during a second trial. Where a defendant objected to a trial court's termination of his or her first trial, courts apply a manifest necessity test. *Wittsell*, 275 Kan. at 446. Baker correctly notes that neither he nor his trial counsel explicitly requested a mistrial. Nonetheless, Baker did not object to the trial court's termination of his first trial.

***3** Where a defendant does not object to the termination of his or her first trial, his or her failure to object is treated as consent. *Wittsell*, 275 Kan. at 447. Thus, Baker consented to the mistrial and this court's standard of review is as follows:

> "Where a criminal defendant consents to a mistrial, double jeopardy is not implicated unless the prosecutorial conduct giving rise to the mistrial was intended to 'goad' the defendant to move for a mistrial. Retrial is constitutionally permissible only where the governmental conduct was not intended to provoke the

defendant into seeking a mistrial." 275 Kan. 442, Syl. ¶ 3.

Baker does not contend there was any prosecutorial "goading" in this case. Instead, Baker merely argues that the termination of his first trial was without his consent. However, Baker's failure to object is treated as consent.

We note that K.S.A. 22–3423(1)(b) allows a trial court to order a mistrial when it finds termination was necessary because "[t]here is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law and the defendant requests or consents to the declaration of a mistrial." Here, the trial court terminated Baker's first trial because it found that Baker could not receive a fair trial. Baker had complained to the trial court on two separate occasions about his trial counsel's behavior and the deterioration of his relationship with his counsel. Moreover, Bock stated that "a significant difficulty ... has arisen between attorney and the client that makes it extremely difficult to proceed." After both Baker's and Bock's complaints to the trial court, it is unlikely that the court could have adequately addressed their concerns without terminating the trial and appointing new counsel.

Because Baker consented to the mistrial by failing to object, the trial court did not err in terminating Baker's first trial. As such, the district court did not err in determining that double jeopardy was not implicated by the second trial.

Instruction on criminal restraint

Baker argues that the trial court erred in failing to instruct the jury on criminal restraint as a lesser included offense of kidnapping. Baker did not raise this trial error on direct appeal. Generally, a postconviction motion under K.S.A. 60–1507 should not be used to challenge trial errors that should have been raised on direct appeal absent exceptional circumstances. Supreme Court Rule 183(c) (2006 Kan. Ct. R. Annot. 227). Because Baker's ineffective assistance of counsel claim is partially based on the argument that his trial counsel was ineffective for failing to request an instruction on criminal restraint, we will analyze this issue.

The difference between kidnapping and criminal restraint is that kidnapping requires specific intent and criminal restraint does not. *State v. Wiggett*, 273 Kan. 438, 449, 44 P.3d 381 (2002). Ordinarily, criminal restraint is a lesser included offense of kidnapping. *State v. Timms*, 29 Kan.App.2d 770, 773, 31 P.3d 323 (2001).

***4** The district court first noted that Baker did not object to the trial court's failure to instruct the jury on criminal restraint. Pursuant to K.S.A.2006 Supp. 22–3414(3):

> "No party may assign as error the giving or failure to give an instruction, including a lesser included crime instruction, unless the party objects thereto before the jury retires to consider its verdict stating distinctly the matter to which the party objects and the grounds of the objection unless the instruction or the failure to give an instruction is clearly erroneous. Opportunity shall be given to make the objections out of the hearing of the jury."

The district court further found that the trial court did not err in failing to give the lesser included offense instruction because there was no evidence to support the instruction.

> "A criminal defendant has a right to an instruction on all lesser included offenses supported by the evidence at trial as long as (1) the evidence, when viewed in the light most favorable to the defendant's theory, would justify a jury verdict in accord with the defendant's theory and (2) the evidence at trial does not exclude a theory of guilt on the lesser offense. [Citation omitted]." *State v. Williams*, 268 Kan. 1, 15, 988 P.2d 722 (1999).

However, an instruction on a lesser included offense is not proper if the jury could not reasonably convict the defendant of the lesser offense from the evidence presented at trial. *State v. Scott*, 28 Kan.App.2d 418, 425, 17 P.3d 966, *rev. denied* 271 Kan. 1041 (2001). The Kansas Supreme Court has stated that "[w]here there is no substantial evidence applicable to the lesser degrees of the offense charged, and all of the evidence taken together shows that the offense, if committed, was clearly of the higher degree, instructions relating to the lesser degrees of the offense are not necessary. [Citation omitted.]" *State v. Gibbons*, 256 Kan. 951, 955, 889 P.2d 772 (1995).

This court previously summarized the facts underlying Baker's kidnapping conviction in an unpublished opinion affirming Baker's conviction:

> "Here, the victim was moved from her bedroom at gunpoint and forced to join her roommates on the living room floor where her hands were bound with electrical wire.... [T]he victim was tied for the purpose of incapacitating her while her house was searched and items were removed. Similarly, the removing of the victim from one rom to another lessened the risk of detection of the crime, and the confinement facilitated the commission of the crimes." *Baker,* slip op. at 5.

Baker does not cite any evidence to support the contention that the victim was restrained for any purpose other than facilitating the commission of a crime. Furthermore, Baker's theory of defense was that he was innocent and was not involved in the commission of any of the charged crimes. In light of Baker's theory of defense and all the evidence taken together, there was no evidence presented at trial from which the jury could have reasonably concluded that Baker committed criminal restraint rather than kidnapping. Thus, the district court did not err in rejecting Baker's K.S.A. 60–1507 motion on this issue.

Multiplicitous crimes

***5** Baker argues that his convictions for kidnapping, aggravated assault, and aggravated robbery were multiplicitous and violated his rights against double jeopardy protected by the Fifth Amendment to the United States Constitution and § 10 of the Kansas Constitution Bill of Rights and should therefore be overturned. Baker's argument is premised on the "single act of violence test" used by the Kansas Supreme Court in *State v. Groves,* 278 Kan. 302, 95 P.3d 95 (2004).

Baker's argument has been largely nullified by the Kansas Supreme Court's decision in *State v. Schoonover,* 281 Kan. 453, 475, 133 P.3d 48 (2006). The *Schoonover* court stated that "the single act of violence/merger analysis should no longer be applied when analyzing double jeopardy or multiplicity issues...." 281 Kan. at 493. Under *Schoonover,* whether the State violated Baker's protections against double jeopardy requires a two-part analysis: "(1) [Did] the convictions arise from the same conduct? and (2) By statutory definition are there two offenses or only one?" 281 Kan. at 496.

The threshold question in a multiplicity analysis is whether the two convictions arose from the same conduct. 281 Kan. at 496. When determining whether convictions arose from the same conduct, the following factors should be considered:

> "(1) whether the acts occur at or near the same time; (2) whether the acts occur at the same location; (3) whether there is a casual relationship between the acts, in particular whether there was an intervening event; and (4) whether there is a fresh impulse motivating some of the conduct." 281 Kan. at 497.

Here, Baker was charged with kidnapping Deanna Hill, aggravated robbery against Joshua Ruff, and aggravated assault against Michael Hill. Ruff was at his home on August 1, 1997, when he heard a knock on the door. When Ruff's girlfriend, Brandy Fleeger, opened the door, three men with guns stormed into the house. None of these men were Baker, but the State alleged that Baker aided and abetted the men. The men pointed guns at Ruff and Fleeger and ordered them to lie down on the ground. One of the men went into a bedroom and found Leonard Baker and Deanna sleeping. The man pointed a gun at Leonard and Deanna and ordered them to lie down on the living room floor with Ruff and Fleeger. The men then tied up all four victims. One of the men went through Ruff's pockets and stole his wallet and his gold chain. Michael, Deanna's son, then came out of the bedroom. One of the men pointed a gun at Michael and yelled at him to go back into the bedroom. After stealing various items, the three men left the house.

The three men's actions of kidnapping Deanna, robbing Ruff, and assaulting Michael happened within a short amount of time and in approximately the same location. There does not appear to be any intervening acts or different motivations for the actions. Thus, Baker's three convictions as an aider and abetter arose from the same conduct.

***6** The second question in the multiplicity analysis is whether, by statutory definition, there were two offenses (or more) or only one. *Schoonover,* 281 Kan. at 497. Here, Baker was convicted under three different statutes: K.S.A. 21–3410, K.S.A. 21–3420, and K.S.A. 21–3427. When a double jeopardy issue arises because of convictions for

violations of different statutes, "the test is: Does one statute require proof of an element not necessary to prove the other offense? If so, the statutes do not define the same conduct and there is not a double jeopardy violation." 281 Kan. at 498.

To prove aggravated robbery, the State was required to show that the defendant took property from Ruff by force or threat while armed with a dangerous weapon. K.S.A. 21–3426; K.S.A. 21–3427. To prove kidnapping, the State was required to show that the defendant took or confined Deanna by force or threat with the intent to facilitate a crime. K.S.A. 21–3420. To prove aggravated assault, the State was required to show that the defendant intentionally placed Michael in reasonable apprehension of immediate bodily harm with a deadly weapon. K.S.A. 21–3408; K.S.A. 21–3410(a).

The three crimes are clearly not multiplicitous. Not only does each crime require the State to prove different elements, but the victims of the crimes were three separate people. Because each conviction required the State to prove a different element, the district court did not err in determining that Baker's convictions for aggravated robbery, kidnapping, and aggravated assault were not multiplicitous.

Speedy trial

Baker argues that his statutory right to a speedy trial was violated. As a preliminary matter, Baker fails to cite to any portion of the record to support his contention. Facts in the brief not keyed to the record on appeal are presumed to be without support under Supreme Court Rule 6.02(d) (2006 Kan. Ct. R. Annot. 36). Moreover, Baker's argument that his right to a speedy trial was violated is based entirely on his claim that the trial court improperly terminated his first trial. As we have concluded, the double jeopardy issue is without merit. Thus, Baker's speedy trial argument fails.

Ineffective assistance of counsel

Baker argues that both his trial counsel and his appellate counsel were ineffective. He contends that his trial counsel was ineffective for failing to interview two witnesses, failing to request a jury instruction on criminal restraint as a lesser included offense of kidnapping, failing to argue that he was subjected to double jeopardy, and failing to raise the violation of his right to a speedy trial. Baker contends that his appellate counsel was ineffective for failing to raise on appeal the lesser included offense issue, the double jeopardy issue, and the speedy trial issue.

The determination of Baker's claim of ineffective assistance of trial counsel requires a two-pronged analysis. First, Baker must establish that his counsel deficiently performed to the degree that he failed to receive the level of representation required under the Sixth Amendment to the United States Constitution. Second, Baker must establish a connection between his counsel's deficient performance and any alleged prejudice to his defense. See *State v. Mathis*, 281 Kan. 99, 109, 130 P.3d 14 (2006). In other words, his counsel's errors must have been so serious that he was deprived a fair trial. See 281 Kan. at 109–10.

***7** Baker claims that his trial counsel was ineffective for failing to request a jury instruction on criminal restraint, failing to argue double jeopardy, and failing to argue speedy trial. However, these issues have all been resolved against Baker. Thus, on these issues, Baker fails to meet even the first prong needed to establish an ineffective assistance of counsel claim, that is, that his counsel's performance was deficient.

The only remaining issue is whether Baker's trial counsel was ineffective for failing to interview two potential witnesses. Baker wanted his trial counsel to call two witnesses, Deborah Ferguson, his probation officer, and Barbara Schnitker, a representative from the Douglas County Health Department, in order to impeach the credibility of a State's witness, Raquel Jordan. Baker claimed that his trial counsel failed to interview the two witnesses. However, the district court found that Baker's trial counsel had interviewed these two witnesses and determined that it was not in Baker's best interest for them to testify. There is substantial competent evidence in the record to support this finding. Thus, Baker has failed to show that his trial counsel's performance was deficient. *State v. Smith*, 278 Kan. 45, 51–52, 92 P.3d 1096 (2004).

Baker argues that his appellate counsel was ineffective for failing to raise on appeal the lesser included offense issue, the double jeopardy issue, and the speedy trial issue. However, as we have determined, none of these issues were

meritorious. Thus, Baker's claim of ineffective assistance of appellate counsel also fails.

For all the reasons stated, the district court did not err in denying Baker's K.S.A. 60–1507 motion.

Affirmed.

All Citations

171 P.3d 674 (Table), 2007 WL 4297993

End of Document

344 P.3d 396 (Table)
Unpublished Disposition

Court of Appeals of Kansas.

STATE of Kansas, Appellee,

v.

David Lawrence SMITH, Appellant.

No. 109,165.

March 6, 2015.

Appeal from Atchison District Court; Martin J. Asher, Judge.

Attorneys and Law Firms

Robert D. Campbell, of Campbell Law Office, P.A., of Atchison, for appellant.

Gerald R. Kuckelman, county attorney, and Derek Schmidt, attorney general, for appellee.

Before ATCHESON, P.J., POWELL, J., and JOHNSON, S.J.

MEMORANDUM OPINION

POWELL, J.

***1** David Lawrence Smith appeals from his convictions of one count of aggravated indecent liberties with a child under 14 years of age and two counts of aggravated indecent liberties with a child over 14 years of age but less than 16 years of age. Smith alleges the district court committed reversible error by: (1) admitting a photograph of a latch on the victim's brothers' bedroom door; (2) denying his motions for a new trial; (3) responding to two jury questions in writing; (4) failing to include in the jury instructions the element for aggravated indecent liberties that the defendant must be over the age of 18; (5) using a special question on the verdict form; (6) imposing a life sentence which is categorically disproportionate in violation of the Eighth Amendment to the United States Constitution; (7) designating his pre-KSGA in-state and out-of-state convictions as person felonies; and (8) using his criminal history to increase his sentence. Because the district court improperly classified Smith's pre-KSGA out-of-state conviction as a person felony, we must vacate Smith's sentence and remand for resentencing, but we affirm Smith's convictions and the district court in all other respects.

FACTUAL AND PROCEDURAL HISTORY

On July 23, 2011, a woman named Amanda contacted the Atchison County Sheriff's Department to request a civil standby while she helped her sister, Gayla Robinson, and Robinson's children move out of a residence in that county. Two officers, Undersheriff Larry Myer and Sergeant Jeremy Peak, accompanied Robinson's two sisters and their husbands to Robinson's residence. Robinson and her four children lived with her boyfriend, Smith.

When the parties arrived at the residence, Robinson was outside with her three sons working on and cleaning an air conditioner unit. The home's main air conditioner had broken, and they had installed a window air conditioner in Robinson and Smith's bedroom earlier that day. Once the window unit was installed, Smith went into the bedroom to lie down. Robinson testified she and her daughter, B.N.M ., also went into the bedroom to lie down. Smith was naked but had a blanket over him up to his waist. Robinson testified it was normal for him to sleep without clothes. Robinson claimed Smith then sent her outside to work with the boys on the other air conditioner so they could install it in the boys' bedroom. Smith denied telling Robinson to leave; he claimed he had gone to sleep and did not know B.N.M was in the room with him. B.N.M. testified she was watching a movie and Smith was sleeping.

Outside, Robinson told the officers things were bad between her and Smith so she needed to leave and go back to Arkansas with her sisters. Robinson had not told Smith she was planning on leaving as she was afraid to tell him because he had a bad temper and would hit her and her children.

Robinson indicated to the officers that Smith was inside the residence taking a nap. The officers knocked on the front door, but no one answered. Robinson then gave them permission to go inside and told them Smith was in their bedroom. Myer knocked on the bedroom door, and it swung open. He saw Smith lying on his side naked on the bed with a blanket only draped over his calves and upper thigh. B.N.M. was also on the bed next to Smith. Myer testified he saw B.N.M.'s arm on Smith down around the lower part of his stomach or groin area. B.N.M. testified her hand was on his side. B.N.M. jumped off the bed and out of the bedroom. As she walked by Peak, he asked if she was ok and B.N.M. shook his hand and said thank you.

***2** Smith got dressed, and the officers told him Robinson and the children were going to leave. Smith was cooperative and gave Robinson a truck to transport her belongings. After loading the truck, Robinson, her four children, Robinson's sisters and their husbands, and Smith all went to the sheriff's office. B.N.M. rode to the office with her Aunt Amanda and Amanda's husband.

Myer interviewed B.N.M., who told him Smith had been sexually abusing her since she was age 7. She told Myer that since moving to Kansas in September 2010, Smith would send her mother and brothers outside, then he would sit on the couch or a chair, have her remove her clothes, bend over, and would insert his fingers in her vagina. He would also remove her shirt and bra and rub her breasts. She said it had occurred 15 to 20 times from September 2010 through July 2011, although she did not identify any specific dates. She told them the last time it had occurred was 2 or 3 weeks prior to the police coming on July 23, 2011. She said she had not told anyone because she was scared Smith would hurt her or her brothers. Myer called the University of Kansas Hospital, which advised that a medical examination of B.N.M. was not needed because she said sexual contact had not occurred for weeks.

During the trial, B.N.M. testified she had turned 14 years old on February 22, 2011, and sexual contact with Smith had occurred several times in the year before and after her birthday. Before trial, B.N.M. had not given any specific dates of when the sexual abuse occurred; however, at trial she said she remembered two specific dates. B.N.M. testified that on Father's Day, June 19, 2011, Smith sent Robinson and B.N.M.'s three brothers out to take care of the dogs. He then sat on the edge of the couch and made B.N .M. pull down her pants; he put her hand on his penis and inserted his fingers into her vagina. She testified the same thing happened on July 10, 2011, Smith's birthday. She did not give other specific dates or number of times other incidents occurred, but she claimed sexual contact occurred multiple times while she was 13 years old and multiple times between February and June 2011 when she was 14. She testified the sexual encounters were always the same.

B.N.M claimed no sexual contact occurred on the day Myer and Peak were in the home, and Smith was not charged with anything related to that date. B.N.M. testified she had never told anyone about the sexual contact because she was afraid of Smith and was afraid he would hit her, her brothers, or her mother because he had done so before. In December 2010, an SRS worker visited B.N.M. and her family, and B.N.M. told the worker she was not afraid of Smith. B.N.M. never mentioned any sexual abuse.

The defense introduced two birthday cards and one Father's Day card into evidence through Robinson. One of the birthday cards was to Smith from B.N.M. and her siblings. Inside, B.N.M. wrote: "Happy birthday, Dad. I hope you have the best 52nd birthday ever and hope you get everything you want and wish for. You mean so much to me, Dad. I love you with all my heart. I love you always." In the Father's Day card, B.N.M. wrote: "Happy Father's Day. I love you. Hope you have the best Father's Day ever. I love you with all my heart." B.N.M. acknowledged that while she had written that she loved Smith, she was angry and upset about the sexual contact and she did not love him or want to be with him. Smith denied having sexual contact with B.N.M., and he denied ever threatening her or that she was afraid of him. On February 15, 2012, the jury found Smith not guilty of three counts of rape and guilty of three counts of aggravated indecent liberties with a child.

***3** On February 22, 2012, Smith's trial attorney, John Kurth, filed a motion for new trial and judgment of acquittal. On April 2, 2012, Smith filed a pro se motion for new trial and judgment of acquittal for misrepresentation of counsel. On April 5, 2012, Kurth filed a second motion for a new trial or judgment of acquittal. In his pro se motion for new trial, Smith alleged ineffective assistance of counsel of Kurth, so the court appointed a new defense attorney, J. Phillip Crawford.

Crawford filed another motion for new trial and a motion for judgment of acquittal on July 3, 2012. Crawford also filed an objection to the presentence investigation report and a motion to declare the hard 25 life sentence under K.S.A.2010 Supp. 21–4643 unconstitutional. The district court held an evidentiary hearing on July 12, 2012, at which it addressed all the filed motions for new trial. Kurth and Smith testified. The district court denied Smith a new trial.

On August 2, 2012, Smith filed a pro se motion to vacate his convictions and a motion alleging ineffective assistance from Crawford, asking the district court to dismiss Crawford and to allow Smith to represent himself. Smith waived his right to counsel and filed a pro se motion for judgment of acquittal on September 6, 2012. On September 10, 2012, Smith filed another pro se motion for new trial and then on September 20, 2012, Smith filed a second pro se motion for new trial or acquittal and a motion objecting to his presentence investigation report. On September 20, 2012, the district court denied Smith's pro se motions for new trial and judgment of acquittal and sentenced him to life plus 154 months in prison.

Smith timely appeals.

DID THE DISTRICT COURT ERR BY ADMITTING A PHOTOGRAPH OF B.N.M.'S BROTHERS' BEDROOM DOOR INTO EVIDENCE?

On redirect examination of Myer, the State submitted additional pictures of the interior of Robinson and Smith's home. Two pictures were of the second bedroom where Robinson's three boys slept. The first picture, State's Exhibit 8, showed the interior of the room and a latch on the door. The second picture, State's Exhibit 9, was a close-up of the outside of the bedroom door with the latch hooked to the wall. Smith told Myer he put the lock on the outside of the door so that the boys could not get up in the middle of the night to eat. Robinson explained they had problems with the boys getting food from the kitchen, especially one of the boys who was diabetic and had eaten food that caused medical problems related to his diabetes.

Defense counsel did not object to the admission of State's Exhibit 8 but did object to the admission of the second picture, State's Exhibit 9, claiming it was not relevant. The court overruled the objection because the photograph showed the interior of the house. After the conclusion of the State's case-in-chief, defense counsel renewed his objection to State's Exhibit 9, arguing the picture and the testimony about it were highly inflammatory and prejudicial. The objection was again overruled. On appeal, Smith argues the district court erred by admitting the picture of the latch because it was irrelevant and prejudicial.

***4** Multiple inquiries are involved when the admission or exclusion of evidence is challenged on appeal. The court must determine whether the evidence was relevant. Generally, all relevant evidence is admissible. K.S.A. 60–407(f). Relevant evidence is defined as "evidence having any tendency in reason to prove any material fact." K.S.A. 60–401(b). This definition encompasses two elements: a materiality element and a probative element. Standards of review for each element vary. A fact is material if it "has a legitimate and effective bearing on the decision of the case and is in dispute." *State v. Stafford*, 296 Kan. 25, 43, 290 P.3d 562 (2012). Review for materiality is de novo. *State v. Ultreras*, 296 Kan. 828, 857, 295 P.3d 1020 (2013). "Evidence is probative if it has any tendency to prove any material fact." *Stafford*, 296 Kan. at 43, 290 P.3d 562. We review the district court's assessment of the probative value of evidence under an abuse of discretion standard. *Ultreras*, 296 Kan. at 857, 295 P.3d 1020.

Smith argues the presence of a latch on the outside of the boys' bedroom door had no tendency to prove any material fact because Smith was not charged with acts involving B.N.M.'s brothers. The State argues the picture was relevant because it showed the inside of the house where the alleged sexual abuse of B.N.M. occurred. However, B.N.M. testified the sexual abuse occurred in the living room or Smith and Robinson's bedroom. We agree it was relevant for the State to show the jury the inside of the home as it related to where the alleged sexual abuse occurred, but a close-up picture of B .N.M.'s brothers' bedroom door had no tendency to prove any material fact related to the charges. Therefore, we must conclude the district court erred by admitting the picture, State's Exhibit 9.

However, an

> "erroneous admission of evidence is subject to review for harmless error. See K.S.A. 60–261. The harmless-error analysis under K.S.A. 60–261 ... requires [the

court] to determine whether there is a reasonable probability that the error affected the outcome of the trial in light of the entire record. [Citation omitted.] ... [T]he party benefitting from the error bears the burden of establishing the error was harmless." *State v. Greene*, 299 Kan. 1087, 1095–96, 329 P.3d 450 (2014).

Smith argues the admission affected the outcome of the trial because the photograph suggested to the jury that he mistreated B.N.M.'s brothers, leading to the inference that he was the type of person who would mistreat and sexually abuse B.N.M. The State argues that regardless of whether the district court had admitted the picture, it was only one piece of evidence among many concerning the children's fear of Smith, and the main issue at trial concerned the credibility of B.N.M. and Smith. We must agree with the State.

First, State's Exhibit 9 was not the only photograph showing the latch on the outside of the boys' bedroom door. The latch was visible in State's Exhibit 8—the photograph of the inside of the boys' bedroom—and Smith did not object to its admission. Although the latch was not as prominent in State's Exhibit 8 as it was in State's Exhibit 9, the jury still had the opportunity to see the latch on the door even if State's Exhibit 9 had not been admitted.

***5** Second, the picture of the hook and latch and the discussion of why it was there may have raised concerns in the jurors' minds about Smith's parenting techniques, but there was ample evidence introduced regarding Smith's temper and propensity to hit B.N.M., her brothers, and her mother. B.N.M. testified she did not tell anyone about the sexual abuse because she was scared of Smith and afraid he might hurt her brothers or her mother if she told. She stated Smith had hit her brothers before, and her mother testified she was afraid to tell Smith that she and the children were leaving him because he had a bad temper and had hit her and her children.

We conclude there is no reasonable probability that the outcome of the trial would have been different without the admission of State's Exhibit 9, and the admission of State's Exhibit 9 was harmless error.

DID THE DISTRICT COURT ERR BY DENYING SMITH'S MOTIONS FOR NEW TRIAL?

After the trial, Kurth filed a timely motion for new trial. Subsequently, Smith filed his own pro se motion for new trial, which was untimely as it was filed beyond the 14–day time limit. Kurth then filed an untimely second motion for a new trial. After the court appointed Smith new counsel, Crawford filed an untimely motion for a new trial. The district court held an evidentiary hearing to address all the motions. Because the motions alleged Kurth provided ineffective assistance of counsel during the trial, both Kurth and Smith testified. The district court made findings of fact on the record and denied Smith a new trial. Smith's motions can be effectively be divided into two groups: the first dealing with his allegations of ineffective assistance of counsel, and the second asserting two trial errors committed by the district court.

a. *Does this court have jurisdiction over issues raised in untimely motions for new trial?*

Before we address of the merits of the numerous motions for a new trial, we are constrained to initially note that neither party nor the district court raised the issue of whether the district court had jurisdiction to review the issues raised in Kurth's, Smith's, and Crawford's motions for a new trial filed outside the 14–day time limit as contained in K.S.A.2014 Supp. 22–3501. We have a duty to raise jurisdictional questions *sua sponte*. *State v. Williams*, 298 Kan. 1075, 1080, 319 P.3d 528 (2014) (citing *State v. Berreth*, 294 Kan. 98, 117, 273 P.3d 752 [2012]). Because a question surrounding jurisdiction is one of law, we exercise unlimited review. *State v. Ellmaker*, 289 Kan. 1132, 1147, 221 P.3d 1105 (2009), *cert. denied* 560 U.S. 966, 130 S.Ct. 3410, 177 L.Ed.2d 326 (2010).

Under differing circumstances, appellate courts have taken various approaches towards addressing untimely motions for new trial, but under *State v. Kirby*, 272 Kan. 1170, 1193–94, 39 P.3d 1 (2002), the most recent Supreme Court case addressing the issue, an untimely motion for a new trial based on ineffective assistance of counsel may be construed as a motion for postconviction relief. See also *State v. Kingsley*, 252 Kan. 761, 765–66, 851 P.2d 370 (1993) (untimely pro se motion for new trial on basis of ineffective assistance of counsel construed as postconviction motion for relief). Because all but one of the untimely motions for a new trial asserted ineffective assistance of counsel, the district court had jurisdiction over the merits of these claims, giving us appellate jurisdiction as well. Moreover, since the district court held an evidentiary hearing on the motions, the

record is sufficiently complete for us to appropriately address Smith's claims.

b. *Standard of review*

***6** "The decision to grant or deny a motion for a new trial rests in the sound discretion of the district court. [Citation omitted.] Judicial discretion is abused only when no reasonable person would take the view of the district court. The party who asserts abuse of discretion bears the burden of showing it. [Citation omitted.]' " *State v. Fulton*, 292 Kan. 642, 648, 256 P.3d 838 (2011) (quoting *State v. Stevens*, 285 Kan. 307, 319, 172 P.3d 570 [2007]).

A judicial action constitutes an abuse of discretion if the action

> "(1) is arbitrary, fanciful, or unreasonable, *i.e.*, if no reasonable person would have taken the view adopted by the trial court; (2) is based on an error of law, *i.e.*, if the discretion is guided by an erroneous legal conclusion; or (3) is based on an error of fact, *i.e.*, if substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based." *State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801 (2011), *cert. denied* —— U.S. ——, 132 S.Ct. 1594, 182 L.Ed.2d 205 (2012).

c. *Did Kurth provide ineffective assistance of counsel?*

Smith first argues the district court erred by finding his trial counsel did not provide ineffective assistance. He argues Kurth provided ineffective assistance of counsel because he: (1) failed to object to the admission of prior bad acts evidence; (2) did not strike a potential juror "for cause" even though she had worked directly with B.N.M. in school; (3) failed to submit a letter from B .N.M.'s Aunt Amanda into evidence; (4) failed to use two alleged prior inconsistent statements to impeach B.N.M.; (5) did not arrange for an independent psychological examination of B.N.M.; (6) did not request a change of venue; (7) failed to request and obtain copies of phone conversations between Smith and Robinson; and (8) did not request a continuance to consult with his client during trial when B .N.M. identified specific dates of the alleged sexual abuse.

A claim alleging ineffective assistance of counsel presents mixed questions of fact and law requiring de novo review. *Thompson v. State*, 293 Kan. 704, 715, 270 P.3d 1089 (2011). An appellate court "reviews the underlying factual findings for substantial competent evidence and the legal conclusions based on those facts de novo." *Boldridge v. State*, 289 Kan. 618, 622, 215 P.3d 585 (2009). If the district court made either an error of law or an error of fact in determining that Smith did not receive ineffective assistance of counsel, then it necessarily abused its discretion in denying his motion for new trial on that basis.

To establish ineffective assistance of counsel, it is not enough to merely surmise, with the benefit of hindsight, that another attorney may have tried the case differently. Rather, before counsel's assistance can be found to be so defective as to require reversal of a conviction, the defendant must establish two elements. First, the defendant must establish that counsel's performance was constitutionally deficient. This requires a showing that counsel made errors so serious that his or her performance was less than that guaranteed by the Sixth Amendment to the United States Constitution. Second, if the first element is shown, then the defendant must establish that counsel's deficient performance prejudiced the defense, meaning that counsel's errors were so severe as to deprive the defendant of a fair trial. *Harris v. State*, 288 Kan. 414, 416, 204 P.3d 557 (2009).

***7** Judicial scrutiny of counsel's performance in a claim of ineffective assistance is highly deferential and requires consideration of the totality of the evidence before the judge or jury. The reviewing court must strongly presume that counsel's conduct fell within the broad range of reasonable professional assistance. 288 Kan. at 416, 204 P.3d 557. If counsel had made a strategic decision after making a thorough investigation of the law and the facts relevant to the realistically available options, then counsel's decision is virtually unchallengeable. Strategic decisions made after a less than comprehensive investigation are reasonable to the extent a reasonable professional judgment supports the limitations on the investigation. *Rowland v. State*, 289 Kan. 1076, 1083–84, 219 P.3d 1212 (2009) (quoting *State v. Gleason*, 277 Kan. 624, 644, 88 P.3d 218 [2004]).

To establish prejudice, the defendant must demonstrate a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. A reasonable probability is a probability

sufficient to undermine confidence in the outcome. In making such a determination, the reviewing court must consider all the evidence before the judge or jury. *Harris*, 288 Kan. at 416, 204 P.3d 557.

i. *Did the district court abuse its discretion in finding Kurth did not provide ineffective assistance of counsel by failing to make a contemporaneous objection to the admission of prior bad acts evidence?*

Smith argues Kurth's performance fell below an objective standard of reasonableness because he did not contemporaneously object to the admission of evidence regarding uncharged bad acts. At trial, evidence referred to prior bad acts by Smith, such as hitting or beating B.N.M., her brothers, and her mother, as well as other allegations about incidents of possible abuse in different states.

During the hearing on Smith's motion for new trial, Kurth testified he did not lodge a contemporaneous objection to the prior bad acts evidence because he, Smith, and the prosecutor had discussed allegations and charges against Smith in different states but agreed they were going to focus on the allegations and events that occurred in Atchison County. Kurth knew before trial that the individuals testifying might mention these allegations of abuse and potential claims from other states, but he did not object because he did not want to draw attention to them. Instead, he chose to make a motion for mistrial and allow Smith to deny the prior bad acts when he testified. There was never a pretrial hearing to determine the admissibility of the prior bad acts evidence, but Kurth testified he and the prosecutor had a "gentlemen's agreement" that they would both attempt to keep witnesses from testifying about anything other than the Atchison County allegations.

Kurth told Smith of this agreement before trial. Smith testified Kurth told him the prosecutor agreed not to solicit evidence about allegations that Smith hit Robinson, B.N.M., and her brothers, that Smith kept food from them, or that he forced them to work without paying them. Smith had planned to testify, and Kurth claimed that decision was made and remained unaltered by the admission of the prior bad acts evidence during trial.

***8** The district court ruled the better practice would have been to have a pretrial hearing rather than just a "gentleman's agreement." However, it found that the evidence of prior abuse allegations and police contact was inevitably going to be brought in by the defense through witness testimony because the defense's strategy was to argue that B.N.M. had multiple opportunities throughout the years to report the abuse allegations to social workers or the police yet failed to do so. In fact, the defense's first two witnesses were workers from the State who met with the family to investigate allegations of abuse and offer the family services. Therefore, the fact that physical abuse allegations had been made against Smith in the past was required to explain why the social workers had contact with the family. The defense also needed to explain why B.N.M. had had multiple opportunities to tell the police. The evidence that Smith and Robinson had a stormy relationship and that law enforcement was sometimes used to keep the peace was needed for Smith's defense theory.

However, even if Kurth erred by failing to object, and even if the district court erred by allowing the evidence to be admitted, we conclude the errors were harmless. The district court analyzed how it might have ruled had the issue been brought up in a pretrial hearing. It found most of the prior bad acts evidence would have been admissible because it was relevant to the material issue of why B.N.M. was scared of Smith and why she did not tell anyone about the sexual abuse sooner. The testimony alleging prior bad acts, such as hitting B.N.M., was not discussed in great detail but was merely offered as an explanation of why B.N.M. was afraid. Moreover, the district court gave a prior-bad-acts limiting jury instruction despite the lack of a pretrial hearing and Kurth's failure to object during trial.

The record shows Kurth made a strategic decision not to object and thereby draw attention to the evidence of prior bad acts. Additionally, substantial competent evidence supported the district court's finding that the evidence would have been admissible even if Kurth had objected. The district court also gave a limiting instruction; therefore, it is unlikely the outcome would have changed even if Kurth had made contemporaneous objections. The district court did not abuse its discretion by denying this claim.

ii. *Did the district court abuse its discretion in finding Kurth did not provide ineffective assistance of counsel by failing to strike a potential juror for cause?*

Second, Smith argues Kurth should have struck a potential juror for cause pursuant to K.S.A. 22-3410(2)(i) rather than waiting to strike her during peremptory strikes. This juror knew B.N.M. from working with her at school and stated she knew B.N.M. pretty well. The prosecutor asked the juror if she felt she could sit and listen to the case and decide it on the evidence; the juror answered she would try. The defense struck the potential juror from the jury during the peremptory challenges.

***9** At the hearing on Smith's motion for new trial, Kurth explained he did not see a need to strike any potential juror for cause based on whether the juror knew B.N.M., Myer, himself, or any other participant if the juror believed he or she could be fair and impartial and not biased. In the end, Kurth did use peremptory strikes to remove several potential jurors who knew persons involved in the case, including the juror who knew B.N.M. Kurth claimed he discussed with Smith the potential jurors and which ones to peremptorily strike, but Smith claimed he did not have any say in whom to strike. Since the potential juror at issue thought she could be a fair juror even though she knew B.N.M., the district court ruled there would not have been grounds to strike her from the jury pool for cause. Therefore, Kurth did not err by waiting to strike her during peremptory strikes. Substantial competent evidence supported the district court's findings and conclusion of law. The district court did not err by denying this claim.

iii. *Did the district court abuse its discretion in finding Kurth did not provide ineffective assistance of counsel by failing to utilize a letter from B.N.M. to her Aunt Amanda during trial?*

Third, Smith argues Kurth failed to use a letter B.N.M. wrote to her aunt to discredit B.N.M.'s statement that she was afraid of Smith. Before trial, Smith brought Kurth a letter B.N.M. wrote to Amanda. The letter referred to a time when Robinson, B.N.M., and her brothers had left Smith but then returned to live with him. The first part of the letter said it had been the children's idea to move back in with Smith, not Robinson's. Kurth testified he and Smith discussed presenting the letter at trial to discredit B.N.M.'s testimony that she was afraid of Smith; however, Kurth explained he did not use the letter because it discussed events in another state. Kurth said, "We didn't bring the letter in because it discussed other things we've already talked about and the fact that basically [B.N.M.] had already testified she was scared of him and that it was just kind of not the way it was." Smith claimed he asked Kurth to introduce the letter into evidence at trial, but he never did. The letter was provided to the district court during the hearing but was not included in the record on appeal. Kurth said Smith thought the letter was important and wanted Kurth to talk to B.N.M. about it; however, Kurth said Smith never told him to try to submit the letter into evidence, nor did they ever specifically agree not to submit it during trial.

The district court denied all of Smith's various motions for new trial but did not make specific findings regarding this issue of the letter. Neither party objected nor requested the court make additional findings. When no such objection is made, we can presume the district court found all facts necessary to support its judgment. See *Drach v. Bruce*, 281 Kan. 1058, 1080, 136 P.3d 390 (2006), *cert. denied* 549 U.S. 1278, 127 S.Ct. 1829, 167 L.Ed.2d 317 (2007). Generally, decisions of whether and how to conduct cross-examination of a witness are matters of trial strategy. *Wilkins v. State*, 286 Kan. 971, 982, 190 P.3d 957 (2008). Kurth testified he knew about and had read the letter, but he decided against using the letter during trial because it discussed other matters harmful to his client. Kurth's actions were not constitutionally deficient, and the district court correctly denied this claim.

iv. *Did the district court abuse its discretion in finding Kurth did not provide ineffective assistance of counsel by failing to use two prior inconsistent statements when cross-examining B.N.M.?*

***10** Fourth, Smith argues Kurth should have used two prior inconsistent statements made by B.N.M. when cross-examining her. Crawford identified an inconsistent statement B.N.M. made to Myer regarding whether Smith made her take off her own clothes or whether he took them off of her. Crawford also pointed out that B.N.M. testified Myer was the first person she told about the sexual abuse. However, in B.N.M.'s statement to Myer, she told him she told her Aunt Amanda and Amanda's husband about the sexual abuse in the car when they were driving from Smith's house to the police station where she reported the abuse to Myer. Kurth admitted he did not point out either of these prior inconsistent statements during trial.

Kurth testified he did not believe introducing the statements would have helped. He explained that both he and Smith knew B.N.M. had told her aunt and uncle about the sexual abuse before telling Myer, but it was

unnecessary for him to clarify her statement during the trial because she would have merely explained Myer and Peak were the first police officers she told. Kurth claimed the decision whether to bring up a prior inconsistent statement was a matter of trial tactics.

Kurth also stated he and Smith decided not to have Amanda testify, despite the possibility it could reveal inconsistencies in B.N.M's statements, because Amanda's testimony would have been more harmful than helpful to Smith's defense. At the hearing on the motions for a new trial, Smith claimed Amanda was telling B.N.M. to lie about the sexual abuse in order to separate Robinson (Amanda's sister) and Smith. Smith testified he wanted Amanda to testify so she could be caught in her lies.

Again, the district court did not make specific findings regarding B.N.M.'s inconsistent statements and whether Amanda should have testified, and neither party objected nor requested the court make additional findings. Without an objection, we presume the district court found all facts necessary to support its denial of the claim. See *Drach*, 281 Kan. at 1080, 136 P.3d 390. The decisions of whether to call a witness or how to cross-examine a witness are matters of trial strategy. *Wilkins*, 286 Kan. at 982, 190 P.3d 957. Kurth testified he did not believe using these two inconsistent statements would have been helpful, and he decided not to have Amanda testify because it would have been harmful to Smith's defense. Kurth's representation was not constitutionally deficient; therefore, the district court did not err in denying this claim.

v. *Did the district court abuse its discretion in finding Kurth did not provide ineffective assistance of counsel by failing to set up a psychological examination of B.N.M.?*

Fifth, Smith argues Kurth was ineffective because he failed to obtain a psychological evaluation of B.N.M., which he felt was critical as the State's case was based on B.N.M.'s testimony and her credibility was crucial. Smith claims learning more about B.N.M.'s understanding of veracity and whether she had other issues that would have impacted her credibility could have greatly aided his defense. The State disagrees and argues nothing in the case indicated that B.N.M. suffered from any mental defect or had an issue with truthfulness; therefore, it was reasonable for Kurth not to pursue the psychological examination.

***11** Smith claimed he asked Kurth about the hearing held pursuant to *State v. Gregg*, 226 Kan. 481, Syl. ¶ 3, 602 P.2d 85 (1979), to determine whether the court would order B.N.M. to undergo a psychological examination and why an independent psychological examination of B.N.M. was never obtained. At the *Gregg* hearing, the district court found the facts of the case did not meet the factors described in *Gregg* meriting an order for a psychological examination. See 226 Kan. at 487–89, 602 P.2d 85. The district court refused to order B.N.M. to undergo the examination but advised the parties they could have a psychological examination of B.N.M. done on their own.

Kurth testified he obtained and reviewed school records and other records from Arkansas but did not find anything indicating B.N.M. had a mental deficiency or anything of that nature. Kurth also testified he did not feel the *Gregg* factors were met and there was a question about whether B.N.M.'s mother would consent to a psychological examination of B.N.M. After the *Gregg* hearing, Kurth and Smith discussed whether an examination would be done, but Kurth testified they "just didn't pursue it any further." Kurth claimed he and Smith never had a specific agreement to ask for the psychological examination with the consent of all parties. According to Kurth, it became a nonissue. At the hearing on the motions for a new trial, Smith claimed Kurth never discussed the psychological evaluation with him after the *Gregg* hearing.

The district court found it was not ineffective assistance of counsel for Kurth not to pursue a psychological examination of B.N.M. after the *Gregg* hearing because the case facts were not even close to showing a need for the examination of B.N.M. Robinson would have needed to consent to the evaluation, which would have been logistically difficult since B.N.M. and Robinson were living in Arkansas. Smith fails to point to any specific evidence that would support his claim that a psychological examination would have revealed information so important it would have impacted B.N.M.'s credibility to the extent that the jury would have found him not guilty. The record supports the district court's findings of fact and conclusions of law.

vi. *Did the district court abuse its discretion in finding Kurth did not provide ineffective assistance of counsel by failing to request a change of venue?*

Sixth, Smith claims Kurth should have requested a change in venue and was ineffective for not doing so. Before trial, Smith asked Kurth multiple times about changing the venue of the trial because he was concerned about the coverage of the case in the local newspaper and on the radio. Smith testified Kurth never explained why he believed the court would not grant a motion to change venue. Kurth testified he believed the court would not change the venue because the coverage in the newspapers and on the radio was nothing out of the ordinary and he felt the potential jury members questioned during voir dire had either not heard anything or, even if they had, had not formed an opinion as to Smith's guilt prior to hearing the evidence.

***12** Kurth understood many people in the jury pool knew at least one of the police officers involved in the case, but he testified that was common in a small, rural county. Kurth explained that usually he asked each juror whether he or she could be fair and impartial despite knowing an individual involved in the case. During voir dire, no potential juror who knew one of the police officers said it would affect his or her ability to be fair. Kurth stated he never considered using the fact that potential jurors knew the police officers or others involved in the case as a reason to either request a change of venue or to strike the whole jury panel.

The district court found Kurth was not ineffective for failing to request a change of venue because mere publicity alone is insufficient to change venue. *State v. Carr*, 300 Kan. 1, 65–66, 331 P.3d 544 (2014) (quoting *State v. Dunn*, 243 Kan. 414, 424, 758 P.2d 718 [1988]). Only 3 of the 36 potential jurors had heard about the case before trial, and there was no real danger Smith was not going to receive a fair trial due to publicity. All three of the potential jurors who had heard about the case through the press were struck during peremptory strikes by the defense. Since none of the individuals who actually sat on the jury had heard publicity about the case, it is clear the case was tried before a jury unaffected by publicity just as if venue had been changed. The district court correctly found this claim had no merit.

vii. *Did the district court abuse its discretion in finding Kurth did not provide ineffective assistance of counsel by not requesting any recordings of phone calls between Smith and Robinson?*

Seventh, Smith argues Kurth's failure to investigate whether phone calls between Robinson and Smith were recorded prohibited him from making an informed decision about whether Robinson's recorded statements could have been used to undermine B.N.M.'s credibility.

Before trial the prosecutor's office made Kurth aware of phone calls between Robinson and Smith while Smith was in jail. The prosecutor's office was concerned about the possibility of witness intimidation. Kurth advised Smith to stop talking to Robinson on the phone because the calls might be recorded. Smith indicated to Kurth that Robinson had told him she did not believe B.N.M.'s allegations and she felt intimidated by law enforcement to testify. Smith claimed he asked Kurth to request any recordings of his conversations with Robinson, but Kurth did not pursue it. Kurth admitted that if Robinson had felt she was being forced to testify, he could have discussed it with her during the trial, and he conceded it might have aided Smith. However, Kurth maintained he could not have asked Robinson to give her opinion on whether B.N.M. was telling the truth. Kurth testified he did not know whether phone calls to and from inmates at the Atchison jail were recorded and did not ask. He advised Smith not to talk to Robinson because he knew there was a possibility such phone calls were recorded.

***13** Again, the district court did not make specific findings regarding this issue. But as neither party objected nor requested the court make additional findings, we presume the district court found all facts necessary to support its denial of the claim. See *Drach*, 281 Kan. at 1080, 136 P.3d 390.

In our view, Robinson's statements could not have been introduced at trial. First, Smith claims Robinson's alleged statements that she did not believe B.N.M.'s allegations could have been used to undermine B.N.M.'s credibility. However, "[a] witness may not express an opinion on the credibility of another witness [citations omitted] ... because the determination of the truthfulness of a witness is for the jury." *State v. Albright*, 283 Kan. 418, 430–31, 153 P.3d 497 (2007). Second, Smith claims Robinson's alleged statements that she felt forced to testify may have helped Smith's defense by undermining B.N.M.'s credibility. It is unclear to us how Robinson's statements that she did not want to testify or felt forced to testify would have affected the jury's evaluation of B.N.M.'s credibility. The jury had the opportunity to see and hear

B.N.M. testify and directly evaluate her credibility. We conclude the verdict would not have been different had Kurth further investigated the recorded phone calls.

viii. *Did the district court abuse its discretion in finding Kurth did not provide ineffective assistance of counsel by failing to request a continuance in order to consult with Smith when B.N.M. identified two specific dates of the sexual abuse for the first time during trial?*

Eighth, Smith claims Kurth was ineffective for not seeking an immediate continuance when B.N.M. unexpectedly identified two specific dates of sexual abuse—Father's Day and Smith's birthday—for the first time during the trial. Smith argues Kurth should have asked for a continuance in order to confer with Smith about an alibi to refute B.N.M.'s allegations. After the trial, Kurth filed a second motion for a new trial, arguing the defense was not given additional time or the opportunity to investigate the dates even though he did not request a continuance during the trial. Kurth testified he did not ask whether Smith had an alibi for the specified days until after the trial. Smith testified that after the trial he told Kurth he was at the lake all day on his birthday, so there could not have been sexual contact between Smith and B.N.M. at their house.

Again, like a number of Smith's other ineffective assistance of counsel claims, the district court did not make specific findings regarding this issue, but neither party objected nor requested the court make additional findings. Without an objection, we presume the district court found all facts necessary to support its denial of the claim. See *Drach*, 281 Kan. at 1080, 136 P.3d 390.

Smith argues Kurth's failure to request a continuance prohibited him from obtaining a witness to support Smith's testimony that the whole family was at the lake, not at home, on Smith's birthday. We disagree. First, surprises happen during trials, and counsel is not obligated to immediately stop the proceedings because a surprise occurs. Second, Kurth had the opportunity to cross-examine the victim about her surprise recall of these dates, and Smith, during his testimony, directly refuted the allegation that sexual abuse occurred on his birthday. Third, Kurth had time before presenting the defense's case-in-chief to confer with Smith and prepare an appropriate response if one was available. Fourth, Smith fails to provide us with any witness who would, in fact, provide an alibi and substantiate his testimony that the family was camping at Centralia Lake on his birthday. Finally, B.N.M. testified on cross-examination that the abuse occurred after they returned from the lake, meaning that any alibi witness confirming Smith's testimony that the family was at the lake on his birthday would not have been helpful. Given this record, we are unpersuaded that counsel was ineffective on this point.

d. *Did the district court err by finding the admission of State's Exhibit 9 was not prejudicial and by finding it did not give the jury an improper initial instruction?*

***14** As we stated earlier, Smith's motions for a new trial were composed of two parts—one alleging ineffective assistance of counsel and one alleging the district court erred by: (1) admitting State's Exhibit 9 and (2) telling the jury, prior to opening arguments, that it hoped the jury would reach a verdict.

First, we have already determined the admission of State's Exhibit 9 (the photograph of B.N.M.'s brothers' bedroom door with hook and latch on the outside) was harmless error. The district court correctly rejected this argument.

Second, Smith takes issue with an initial instruction given by the district court to the jury before opening arguments. We note this contention was raised by Smith's second counsel, Crawford, in the July 3, 2013, motion for a new trial, which makes it untimely. Accordingly, we must deny it on that basis. However, even assuming the issue was timely raised, we still deny it on the merits.

After the jury had been selected, the judge explained the jurors' roles:

> "[It] is really very simple in a way in that what we want you to do is just listen to the evidence, then determine the facts from that evidence, then apply the law that I will give you at the conclusion of the evidence and hopefully arrive at a verdict, so again your main thing is to pay close attention to what is testified to from the witness stand."

Crawford's motion for a new trial argued the court implied to the jury that declaring a verdict was necessary and that a hung jury would not be acceptable. The district court rejected this argument. The instruction was given before opening arguments or any evidence was presented. The

court did not see how a jury could feel compelled to reach a verdict after hearing that initial instruction.

Smith raises the issue again on appeal and argues the initial instruction was coercive. He cites to *State v. Struzik*, 269 Kan. 95, 103–12, 5 P.3d 502 (2000), in which the jury initially could not agree on a verdict after a weeklong trial. The district court allowed the jury to go home and return the next morning. That morning the court asked the jurors to make a good-faith effort and deliberate for 1 hour; if they decided they could not reach a unanimous verdict, then they would report that to the judge. One hour later, the jury returned with a unanimous verdict. Our Supreme Court found the judge's oral instruction limiting the deliberations to 1 hour was not coercive and did not pressure the jury into reaching a verdict; instead, "the judge was clear that the time limit was to prevent a prolonged attempt at fruitless deliberations." 269 Kan. at 112, 5 P.3d 502.

This case is easily distinguishable from *Struzik*. In the present case, the district court stated the jury would "hopefully arrive at a verdict" at the beginning of the trial when it was explaining the general duties of the jury, before opening arguments, before any evidence was presented, and well before the jury actually received instructions and deliberated. The district court correctly ruled its statement during the initial instructions was not coercive. Because the district court correctly found Smith's arguments to be without merit, it did not abuse its discretion by denying the motion for new trial based on these arguments.

DID THE DISTRICT COURT'S PROCESS IN ANSWERING THE JURY'S QUESTIONS DURING DELIBERATION VIOLATE SMITH'S STATUTORY AND CONSTITUTIONAL RIGHTS?

***15** Smith argues the process by which the district court responded to the jury's questions violated Smith's statutory and constitutional rights. He claims his statutory right in K.S.A. 22–3420(3) was violated because the jury did not receive the court's response in open court and in the presence of the defendant, and he claims his constitutional rights to be present at every critical stage of the trial, to a public trial, and to an impartial judge were violated. A claim that a defendant was deprived of his statutory and constitutional rights to be present during a portion of the trial raises legal questions that are subject to unlimited review on appeal. See *State v. Engelhardt*, 280 Kan. 113, 121, 119 P.3d 1148 (2005).

While deliberating, the jury sent a written request to the court seeking a copy of the investigating officers' reports. On the record in the courtroom, the court read the request to the parties and noted the appearances of the defendant, defense counsel, and the prosecutor. The court advised the parties of its proposed response to which neither party objected. The court responded: "No. You can only consider the evidence that has been admitted by the Court, Instruction No. 2." The jury sent a second written question asking the court for the legal definition of "rape" and "aggravated indecent liberties with a child." The court again noted the appearances of the defendant, defense counsel, and the prosecutor and proposed a response referring the jury to the given instructions. It stated: "Please see Instruction 8 through 13." Neither Kurth nor the prosecutor objected to the response.

The record does not specify that the court's answers were written and delivered to the jury, but this court may assume as much since there is no record of the jury returning to the courtroom to have the court's answer read to it. While discussing the questions and responses on the record, the court did not directly ask Smith whether he agreed with the court's response or its method of delivery.

Before reaching the merits of Smith's argument, however, it is important to note Smith failed to object to the district court's written answers to the jury's questions and that he raises this issue for the first time on appeal. Smith also did not challenge the trial court's procedure in responding to the question in writing rather than calling the jury into the courtroom to communicate the answer. Generally, since issues not raised before the trial court cannot be raised for the first time on appeal, *State v. Warledo*, 286 Kan. 927, 938, 190 P.3d 937 (2008), our review of this question would appear to be foreclosed. However, there are three recognized exceptions to this rule: "(1) The newly asserted claim involves only a question of law arising on proved or admitted facts and is 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." *State v. Bowen*, 299 Kan. 339, 354, 323 P.3d 853 (2014).

***16** Smith claims we may address this issue because it presents a purely legal question and involves Smith's fundamental right to a fair trial. The facts are not disputed; the issue involves the interpretation of a statute and constitutional rights, which are questions of law, and if there is an error that is not harmless, it would be determinative of the case. Therefore, we will review this issue for the first time on appeal.

a. *Did the district court violate Smith's statutory right?*
Smith's statutory argument relies on K.S.A. 22–3420(3), which governed the trial court's procedures for answering questions from the jury:

> "After the jury has retired for deliberation, if they desire to be informed as to any part of the law or evidence arising in the case, they may request the officer to conduct them to the court, where the information on the point of the law shall be given, or the evidence shall be read or exhibited to them in the presence of the defendant, unless he voluntarily absents himself, and his counsel and after notice to the prosecuting attorney."

(NOTE: The legislature amended this statute as of July 1, 2014. See L.2014, ch. 102, sec. 7. The amendment occurred after all parties had submitted their briefs, and the parties have not argued the new statute is retroactive.)

" 'K.S.A. 22–3420(3) explicitly requires that any questions from the jury concerning the law or evidence pertaining to the case must be answered in open court in the defendant's presence unless the defendant is absent voluntarily.' " *State v. King*, 297 Kan. 955, 966, 305 P.3d 641 (2013) (quoting *State v. Coyote*, 268 Kan. 726, 732, 1 P.3d 836 [2000]). The State concedes the court violated K.S.A. 22–3420(3) and should have had the jury return to the courtroom in order to read the court's response to each question in the presence of the defendant. However, the State argues the error was harmless which we will address below.

b. *Did the district court violate Smith's constitutional rights?*
Smith also argues the district court violated three constitutional rights: (1) his right to be present at every critical stage of the trial; (2) his right to a public trial; and (3) his right to an impartial judge.

"Appellate arguments on a defendant's right to be present at every critical stage of his or her criminal trial raise an issue of law over which this court exercises unlimited review." *State v. Verser*, 299 Kan. 776, 787, 326 P.3d 1046 (2014). Under both the United States Constitution and K.S.A. 22–3405, a criminal defendant has the right to be present at every critical stage of his or her trial. See *State v. Herbel*, 296 Kan. 1101, 1109, 299 P.3d 292 (2013). This right includes the right to be present for communications between the district court and the jury after the jury retires for deliberation. K.S.A. 22–3420(3); *Herbel*, 296 Kan. at 1107, 299 P.3d 292. Generally, a defendant may waive his or her right to be present, but the right is so "personal to him or her [that it] cannot be waived through the counsel, unless the defendant and counsel have previously discussed the matter and agreed upon the waiver." *Verser*, 299 Kan. at 788, 326 P.3d 1046. The record does not indicate Smith personally, or through counsel, waived his right to be present. Smith was not present when the jury received the written communication from the court; therefore, Smith's right to be present at every critical stage of his trial was violated.

***17** Next, Smith argues the district court's procedure violated his right to a public trial under the Sixth Amendment to the United States Constitution and § 10 of the Kansas Constitution Bill of Rights. Smith's argument is again based on his contention that the communication with the jury was not effective until the jury received the written answer in the jury room. In this case, the judge read the jury questions on the record in the courtroom with both attorneys and the defendant present. The court decided on an answer to each of the jury's questions on the record which is now available to the public as part of the court file. The public was not present when the jury actually received the court's answer in the jury room, but jury deliberations are never open to the public. Under the facts of this case, we conclude Smith's constitutional right to a public trial was not violated. See *State v. Womelsdorf*, 47 Kan.App.2d 307, 325, 274 P.3d 662 (2012) (denying Womelsdorf's claim that court's written response to jury question violated her right to public trial), *rev. denied* 291 Kan. 1256 (2013).

Finally, Smith claims the district court's written communication with the jury violated his right to an impartial judge. Smith compares this case to *State v. Brown,* 362 N.J.Super. 180, 827 A.2d 346 (2003), where the jurors requested a readback of the victim's testimony. The *Brown* case was distinguished and this issue was discussed by another panel of this court in *Womelsdorf,* 47 Kan.App.2d at 323–24, 274 P.3d 662:

> "During the jury's deliberations in *Brown,* the jurors requested a readback of the victim's testimony. Although the defendant objected, the district judge ordered that the readback occur in the jury room, with counsel present, but without the judge or the defendant present. Moreover, prior to the readback, the district judge went into the jury room with the jury but outside the presence of counsel and the defendant and instructed the jurors that they could take notes on the readback but not to discuss the readback in front of counsel.
>
> "On appeal, the Superior Court of New Jersey, Appellate Division, held that the readback of testimony was a 'critical stage of the criminal proceedings'; that a defendant has a right to be present; and that the readback must be conducted in open court, on the record, and under the supervision of the presiding judge. 362 N.J.Super. at 182, 188–89, 827 A.2d 346. The court stated that it found the readback to be a critical stage of the proceedings because '[i]t is furnishing [jurors] with information they need to decide the case.' 362 N.J.Super. at 188–89, 827 A.2d 346. The court concluded that the district court denied the defendant his right to be present at the critical stage and, by barring the public, also denied the defendant his right to a public trial. 362 N.J.Super. at 189, 827 A.2d 346. Accordingly, the court reversed the defendant's convictions and remanded for a new trial. 362 N.J.Super. at 189–90.
>
> "The result in *Brown* was based primarily on violations of the defendant's constitutional right to be present at each critical stage of the trial and also the right to a public trial, rather than on the defendant's constitutional right to an impartial judge. Moreover, the facts of *Brown* are clearly distinguishable from Womelsdorf's case. The *Brown* court determined that the readback was a critical stage of the proceeding because it furnished the jurors with information they needed to decide the case. Here, the written answer to the jury denied it additional information it was seeking and reminded the jury to consider only the evidence admitted during trial. As the State points out, there is a distinct difference between the lengthy process of a readback, which also necessarily involves the court reporter, and the process of delivering a short written answer to a jury question which does not provide additional information. Under the facts of this case, we conclude that the district court's procedure in responding to the jury question in writing did not violate Womelsdorf's constitutional right to an impartial judge."

***18** The facts of this case are similar to *Womelsdorf* and distinguishable from *Brown.* The written answers in this case did not provide the jury additional evidence and referred it back to the given jury instructions. We conclude the district court did not violate Smith's right to an impartial judge.

c. *Were the district court's violations of Smith's statutory and constitutional rights to be present at every critical stage of the trial harmless error?*

"[A] violation of the right to be present is subject to the harmless error rule." *State v. Betts,* 272 Kan. 369, 391, 33 P.3d 575 (2001), *overruled on other grounds by State v. Davis,* 283 Kan. 569, 158 P.3d 317 (2006). When an error infringes upon a party's federal constitutional right, a court will declare a constitutional error harmless only when the party benefitting from the error persuades the court "beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.,* proves there is no reasonable possibility that the error affected the verdict." *State v. Ward,* 292 Kan. 541, 569, 256 P.3d 801 (2011), *cert. denied* — U.S. ——, 132 S.Ct. 1594, 182 L.Ed.2d 205 (2012) (citing *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.3d 705, *reh. denied* 386 U.S. 987 [1967]). Although the right to be present also implicates the violation of a statutory right, the constitutional harmless error test applies when violations of both statutory and constitutional rights arise out of the same acts or omissions. *Herbel,* 296 Kan. at 1110–11, 299 P.3d 292.

Here, there was no reasonable possibility the error contributed to the verdict. The district court's response to the jury question did not misstate the law or the evidence. Instead, the answer merely informed the jury

that the requested documents were not available, and the jury must consider only the evidence admitted during the trial. Essentially, the district court's response restated an instruction initially provided to the jury. The second response simply referred the jury to the jury instructions. The answers did not provide any additional information that could have changed the jury's verdict. Furthermore, the answer did not place undue emphasis on whether the jury should find Smith guilty or not guilty. We conclude beyond a reasonable doubt that the district court's procedure of submitting the answer in written form rather than calling the jury into the courtroom to receive the answer had no impact on the outcome of the trial, and any error was harmless.

DID THE DISTRICT COURT ERR BY SUBMITTING A SPECIAL QUESTION REGARDING SMITH'S AGE TO THE JURY?

Smith argues the district court committed structural error when it (1) failed to include an essential element of the crime of aggravated indecent liberties with a child under the age of 14 in the jury instructions and (2) submitted a special question to the jury regarding Smith's age. Smith acknowledges Kansas appellate courts have previously reviewed jury instructions that were not objected to under the clearly erroneous and harmless error standard; however, Smith argues we should instead find the district court's error was structural error because it created structural defects in the constitution of the trial mechanism which diluted the State's burden of proof. In the alternative, he claims the jury instructions were clearly erroneous and are reversible error. The State ignores Smith's structural error argument and admits submitting the defendant's age as a special question was error but asserts such error was harmless.

***19** Jury Instruction 9 instructed the jury on aggravated indecent liberties with a child under age 14:

> "To establish this charge, each of the following claims must be proved:
>
> "1. That the defendant submitted to lewd fondling or touching of his person by [B.N.M.], with the intent to arouse or to satisfy the sexual desires of the defendant;
>
> "2. That at the time of the act, [B.N.M.], was a child under the age of 14; and
>
> "3. That this act occurred between September 1, 2010, and February 22, 2011, in Atchison County, Kansas.
>
> "Lewd fondling or touching may be defined as a fondling or touching in a manner which tends to undermine the morals of the child, which is so clearly offensive as to outrage the moral senses of a reasonable person, and which is done with the specific intent to arouse or satisfy the sexual desires of the offender. Lewd fondling or touching does not require contact with the sex organ of one or the other."

The verdict form for this offense stated: "If you find the defendant guilty of aggravated indecent liberties with a child, do you also unanimously find beyond a reasonable doubt that the defendant was 18 years of age or older at the time the offense was committed?"

The jury found Smith guilty of aggravated indecent liberties with a child under age 15 and checked yes that it found Smith was 18 years of age or older at the time of the offense. Smith did not object to the instruction or verdict form.

Smith asserts the district court erred because it omitted an essential element from the jury instruction for aggravated indecent liberties with a child, claiming this error was structural error. Our Supreme Court, following the United States Supreme Court, "found structural error require[es] automatic reversal in only a few limited cases such as cases involving the complete denial of counsel, a biased trial judge, racial discrimination in grand jury selection, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction." *State v. Daniels*, 278 Kan. 53, 61, 91 P.3d 1147 (citing *Neder v. United States*, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 [1999]), *cert. denied* 543 U.S. 982 (2004). The *Neder* Court found the failure to submit an element of the crime to the jury was not structural error and, instead, was subject to harmless error review. *Neder*, 527 U.S. at 17.

Smith acknowledges this case is similar to *State v. Reyna*, 290 Kan. 666, 234 P.3d 761, *cert. denied* —— U.S. ——, 131 S.Ct. 532, 178 L.Ed.2d 391 (2010). Reyna argued the district court's failure to instruct the jury that it must find Reyna was over the age of 18 at the time of the offenses violated his right to a trial by jury under the Sixth Amendment to the United States Constitution and § 10 of the Kansas Constitution Bill of Rights as

defined in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Nowhere was the jury instructed about Reyna's age, but during the trial Reyna himself testified he was 37 years old. Reyna's age was uncontroverted. The *Reyna* court ruled the district court erred by failing to instruct on an essential element of the offense, the defendant's age, but the harmless error analysis still applied "to the omission of an element from the instructions to the jury when a review of the evidence leads to the conclusion beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error." 290 Kan. at 681, 234 P.3d 761.

***20** In this case, the State presented evidence that Smith's date of birth was July 10, 1959. Just as in *Reyna,* this evidence was uncontroverted. Despite the *Reyna* court's conclusion, Smith argues the omission of the element in the aggravated indecent liberties instruction itself was structural and not subject to the harmless error test because the jury could not have understood that Smith's age was a claim the State had to prove beyond a reasonable doubt in order to sustain a Jessica's Law conviction for aggravated indecent liberties with a child. However, since our Supreme Court found no structural error in *Reyna* when the jury instructions completely failed to ask the jury to decide whether the defendant was over 18 years old at the time of the offense, it follows there was no structural error when the jury instructions at least ask somewhere for the jury to find the defendant was over the age of 18. We reject Smith's argument that omitting an essential element in the jury instructions was structural error.

Because Smith did not object to the district court's instructions, we review the instruction for clear error. See K.S.A.2014 Supp. 22–3414(3). To determine whether it was clearly erroneous to give or fail to give an instruction, we must first decide whether an error occurred, which presents a legal question subject to unlimited review. *State v. Williams*, 295 Kan. 506, 515–16, 286 P.3d 195 (2012). After first determining the district court erred in giving the instruction, we then conduct a reversibility inquiry. The test for clear error requiring reversal is whether we are firmly convinced the jury would have reached a different verdict had the instruction error not occurred. This assessment involves a review of the entire record and a de novo determination. The burden of showing clear error remains with the defendant. 295 Kan. at 516, 286 P.3d 195.

This case is nearly identical to *State v. Brown*, 298 Kan. 1040, 1045, 318 P.3d 1005 (2014), in which the jury found the defendant guilty of rape and aggravated indecent liberties with a child. Like here, the jury instructions setting forth the elements of the crime did not include Brown's age, but the jury answered in the affirmative to special questions on the verdict forms as to whether Brown was 18 years of age or older at the time the offenses were committed. Our Supreme Court held Brown was entitled to have the jury instructed on his age as part of the elements instructions because the defendant's age was an essential element of the off-grid crimes of rape and aggravated indecent liberties with a child. 298 Kan. at 1045, 318 P.3d 1005. Finding *State v. Osburn*, 211 Kan. 248, Syl. ¶ 5, 505 P.2d 742 (1973), remained good law, the *Brown* court held the district court erred in submitting the element of age to the jury in special questions on the verdict forms but concluded the errors were harmless because the trial record included evidence from which the jury was justified in finding, as indicated by its answer to the special question, that Brown was aged 18 or older. 298 Kan. at 1046–49, 318 P.3d 1005.

***21** Under the analysis set out in *Brown,* we find the district court erred by not instructing the jury on Smith's age as part of the element instructions and by submitting the element of age to the jury in a special question on one of the verdict forms. But, these errors were harmless because the jury affirmatively answered the special question about Smith's age and that decision was supported by the undisputed evidence of Smith's date of birth presented at trial.

IS SMITH'S SENTENCE CATEGORICALLY DISPROPORTIONATE UNDER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

Smith argues his hard 25 life sentence imposed under Jessica's Law, K.S.A.2010 Supp. 21–4643(a)(1)(C), for his conviction of aggravated indecent liberties with a child under age 14 is categorically disproportionate and, therefore, cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. According to Smith, "the Eighth Amendment does not

permit a first-time offender to be sentenced to life in prison for an offense involving sexual contact with a minor, without any element of force, coercion, or penetration." Smith specifically raises this as a categorical and not a case-specific proportionality argument. This exact argument was addressed and rejected by our Supreme Court in *State v. Cervantes–Puentes,* 297 Kan. 560, 566, 303 P.3d 258 (2013):

> "[We] reject this claim because Cervantes–Puentes' appellate counsel failed to construct a valid categorical claim. Cervantes–Puentes asks this court to consider the constitutionality of a hard 25 sentence for first-time offenders convicted of committing a sexual offense against a minor when the offense does not involve penetration, force, or coercion. As we have in the past, we decline to consider a purported categorical claim that, in reality, presents a case-specific proportionality challenge to a term-of-years sentence. See *State v. Florentin,* 297 Kan. 594, 605–06, 303 P.3d 263 (2013) (rejecting defendant's attempt to define the range of crimes for his categorical claim as rape by " 'consensual digital penetration of the victim, who is thirteen years or older,' " when crime involves no " 'force, prostitution or pornography, a weapon, or ... bodily injury to the victim' "); *[State v.] Mossman,* 294 Kan. [901,] 928[, 281 P.3d 153 (2012)] (rejecting defendant's attempt to define range of crimes for his categorical claim as 'crimes to those involving sex with a child who is 14 or 15 where the crime is committed without any element of force, coercion, prostitution, or pornography'). Accordingly, we reject Cervantes–Puentes' purported categorical claim."

Based on our Supreme Court's holding in *Cervantes–Puentes,* we conclude that Smith's hard 25 life sentence was not categorically disproportionate under the Eighth Amendment.

DID THE DISTRICT COURT ERR BY CLASSIFYING SMITH'S PRE–1993 IN–STATE AND OUT–OF–STATE CONVICTIONS AS PERSON FELONIES????

***22** Smith filed a motion objecting to his criminal history score in the presentence investigation report, claiming two pre-KSGA convictions should not have been scored as person felonies. The State produced two journal entries from Smith's prior cases. One was a conviction for aggravated battery in the state of Kansas in May 1993; the second contained convictions for jailbreak, felonious assault, forgery, and malicious destruction in the state of Michigan in 1981. Based on these documents, the district court found Smith was previously convicted of two person felonies: aggravated battery in Kansas and felonious assault in Michigan. The district court denied Smith's objection to his criminal history category and declared his criminal history to be category B based on two prior person felonies.

On appeal, Smith argues the district court erred by classifying these two prior convictions as person felonies because they occurred before Kansas adopted the Kansas Sentencing Guidelines Act (KSGA), K.S.A. 21–4701 *et seq.,* effective July 1, 1993. Interpretation of sentencing statutes is a question of law subject to unlimited review. *State v. Murdoch,* 299 Kan. 312, 314, 323 P.3d 846 (2014), *modified* by Supreme Court order September 19, 2014. "If a statute is plain and unambiguous, appellate courts do not speculate about legislative intent or resort to canons of construction or legislative history." 299 Kan. at 314, 323 P.3d 846.

The issue relating to the pre-KSGA out-of-state conviction was recently addressed by our Supreme Court in *Murdoch,* which held that all pre-KSGA out-of-state convictions must be classified as nonperson felonies. 299 Kan. at 319, 323 P.3d 846. Because we are bound by Supreme Court precedent, *State v. Ottinger,* 46 Kan.App.2d 647, 655, 264 P.3d 1027 (2011), *rev. denied* 294 Kan. 946 (2012), we must conclude the district court

erred by scoring Smith's Michigan conviction as a person felony.

However, *Murdoch* did not directly address pre-KSGA *in-state* convictions. Smith makes three arguments that his May 1993 Kansas aggravated battery conviction should be counted as a nonperson felony. First, he argues the language of K.S.A.2014 Supp. 21–6810(d)(6), formerly K.S.A. 21–4710(d)(8), mandates his conviction be considered a nonperson crime. K.S.A.2014 Supp. 21–6810(d)(6) states: "Unless otherwise provided by law, unclassified felonies and misdemeanors shall be considered and scored as nonperson crimes for the purpose of determining criminal history." Our Supreme Court expressly rejected this interpretation of the statute in *Murdoch*, 299 Kan. at 318, 323 P.3d 846:

> "[I]t is likely K.S.A. 21–4710(d)(8) was adopted to address the scoring of a very limited number of current criminal statutes that do not categorize the crimes as person or nonperson offenses. See, *e.g.*, K.S.A. 21–4213 (unlawful failure to report a wound is a 'class C misdemeanor'); K.S.A. 21–4218 (unauthorized possession of a firearm on the grounds of or within certain state buildings is a 'class A misdemeanor'); K.S.A. 21–4312 (unlawful disposition of animals is a 'class C misdemeanor'); K.S.A. 21–4409 (knowingly employing an alien is a 'class C misdemeanor'). And we believe it unlikely the legislature intended that K.S.A. 21–4710(d)(8) govern all pre–1993 convictions."

***23** Second, Smith points out that the statute provides how to classify and score out-of-state offenses but does not include how to classify pre-KSGA in-state convictions not designated as person or nonperson. He argues under the doctrine of *unius est exlusion alterius, i.e.,* the inclusion of one thing implies the exclusion of another, that the legislature did not intend for pre-KSGA offenses to be designated, treated, and scored according to the person/nonperson designations. Smith's description of the out-of-state conviction sentencing statute is incorrect. While the statutes specify that a crime shall be comparable to a Kansas offense, they fail to state whether an out-of-state crime should be compared to a Kansas offense as of the date of the prior crime; July 1, 1993; the date of the present crime; or some other date. See K.S.A.2014 Supp. 21–6810 and K.S.A.2014 Supp. 21–6811. Since the statutes do not address this issue, it cannot logically follow that the legislature did not intend for pre-KSGA in-state offenses never to be designated person or nonperson.

Third, Smith argues that because the statute governing his May 1993 aggravated battery conviction did not designate it as a person or nonperson crime, it cannot be counted as a person felony in this case. Smith mentions *State v. Williams*, 291 Kan. 554, 244 P.3d 667, Syl ¶ 4, 244 P.3d 1667 (2010), in support of this position. The *Williams* court addressed out-of-state offenses committed after the KSGA was adopted in 1993, holding that the comparable Kansas offenses should be determined as of the date the out-of-state offenses were committed. 291 Kan. at 562, 244 P.3d 667. *Williams* was integral in the *Murdoch* analysis. Unfortunately, neither party provided a notification of additional authority or made additional arguments based on *Murdoch.*

Another panel of this court recently confronted the conundrum created by *Murdoch* over how to classify pre-KSGA in-state convictions in *State v. Waggoner*, 51 Kan.App.2d ——, Syl. ¶ 1, —— P.3d —— (No. 111,548, 343 P.3d 530, 2015 Westlaw 402760, filed January 30, 2015). Most significantly, the panel held that K.S.A. 21–4711(e) does not apply to in-state convictions by its very terms, meaning that the analysis used in *Murdoch* also does not apply to in-state convictions. *Waggoner*, 343 P.3d 530, 2015 Westlaw 402760, at *8–10. Because there is no provision in the KSGA on how to classify pre-KSGA in-state convictions, the panel reasoned it was required to "look to the overall design and purposes of the KSGA." 343 P.3d 530, 2015 Westlaw 402760, at *8. The court stated:

> "Under the sentencing guidelines, designation of a crime as person or nonperson depends on the nature of the offense. Crimes which inflict, or could inflict, physical or emotional harm to another generally are designated as person crimes. Crimes which inflict, or could inflict, damage to property generally are designated as nonperson crimes." 343 P.3d 530, 2015 Westlaw 402760, at *8.

The *Waggoner* court further held the defendant's argument that his prior juvenile adjudication for attempted aggravated battery should be classified as nonperson was contrary to the overall design and purpose of the KSGA. In particular, the panel noted that right after the KSGA was enacted, all prior convictions would have been pre-KSGA convictions, and it was inconceivable the legislature would have intended all in-state pre-KSGA convictions to be scored as nonperson offenses for criminal history purposes. 343 P.3d 530, 2015 Westlaw 402760, at *9.

***24** The court then examined the elements of aggravated battery as they existed before the enactment of the KSGA, stating that since no crime prior to the enactment of the KSGA was classified as person or nonperson, an examination of the "nature of the offense" rather than its classification was required. Pre–KSGA, "aggravated battery was defined as 'the unlawful touching or application of force to the person of another with intent to injure that person or another....' " 343 P.3d 530, 2015 Westlaw 402760, at *9 (quoting K.S.A. 21–3414 [Ensley 1988]). The court concluded the defendant's pre-KSGA in-state juvenile adjudication for attempted aggravated battery was properly classified as a person felony for criminal history purposes under the KSGA because "[a]ttempted aggravated battery is, and always has been, a crime which inflicts, or could inflict, physical or emotion harm to another person ...", the crime as it existed at the time the defendant committed it contained the same elements, and an attempt to commit a crime is treated as a person or nonperson crime in accordance with the designation of its underlying crime. 343 P.3d 530, 2015 Westlaw 402760, at *9–10.

The same analysis applies here. Smith's pre-KSGA in-state conviction in May 1993 for aggravated battery was properly classified as a person felony for criminal history purposes as the nature of the offense at the time Smith committed it was one which would inflict physical or emotional harm to another person.

DID THE DISTRICT COURT VIOLATE SMITH'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS WHEN IT USED HIS CRIMINAL HISTORY TO INCREASE HIS SENTENCE?

Finally, Smith argues that the use of his criminal history to calculate his sentence was unconstitutional because his past convictions were not proved in this case to a jury. See *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Our Supreme Court has rejected this argument, and we reject it as well. See *State v. Baker*, 297 Kan. 482, 485, 301 P.3d 706 (2013); *State v. Ivory*, 273 Kan. 44, 46–48, 41 P.3d 781 (2002).

The judgment of the district court is affirmed in part, vacated in part, and remanded for resentencing.

* * *

ATCHESON, J., concurring in part and dissenting in part.

I join in the result in this case in every respect except the determination of Defendant David Lawrence Smith's criminal history. On that point, I agree that *State v. Murdock*, 299 Kan. 312, 319, 323 P.3d 846 (2014), *modified* by Supreme Court order September 19, 2014, requires that Smith's conviction in Michigan for felonious assault before the Kansas Sentencing Guidelines went into effect must be scored as a nonperson felony for criminal history purposes. But I cannot agree that his Kansas conviction for aggravated battery predating the guidelines should be scored as a person felony. That result is incompatible with the reasoning of *Murdock* and, in light of *Murdock* 's treatment of out-of-state convictions, reads into the sentencing statutes an equal protection violation. I, therefore, respectfully dissent from that much of the majority opinion and would find that Smith's aggravated battery conviction should be treated as a nonperson felony for criminal history purposes.

***25** I first discuss why *Murdoch* requires Smith's aggravated battery conviction be scored as a nonperson felony, and I then outline the equal protection problem in not doing so.

As I understand *Murdock,* the majority essentially reasons this way:

1. Under K.S.A. 21–4711(e), now K.S.A.2014 Supp. 21–6811(e), a court must classify an out-of-state conviction as a person or nonperson felony based on the comparable Kansas offense as shown by the statutory elements of the two crimes.

2. The court has to look at the Kansas crimes as they were statutorily defined at the time the defendant committed the out-of-state crime to determine the comparable offense, as required by *State v. Williams*, 291 Kan. 554, Syl. ¶ 4, 244 P.3d 667 (2010).

3. For an out-of-state conviction before the sentencing guidelines went into effect July 1, 1993, the court has to find the comparable preguidelines Kansas offense.

4. Kansas felonies were not classified as person or nonperson felonies before the 1993 guidelines, so the comparable out-of-state felony must be considered "unclassified" and, thus, a nonperson felony consistent with K.S.A. 21–4710(d)(8), now K.S.A.2014 Supp. 21–6810(d)(6).

As a result, the *Murdoch* majority concluded that all out-of-state convictions predating the sentencing guidelines must be classified as nonperson felonies for criminal history purposes. 299 Kan. at 319, 323 P.3d 846. The three dissenting justices submitted the majority's position amounted to an unreasonable reading of the sentencing statutes precisely because Kansas crimes were not labeled as person felonies or nonperson felonies before the guidelines were enacted. 299 Kan. at 321–23, 323 P.3d 846 (Rosen, J. dissenting, joined by Luckert and Moritz, JJ.). And the dissenters recognized the majority's construction of the relevant statutes necessarily requires all in-state felony convictions predating the sentencing guidelines be considered nonperson offenses for criminal history purposes. 299 Kan. at 319, 323 P.3d 846. Although the *Murdock* dissenters may have the better of the statutory construction argument, the sentencing statutes must be applied in keeping with the majority's holding and rationale—a position that has commanded four votes and is, therefore, the law.

An essential link in the *Murdock* rationale is determining whether the comparable in-state crime predating the sentencing guidelines should be treated as a person felony or a nonperson felony. The determination as to the comparable in-state offense then dictates the classification of the defendant's out-of-state conviction, the ultimate issue in *Murdock*. Here, we need progress in the *Murdock* analysis only so far as classifying Smith's preguidelines in-state conviction for aggravated battery, since that conviction need not then be likened to an out-of-state conviction to assess Smith's criminal history. There is, of course, no logical or legally principled reason why the in-state conviction would be treated differently simply because the last step—the comparison between the in-state conviction and an out-of-state conviction—is unnecessary. For that reason, I part ways with my colleagues and with the panel decision in *State v. Waggoner*, 51 Kan.App.2d ——, ——P.3d —— (No. 111,548, 343 P.3d 530, 2015 WL 402760, at *10, filed January 30, 2015).

***26** Basically, my colleagues and the *Waggoner* panel recycle, with some elaboration, the arguments of the dissenters in *Murdoch*, pronounce those arguments "consistent with the overall design and purpose" of the sentencing statutes, and apply them to classify in-state convictions predating the sentencing guidelines as person felonies in fixing the defendants' criminal histories. However intellectually satisfying the result might be in the abstract, it does not conform to the law established in *Murdoch*.

More importantly, perhaps, treating in-state convictions predating the sentencing guidelines as person felonies when comparable out-of-state convictions must be treated as nonperson felonies, consistent with *Murdock*, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. In this case, my colleagues gloss over the constitutional problem their interpretation of the sentencing statutes creates. The panel in *Waggoner* is similarly silent.

To illustrate the constitutional defect, take the hypothetical cases of stickup artists John Doe and Richard Roe. Each has just been convicted of aggravated robbery, a felony violation of K.S.A.2014 Supp. 21–5420, in Shawnee County District Court. Doe has convictions for aggravated robbery in 1982 and 1992 in Jackson County, Missouri, just over the state line. Under *Murdock*, those convictions must be treated as nonperson felonies for criminal history purposes. Roe favored liquor stores in Johnson County, Kansas, as targets and racked up aggravated robbery convictions there also in 1982 and 1992. Under *Waggoner* and the majority's approach in this case, those convictions should be scored as person felonies for purposes of Roe's current conviction. With two person felonies in his criminal history, Roe faces a presumptive guidelines sentence of 206 to 228 months in prison on his present offense.

Conversely, Doe, with two nonperson felonies, faces a presumptive sentence of 74 to 83 months. That's roughly the difference between a presumptive 18–year sentence for Roe and a presumptive 6 1/2–year sentence for Doe. As the example shows, defendants' criminal histories have a direct relationship to presumptive sentences for present crimes and person felonies significantly escalate those histories. See *Murdock*, 299 Kan. at 314, 323 P.3d 846.

The Equal Protection Clause prohibits state governments from creating classifications among persons resulting in different treatment without some degree of justification. See *Western & Southern L.I. Co. v. Bd. of Equalization*, 451 U.S. 648, 660, 101 S.Ct. 2070, 68 L.Ed.2d 514 (1981) ("[T]he Fourteenth Amendment ... introduced the constitutional requirement of equal protection, prohibiting the States from acting arbitrarily or treating similarly situated persons differently ...."); see also *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike."); accord *State v. Cheeks*, 298 Kan. 1, 5, 310 P.3d 346 (2013). The intensity of judicial review or scrutiny of governmental action creating classifications implicating equal protection rights depends upon the nature of the government's line drawing. If the government classification burdens a fundamental right or divides based upon suspect class characteristics, such as race or religion, the courts must apply strict scrutiny and will uphold the classification only if it furthers compelling government interests and is narrowly tailored to advance those interests. *Plyler v. Doe*, 457 U.S. 202, 216–17, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982); *Zablocki v. Redhail*, 434 U.S. 374, 388, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978); *Bostic v. Schaefer*, 760 F.3d 352, 375 & n. 6 (4th Cir.2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1218 (10th Cir.2014). When a classification impinges on neither a fundamental right nor a suspect class, the courts commonly apply rational basis review in deciding an equal protection challenge. *Vacco v. Quill*, 521 U.S. 793, 799, 117 S.Ct. 2293, 138 L.Ed.2d 834 (1997); *Kwong v. Bloomberg*, 723 F.3d 160, 172 (2d Cir.2013). A government classification survives rational basis review if " 'a plausible policy reason' " supports the scheme and it is not so removed from that reason as to result in an " 'arbitrary or irrational' " distinction. *Fitzgerald v. Racing Assn. of Central Iowa*, 539 U.S. 103, 107, 123 S.Ct. 2156, 156 L.Ed.2d 97 (2003) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 11–12, 112 S.Ct. 2326, 120 L.Ed.2d 1 [1992]); see *Heller v. Doe*, 509 U.S. 312, 319–20, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993); *Cheeks*, 298 Kan. at 9, 310 P.3d 346. The classification may be upheld for any justifiable purpose; the purpose need not be the one that prompted its adoption. See *McDonald v. Board of Election*, 394 U.S. 802, 809, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969); *Estate of Kunze v. C.I.R.*, 233 F.3d 948, 954 (7th Cir.2000).[*]

***27** [*]The courts have applied "intermediate scrutiny"—more demanding than rational basis review and less so than strict scrutiny—to equal protection challenges based on a few recognized class characteristics, including gender and legitimacy. See *Hayden ex rel. A.H. v. Greensburg Community School*, 743 F.3d 569, 577 (7th Cir.2014) (gender); *Pierre v. Holder*, 738 F.3d 39, 50 (2d Cir.2013) (gender and legitimacy). Intermediate scrutiny would not be applicable here.

The courts typically apply rational basis review to sentencing statutes challenged on equal protection grounds. See *Chapman v. United States*, 500 U.S. 453, 465, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991); *United States v. Titley*, 770 F.3d 1357, 1359 n. 3 (10th Cir.2014). As the *Chapman* Court explained, upon a criminal conviction, a person may be punished as required by statute and consistent with constitutionally mandated equal protection "so long as the penalty is not based on an arbitrary distinction." 500 U.S. at 465. A statute is presumed constitutional for purposes of rational basis review, and the party seeking relief bears the burden of proving an equal protection violation. *Heller*, 509 U.S. at 320; *Titley*, 770 F.3d at 1359.

I assume rational basis review applies here. If the sentencing scheme, as construed in *Murdoch* on the one hand and in *Waggoner* and here on the other, violates the Equal Protection Clause under that standard, any analysis using the far more rigorous strict scrutiny test would be superfluous. I turn to that task.

A cornerstone of the sentencing guidelines was and remains " ' "standardiz [ing] sentences so that similarly situated offenders would be treated the same [.]" ' " *State v. Huerta*, 291 Kan. 831, 836, 247 P.3d 1043 (2011). The discordant treatment of preguideline convictions for comparable in-state and out-of-state convictions imposed by *Murdoch* and *Waggoner* (and repeated here) conflicts with and seriously undermines that critical

policy objective. Otherwise similarly situated defendants are treated quite differently for presumptive punishment based merely on where they may have committed felonies before the guidelines went into effect.

I suppose the disparity could survive rational basis review if it advanced some other legitimate purpose. But I can see no rational reason, let alone a good one, the armed robbers Roe and Doe should face significantly different presumptive sentences based on their criminal histories. Nor do I see some sensible explanation as to why Smith's criminal history should be higher because he committed an aggravated battery in Kansas years ago rather than in some other state. Drawing a substantive distinction between instate and out-of-state convictions for crimes otherwise deemed to be comparable in establishing defendants' criminal histories looks to be wholly arbitrary and without any conceivable rationality.

Accordingly, scoring comparable preguideline offenses differently for criminal history purposes based solely on where they occurred—the necessary result of applying the sentencing statutes as construed in *Murdoch* and *Waggoner*—violates the Equal Protection Clause. In short, convictions for comparable in-state and out-of-state crimes must be treated the same, as either person felonies or nonperson felonies, for criminal history purposes.

***28** The constitutional defect now infecting the sentencing statutes incubated in an odd way. Usually, statutes violate the Equal Protection Clause because of how the legislature drafted them. That's not true here. The violation has been injected into the sentencing statutes through the combined effect of appellate judicial decisions construing the language rather than some inherent constitutional defect in that language. Because *Murdoch,* as controlling precedent, holds that all out-of-state felony convictions predating the 1993 sentencing guidelines have to be treated as nonperson felonies in scoring criminal histories, the same treatment must be extended to in-state felony convictions rendered before the guidelines to satisfy equal protection requirements. Rather than doing so, my colleagues and the *Waggoner* panel have chosen to treat in-state convictions differently, thereby creating an equal protection violation. In essence, to avoid expanding what they see as an ill-conceived holding in *Murdoch,* they have precipitated a constitutional deficiency.

On a basic level, their choice runs counter to settled rules of statutory construction. The prime directive among the canons recognizes that statutory language should be construed, if possible, to effect the legislative intent animating an enactment. *State v. Kendall,* 300 Kan. 515, 520–21, 331 P.3d 763 (2014). As I have noted, a primary policy objective of the guidelines was to eliminate marked sentencing disparities among similar defendants. By breaking with *Murdoch* and treating comparable past offenses quite differently for criminal history purposes, my colleagues and the *Waggoner* panel upend that policy. Moreover, nothing in the statutory language suggests, let alone requires, that comparable offenses should be scored differently in assessing criminal histories. So the outcome here cannot be reconciled with that canon. Another canon requires that a statutory ambiguity be resolved in a way that renders the measure constitutional rather than unconstitutional. *Clark v. Martinez,* 543 U.S. 371, 380–81, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005) (As between "plausible statutory constructions," a court should reject one that "would raise a multitude of constitutional problems."); *St. Louis S.W. Ry. v. Arkansas,* 235 U.S. 350, 369–70, 35 S.Ct. 99, 59 L.Ed. 265 (1914); *Planned Parenthood of Central New Jersey v. Farmer,* 220 F.3d 127, 135–36 (3d Cir.2000). A court, for example, may apply a narrow construction to an otherwise potentially vague statute to supply sufficient specificity to avert a constitutional deficiency. *Boos v. Barry,* 485 U.S. 312, 330–31, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988); *United States v. Sutcliffe,* 505 F.3d 944, 953 (9th Cir.2007). I don't know that the sentencing guidelines are ambiguous on this point. But a logical corollary to the canon would preclude an intermediate appellate court from construing a statute in a way that both evades a controlling ruling from a superior court and creates a constitutional defect to do so.

***29** For those reasons, I respectfully dissent from the treatment of Smith's conviction for aggravated battery as a person felony in scoring his criminal history. In keeping with *Murdoch* and equal protection requirements, it must be scored as a nonperson felony.

All Citations

344 P.3d 396 (Table), 2015 WL 1122951

End of Document

140 P.3d 452 (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.

Kevin RISBY, Appellant,
v.
STATE of Kansas, Appellee.

No. 95,399.
|
Aug. 18, 2006.
|
Review Denied Dec. 19, 2006.

Appeal from Geary District Court, Steven L. Hornbaker, judge. Opinion filed August 18, 2006. Affirmed.

Attorneys and Law Firms

Ezra J. Ginzburg, of Topeka, for appellant.

Steven L. Opat, county attorney, and Phill Kline, attorney general, for appellee.

Before MALONE, P.J., HILL, J., and BRAZIL, S.J.

MEMORANDUM OPINION

PER CURIAM.

***1** Kevin Risby appeals the summary denial of his K.S.A. 60–1507 motion alleging ineffective assistance of counsel. We affirm.

The parties are familiar with the facts of the underlying criminal case. Risby pled no contest to attempted first-degree murder, aggravated robbery, aggravated kidnapping, and arson following a car jacking/kidnapping incident on April 11, 2002. He received a sentence of 524 months' imprisonment.

On March 30, 2004, Risby filed a K.S.A. 60–1507 motion, alleging his plea was the result of ineffective assistance of trial counsel. Risby's motion made several generalized arguments, claiming his trial counsel was ineffective for failing to communicate with him, failing to adequately investigate, and failing to procure witnesses. The district court conducted an evidentiary hearing in which Risby; his trial counsel, Allen Angst; and Chris Biggs, the former Geary County Attorney, testified. After hearing the evidence, the district court issued a memorandum decision denying Risby's motion, finding Risby had failed to meet his burden of proof that his plea was the result of ineffective assistance of counsel. Risby timely appeals.

On appeal, Risby again raises several arguments that his plea was the result of ineffective assistance of counsel. He also claims the district court's memorandum decision failed to comply with Supreme Court Rule 183(j) (2005 Kan. Ct. R. Annot. 228).

When an evidentiary hearing has been conducted in the district court, the standard of review for an appeal from a denial of a K.S.A. 60–1507 motion is for the appellate court to determine whether the factual findings of the district court are supported by substantial competent evidence and whether those findings are sufficient to support its conclusions of law. *Lumley v. State,* 29 Kan.App.2d 911, 913, 34 P.3d 467 (2001), *rev. denied* 273 Kan. 1036 (2002).

To support a claim of ineffective assistance of counsel, it is incumbent upon the claimant to prove that (1) counsel's performance was sufficiently deficient to render that performance below that guaranteed by the Sixth Amendment, and (2) counsel's deficient performance was sufficiently serious to prejudice the defense and deprive the defendant of a fair trial. *Strickland v. Washington,* 466 U.S. 668, 687, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984); *State v. Rice,* 261 Kan. 567, 599, 932 P.2d 981 (1997).

A court applies the two-prong test detailed in *Strickland* to determine whether a guilty plea should be set aside because of ineffective assistance of counsel. In order to succeed in such a motion a movant must establish: (1) counsel's performance fell below the standard of reasonableness, and (2) a reasonable probability exists that, but for counsel's errors, defendant would not have pleaded guilty and would have insisted on going to trial. *State v. Muriithi,* 273 Kan. 952, 956, 46 P.3d 1145 (2002) (citing *Hill v. Lockhart,* 474 U.S. 52, 58–59, 88 L.Ed.2d 203, 106 S.Ct. 366 [1985]).

***2** "In the context of guilty pleas, the first half of the *Strickland v. Washington* test is nothing more than a restatement of the standard of attorney competence.... The second, or 'prejudice,' requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

"In many guilty plea cases, the 'prejudice' inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error 'prejudiced' the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial. [Citation omitted.] As we explained in *Strickland v. Washington,* these predictions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the 'idiosyncrasies of the particular decisionmaker.' [Citation omitted.]" *Hill,* 474 U.S. at 58–60.

Risby first claims the district court's decision denying his K.S.A. 60–1507 motion was flawed because it failed to make reference to the *Hill* decision. Risby acknowledges the district court utilized the two-prong test described in *Strickland,* but claims such an analysis is not enough. He claims the district court should have also applied the test described in *Hill.*

This argument is meritless. A review of the district court's decision clearly shows it utilized the appropriate analysis. The *Hill* test is merely a clarification of the analysis described in *Strickland.* The "prejudice" prong of the *Strickland* test is established by showing that, but for counsel's errors, the defendant would not have pled guilty to the crime and would have insisted on going to trial. Here, the district court employed this analysis in judging Risby's claim of ineffective assistance of counsel.

Next, Risby claims his counsel, Angst, was ineffective for failing to obtain an expert witness to argue Risby's affirmative defense of diminished capacity. This argument fails for two reasons. First and foremost, Risby failed to make this argument before the district court. Risby's K.S.A. 60–1507 motion made a general claim that Angst was ineffective because he failed to obtain testimony from expert witnesses. During the evidentiary hearing, Risby questioned Angst about whether he ever obtained an expert witness "with regard to blood or other physical types of evidence." However, Risby never specifically suggested that Angst should have obtained an expert for the purpose of pursuing a diminished capacity defense. Issues not raised before the district court cannot be raised on appeal. *Board of Lincoln County Comm'rs v. Nielander,* 275 Kan. 257, 268, 62 P.3d 247 (2003)

***3** Moreover, there is no evidence in the record indicating Risby suffered from a mental illness or any other condition warranting a diminished capacity defense. Mere conclusory allegations for which no evidentiary basis is stated or appears in the record are insufficient for relief under K.S.A. 60–1507. *Sanders v. State,* 26 Kan.App.2d 826, 827, 995 P.2d 397 (1999), *rev. denied* 269 Kan. 934 (2000).

Next, Risby argues his plea was involuntary because Angst promised him he would receive a sentence of 22.9 years. Instead, Risby was sentenced to 524 months. Risby testified during the evidentiary hearing that Angst wrote 22.9 down on a piece of paper during the sentencing hearing. He further testified that even though he indicated he understood the consequences of his plea, he only responded in that manner because Angst told him if he raised the issue the deal would be off.

Angst denied making any promises about the length of Risby's sentence. Risby testified that Angst prepared notes to use during the sentencing hearing, and Angst had written 22.9 years in these notes. However, Angst testified he never made any promise to Risby that he would be

sentenced to 22.9 years. Angst also testified he went over the sentence possibilities with Risby.

The district court responded that after hearing testimony and comparing Angst's notes with the transcript of the sentencing hearing,

> "it is clear that Angst used the notes as his points of argument during sentencing and then wrote the actual sentence imposed by the court on the bottom of the exhibit. The court weighs the credibility of the witnesses and finds Angst's explanation to be credible and Risby's to be not credible."

A review of the record reveals there was substantial competent evidence to support the district court's findings, and those findings supported the district court's conclusions on this matter. The district court heard testimony from Risby and Angst and concluded Angst was more credible than Risby. This court does not reweigh the credibility of witnesses. *State v. Bell,* 276 Kan. 785, 797, 80 P.3d 367 (2003).

Next, Risby argues Angst was ineffective for failing to request a change of venue. Angst testified he had explained to Risby prior to the plea that he thought requesting a change of venue was not in Risby's best interest. Angst had explained to Risby that, among other reasons, Junction City would be a good venue for a jury trial because of its relatively high minority population.

The district court concluded the decision not to request a change of venue was a tactical issue, which could not support a claim of ineffective assistance of counsel. Furthermore, the district court found that Risby was not prejudiced by Angst's decision not to request a change of venue. Again, the district court's conclusion was based upon substantial competent evidence.

Next, Risby claims Angst was ineffective because he failed to communicate with him or keep him informed about the case. Risby also claims Angst failed to adequately prepare a defense. Risby testified that Angst met with him only three times for less than 30 minutes and that Angst did not conduct an independent investigation of the crime.

***4** Contrary to Risby's testimony, Angst testified he met with Risby on a number of occasions and kept him informed about the case. Angst admitted he did not visit the crime scene or hire experts to conduct an independent investigation of the crime. He testified he concentrated on plea negotiation efforts because Risby did not have a good defense to the charges. Risby's codefendants had been convicted at trial on all counts. According to Angst, Risby did not have an alibi; there was nothing indicating his confession was coerced; and there was nothing that met the statutory requirement concerning the introduction of mental disease or defect.

The district court found Risby's version of events not credible, commenting that Risby's contention that Angst met with him only three times was "unbelievable to say the least." The district court concluded Risby "failed to show that counsel neglected his duty to confer with petitioner or to prepare a defense." Again, the district court's conclusion was supported by substantial competent evidence.

Finally, Risby claims the district court failed to comply with Rule 183(j), which requires a district court to "make findings of fact and conclusions of law on all issues presented" in addressing a K.S.A. 60–1507 motion. See *State v. Moncla,* 269 Kan. 61, 65, 4 P.3d 618 (2000) (finding the district court's ruling did not comply with Rule 183[j]); *Stewart v. State,* 30 Kan.App.2d 380, 382, 42 P.3d 205 (2002) (holding boilerplate journal entries do not comply with Rule 183[j]; case remanded for compliance). However, it is clear that the district court complied with Rule 183(j). The district court filed a comprehensive 9–page memorandum decision which included findings of fact and conclusions of law on all issues presented. Risby's claim that the district court failed to comply with Rule 183(j) is without merit.

Affirmed.

All Citations

140 P.3d 452 (Table), 2006 WL 2443939

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

322 P.3d 1027 (Table), 2014 WL 1707435

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