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No. 16-116483-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

FRANK ROBINSON
Petitioner-Appellee

v.

STATE OF KANSAS
Respondent-Appellant

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
HONORABLE EVELYN Z. WILSON, JUDGE
DISTRICT COURT CASE NO. 14-CV-795

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NATURE OF THE CASE

In case 09-CR-537, Frank Robinson was convicted by a jury of reckless second degree murder and aggravated arson. The district court sentenced Robinson to 438 months in prison. Robinson's conviction and sentence were affirmed on direct appeal. Robinson filed a Petition under K.S.A. 60-1507, claiming numerous issues of ineffective assistance of counsel. After conducting a preliminary hearing and an evidentiary hearing, the district court granted Robinson's Petition. Judge Evelyn Wilson vacated Robinson's convictions and found that the matter must be set for a new trial. The State now appeals the district court's order granting Robinson relief under K.S.A. 60-1507.

STATEMENT OF THE ISSUE

I. The district court erred in finding that Robinson's counsel was deficient and that the deficiency was prejudicial to his case.

STATEMENT OF THE FACTS

In case 09-CR-537 Robinson was charged with felony murder and aggravated arson. (R. II, 42-48.) Robinson was convicted by a jury of reckless second degree murder and aggravated arson. (R. II, 138-39.) The district court sentenced Robinson to 483 months in prison. (R. III, 46-57.)

The facts of the case are summarized in the Court of Appeals opinion in Robinson's direct appeal as follows:

> The State charged Robinson with felony murder and aggravated arson on the theory he set a fire in an apartment building in Topeka in which a tenant living on the second floor died. The building contained four apartments, two of which were occupied – one upstairs and one downstairs. In August 2006, when the fire and the death occurred, the tenants in both apartments sold crack, and the place was known to law enforcement officers as a drug house. Shortly before the fatal fire, the girlfriend of the downstairs tenant smelled smoke. The tenant and his girlfriend found a small fire in the basement and extinguished it. The tenant then saw Robinson and told him to get inside because firefighters

would be there soon. Robinson asked the tenant to give him a small amount of crack. But the tenant demurred and suggested that Robinson try upstairs. Robinson replied, "Fuck Marvina [the upstairs tenant] and everybody up there." Robinson then left the apartment.

A few minutes later, the downstairs tenant's girlfriend said she again smelled smoke. This time the house was engulfed in flames. As the pair fled the apartment, they saw Robinson walking away. The upstairs tenant, who was older and blind, could not escape and died in the fire.

The responding firefighters found an especially intense fire in the hallway and on the stairs to the second floor of the building. A fire investigator testified at Robinson's trial that the fire appeared to have been intentionally set on the stairs using an open flame, such as a lighter, and a flammable liquid.

Robinson turned himself into the Topeka police the same day as the fire. In an initial interview with one detective, Robinson denied any responsibility for the fire. But Robinson later told another detective that he had been at the house and had asked the downstairs tenant for some crack. He said he felt as if the tenant had disrespected him by not offering him some. According to the detective, Robinson agreed that he could have been smoking crack in the hall of the apartment and throwing lighted matches on the floor. Robinson characterized the fire as an accident and, if he caused it, he hadn't intended to hurt anyone. In the interview, Robinson also qualified his inculpatory statements by adding: "I can't say whether I did it [caused the fire] or didn't, but I know I was smoking right there."

The jury acquitted Robinson of felony murder but found him guilty of the lesser included offense of reckless second-degree murder and aggravated arson. The district court sentence Robinson to a presumptive prison term of 438 months and postrelease supervision of 36 months. (R. I, 214-15.)

Robinson filed a direct appeal in appellate case number 10-105281-A. In his direct appeal, Robinson argued that the evidence failed to establish the required mental state for the murder charge, that the district court impermissibly limited his attorney's examination of potential jurors, and that he was assessed fees for his appointed lawyer without a sufficient hearing. A panel of this court found no error and affirmed Robinson's convictions and sentence. See *State v. Robinson*, No. 105,281, 2012 WL

4794455 (Kan. App. 2012) (unpublished opinion). Our Supreme Court denied Robinson's petition for review. The mandate was issued on September 5, 2013.

Robinson filed his K.S.A. 60-1507 Petition on August 4, 2014. (R. I, 9-171.) Robinson raised six claims. (R. I, 38-39.) A preliminary hearing was held on July 15, 2015, and Robinson raised four additional claims. (R. XXIII.) The ten claims were presented as follows:

> 1. Petitioner's right to effective assistance of counsel was violated because trial counsel failed to move to suppress Mr. Robinson's statement as a product of an arrest that lacked probable cause.
>
> 2. Petitioner's right to the effective assistance of counsel was violated because trial counsel failed to present expert testimony to refute the claim made by the State's fire investigators.
>
> 3. Petitioner's right to the effective assistance of counsel was violated because trial counsel failed to impeach the testimony of Detectives Wheeles and Hill, and Fire Marshal Wally Roberts.
>
> 4. Petitioner's right to the effective assistance of counsel was violated because trial counsel failed to present alibi witnesses.
>
> 5. Petitioner's right to the effective assistance of counsel was violated because trial counsel failed to present exculpatory evidence that contradicted Ernest Brown's testimony that Petitioner was seen fleeing the fire.
>
> 6. Petitioner's right to testify was violated because trial counsel rested the case without letting the Plaintiff take the stand.
>
> 7. Petitioner's right to effective assistance of counsel was violated when trial counsel failed to preserve the denial of funds for an expert for appellate review.
>
> 8. Petitioner's right to effective assistance of counsel was violated when trial counsel stipulated that the fire was set without the authorization of the building owner.
>
> 9. Petitioner's right to effective assistance of counsel was violated when trial counsel failed to move for dismissal based on malicious prosecution grounds.

10. Petitioner's right to effective assistance of counsel was violated based on cumulative errors of trial counsel. (R. I, 246.)

Judge Wilson concluded that issues one through six and eight through ten warranted an evidentiary hearing. (R. I, 248.) Issue seven was summarily denied. (R. I, 248-49.) An evidentiary hearing was held on November 16, 2015. (R. XXIV.) Six witnesses testified. The pertinent testimony related to the contested issues in this appeal is as follows:

Trial Counsel

Background.

Mr. Joseph Huerter was Robinson's lead counsel. Mr. Huerter started his law practice in 1984, and has continuously been in practice in Topeka since that time. (R. XXIV, 6.) Most of his work is split between criminal defense and family law. (R. XXIV, 6.) Mr. Huerter's firm has contracted with the Board of Indigent Services (BIDS) for over a decade to provide defense services. (R. XXIV, 6-7.) He estimated that by 2009 he had participated in approximately a dozen homicide cases, almost all of them being first degree murder cases. (R. XXIV, 7.) When Huerter was asked generally "what is it that's required of you in putting forth a competent homicide defense?" He answered,

> Well, a variety of things. You need to know the facts of the case, you need to know the law that applies to those facts. And you just determine what needs to be investigated and follow it. You need to figure out when and how you can develop a theory of your case and a fit theory of your defense. You need to communicate with the client at least to the extent that the client's able or willing to communicate with you. They're not always all that willing at times. And sometimes they're not terribly helpful when they are willing. Other times it works quite well. (R. XXIV, 8.)

Mr. Huerter's firm was appointed Robinson's case in 2009. (R. XXIV, 9.) Mr. Huerter met with Mr. Robinson, and talked to him "a number of times." (R. XXIV, 9.) Mr. Huerter could not remember exactly what the fee that the firm received for the case

was, and that his firm did not "pay attention to what the money [was] on the case." (R. XXIV, 10, 85-86.) If a case needed an expert or investigator, they would request those services, but it was their preference to try to do most of the investigation work in-house. (R. XXIV, 10-11.) Mr. Huerter chose to do his investigation in-house because he "liked to talk to people [himself]." (R. XXIV, 11.)

Mr. Huerter had multiple people from his office, two attorneys, and one attorney with a temporary license working on this case at the same time. (R. XXIV, 86.) Mr. Jason Belveal, and a soon-to-be associate, Mr. David McDonald, assisted Mr. Hueter with the case.

Mr. Belveal was one of the three attorneys that worked on Robinson's defense in 2009. (R. XXIV, 246, 257.) At the time of Robinson's case, Mr. Belveal had been involved in six prior homicide cases. (R. XXIV, 257.) Their firm devoted a significant amount of manpower and resources to working on Robinson's defense. (R. XXIV, 246.)

Additional preparation by the defense team:

Mr. Huerter read the police reports, pleadings, and transcripts that were part of the case file. (R. XXIV, 19, 30, 40, 97-98.) There was a lot of investigative work done because the case had previously been litigated in federal court and dismissed by the Government. (R. XXIV, 19, 88.) Mr. Huerter was provided access to the file from the federal public defender's office. (R. XXIV, 19, 43, 88, 96-97.) He reviewed the file with Mr. Belveal. (R. XXIV, 19-20, 43, 45, 89.) Mr. Huerter noted that they went through the files, "marked a lot of things, [and] were provided copies of everything we asked for." (R. XXIV, 20.)

Expert Witness:

Mr. Huerter testified that he called several experts to see who might be available. (R. XXIV, 12.) He testified:

> We contacted a – basically, it was an arson investigation-type expert, cause and origin person. And it was determined based on the initial feedback we got from him, that it would not be beneficial to the defense to have him testify but rather to end up using him as a consulting expert to help develop the questions we might ask of the State's expert. (R. XXIV, 12, 93-94.)

Mr. Gene Gietzen was the expert that was ultimately retained for consulting. Mr. Huerter could not specifically remember how they came up with Mr. Gietzen's name as an expert to contact. (R. XXIV, 16.) Mr. Huerter explained that they would typically ask BIDS for experts they have worked with before and were approved by their agency. (R. XXIV, 16.) Most likely, they got Mr. Gietzen's name from the approved expert list provided by BIDS. (R. XXIV, 16-18.) Mr. Huerter's practice is to request a copy of the expert's CV, find out how many times they have testified, and always ask, "has any court ever refused to recognize you as an expert?" (R. XXIV, 18-19.)

Mr. Huerter believed that Mr. Gietzen received the investigative reports and the cause and origin reports. (R. XXIV, 13.) Mr. Gietzen provided consultation on areas where the State's expert appeared to be making assumptions and instructed Mr. Huerter on how best to attack those areas. (R. XXIV, 14.) The feedback that Mr. Huerter received from Mr. Gietzen was, "there wasn't anything that this expert thought he could do as far as getting on the stand that would specifically refute the State's expert." (R. XXIV, 13.)

In terms of Mr. Gietzen's services, Mr. Huerter testified:

> Since he didn't think he could get up there and say, with any clarity, that the cause and origin report was specifically wrong in certain areas, that he could provide us areas where we could ask questions where the investigator might have to admit that, well, the opinion on that was maybe

not as rock solid as would appear from the first reading of the report. (R. XXIV, 14.)

Mr. Huerter further testified:

> Basically, what we were told was that the expert could not come up with anything that said definitively that the investigators the State was going to use in those reports were wrong. Couldn't say, no, the fire started in some other part or the fire was started by an electrical outlet or anything like that. Basically, he could tell us that, you know, there were areas where we could question it and try to poke some holes in it, but there wasn't any way he could come up and say this is wrong. And if placed on the stand, the concern was, ultimately he would probably have to testify that he really could not state any different conclusion than what had been come to by the earlier investigation. Last thing I want to do is put somebody up that's going to bolster [the State's] case. (R. XXIV, 58.)

Regarding whether to use Mr. Gietzen as a testifying or consulting expert, Mr. Huerter stated:

> I think when we found out that they couldn't contradict, we didn't want any kind of a report on that because, if we actually were going to use him as an expert and we got that report, we'd have to make it available to the State. And then they'd know we got an expert out there that they could subpoena and put on the stand to bolster their own case. So we did not ever get anything in writing. (R. XXIV, 59.)

Mr. Huerter also discussed how he attacked the State's fire investigator, Special Agent Doug Monty, during cross-examination. (R. XXIV, 82-84, 94-95.) Mr. Huerter stated that he did not need an expert to testify because he could get Special Agent Monty to admit the flaws in his own report. (R. XXIV, 95.) He explained that in his experience that's more powerful to a jury and that a jury thinks that everybody can hire an expert. But, if you get the opposing side's expert to admit your point, that carries much more weight. (R. XXIV, 84.) When asked why he didn't seek another expert, he responded, "[w]ell, for one thing I generally don't go around trying to find people that

are opinions for hire because they generally, you know, just blow up in your face." (R. XXIV, 15, 59.)

Mr. Belveal discussed the process of retaining the assistance of an expert witness (R. XXIV, 252.) He also explained the general process of researching expert witnesses. (R. XXIV, 275.) Mr. Belveal testified that all of the attorneys on the case were involved in researching the expert witness and determining which one to use. (R. XXIV, 275.) They would have looked at the proposed expert's CV, experience, and availability. (R. XXIV, 275, 277.) There was a list of approved experts from BIDS and they would have looked through that list as well as doing internet research for other possible experts. (R. XXIV, 275-76.)

Mr. Belveal spoke to Mr. Gietzen several times on the phone and provided him with the relevant portions of the case file. (R. XXIV, 252, 277-78.) They received "a lot of help from [Gietzen]." (R. XXIV, 252, 278.) Mr. Belveal testified, "[h]e helped us a lot with certain points that – that we wanted to address or attack, certain things that we wanted to clarify in the investigator's report, and he helped us with a lot of questions." (R. XXIV, 252.) Mr. Belveal further testified,

> some of what he told us we thought was beneficial to us, and some of it we thought was—you know, some of what his theories of how the fire might have started weren't all that helpful to us. There were some possibilities, I think, that he believed may have actually been sort of prejudicial to our case, so we decided that the better way to employ his services was to have him just be a non-testifying expert under the umbrella of the law firm. (R. XXIV, 278.)

Mr. Gietzen had specific things that he suggested they ask Special Agent Monty, including the way a certain light bulb worked in the house. (R. XXIV, 279-80.) "There were very specific things that he suggested that we look into, or, you know, that we ask the agent about with regard to, you know, sort of attacking his analysis of where the fire

started, and how it started, how quickly it moved, that sort of thing." (R. XXIV, 279.) The decision on how best to use Mr. Gietzen as an expert witness was also discussed with Robinson in advance of trial. (R. XXIV, 252-53.)

They did not believe that obtaining another expert witness was necessary based on the information that they received from Mr. Gietzen. (R. XXIV, 281.)

Examination of Topeka Police Detective Brian Wheeles:

Mr. Huerter was questioned by Robinson's counsel during the K.S.A. 60-1507 hearing regarding the cross examination at trial of Detective Wheeles. (R.XXIV, 77.) This was almost 6 years removed from the jury trial that occurred in August, 2009. Counsel for Robinson questioned Mr. Huerter as if Mr. Huerter had actually performed the examination of Detective Wheeles at trial. He asked Mr. Huerter questions such as, "You performed a brief cross examination on Detective Wheeles at trial; is that right?" and "I'm curious, what is it you're trying to achieve with your line of questioning regarding him not having a notebook?" and "I was curious, had he testified previously, Detective Wheeles that is, had Detective Wheeles testified previously that he wrote it down in his notepad, would that have been something you would have wanted to point out here during this line of questioning?" (R. XXIV, 77-78.) Mr. Huerter responded that he was not sure but thought he may have done the questioning of Detective Wheeles.

Clearly, during the hearing, Mr. Huerter had difficulty remembering the cross examination of Detective Wheeles. Mr. Huerter began his testimony with "If – and this is jogging my memory. If I'm remembering this right..." He then talked about the issues related to cross examining Detective Wheeles and pointing out the fact that Detective Wheeles didn't carry a tape recorder. (R. XXIV, 77.) Mr. Huerter further testified about issues related to whether or not Detective Wheeles was actually carrying a notebook or

notepad and previous testimony given by Detective Wheeles in federal court regarding having a notepad. (R. XXIV, 77.) Mr. Huerter could not remember whether or not Detective Wheeles testified differently at a prior proceeding and Robinson's counsel didn't refresh Mr. Huerter's recollection with copy of Detective Wheeles' testimony from either the trial or the federal court hearing. (R. XXIV, 78.)

In federal court, Detective Wheeles testified that he "jotted" down the time that Robinson was read his *Miranda* rights in his notepad. (R. XXIX, 95.) In the trial, Detective Wheeles testified as follows: (*Note that this is taken verbatim from the jury trial transcript which contains multiple transcription errors.)

> Q: You have your notebook there?
>
> A: I don't have if I had a time booth 92.
>
> Q: Didn't you make a note of time in your notebook?
>
> A: I said I noted it. I don't know if I had a into the about what you shall what I mean is I recall what time it was to whether I wrote it down.
>
> Q: In 2006, you didn't carry one of those pocket recorders? Surly, you have one of those little flip notebooks detective uses?
>
> A: Right.
>
> Q: You would have had that?
>
> A: No, sir, that's not true because the plan originally was to have Mr. Robinson transferred from the scene from to I didn't have my notebook with me because—
>
> The Court: Just a minute, Counsel.
>
> Mr. Belveal: Thank you, Judge.
>
> The Court: First of all, the reporter can't take two people talking at the same time, so let the witness go ahead and finish his answer before you start the next question.
>
> Mr. Belveal: Thank you, Judge.

The Court: You may, if you recall the question.

> The Witness: My recollection is, I didn't have the notebook with me because the part of that investigative task when I left the station to accomplish was to serve the search warrant the other officers were going to have the search and he was going to be transported for interview back to the station. (R. XII, 147-48.)

The questioning of Detective Wheeles at trial continues for several more pages regarding whether or not he had some type of notebook or notepad during the car to the Law Enforcement Center (LEC) with Mr. Robinson. (R. XXI, 147-50.)

Alibi Witnesses:

Mr. Huerter was questioned about not calling alibi witnesses. He recalled that one potential alibi witness had stated that Robinson was at her residence at the time the fire. (R. XXIV, 118.) However, that same witness also indicated that Robinson had arrived at her residence that day with his clothing smelling like gasoline. (R. XXIV, 118, 121-23.) Mr. Huerter remembered,

> And further inquiry of her, she, I believe, -- I believe, if I am getting this right, if I am recalling the right witness, she had multiple personality disorder and really just lacked credibility. And like I said, I believe at the end of her testimony when the next witness came into testify they realized she had urinated on the witness stand while she was giving her preliminary hearing testimony.
>
> So the only alibi witness that ever sort of presented themselves also testified that Frank had come over around the time of the fire smelling of gasoline, and had some significant impairments being a witness, so I didn't have anything else to work with that I was aware of. (R. XXIV, 118.)

Mr. Huerter testified that the decision not to call this questionable alibi witness was discussed with the other attorneys on the case. (R. XXIV, 119.) Mr. Huerter stated,

> Yeah. And in a case like this, you know, if – if I am basing the case primarily on being able to impeach the State's witnesses and I turn around and put somebody on the stand in my case in chief that is less credible than anybody else the State has called, I kind of lose some of the impact

> of the impeachment that we've done on the State's witnesses. Because the last thing they're going to see is this person who may get on the witness stand and repeat prior statements, "Yeah. Frank came over to my house and his clothes reeked of gasoline. I know because I have a very sensitive nose." She talked about allergies and she just sort of rambled about things. (R. XXIV, 119.)

Mr. Robinson suggested two or three people he believed could serve as alibi witnesses. However, after making contact with those witnesses, they were not, in fact, alibi witnesses nor helpful to Robinson's case. Mr. Belveal testified,

> One of the things I was saying was that we tracked down what we believed were potential witnesses for the case. Frank had one or two people that he thought would alibi him. And I think there may have been as many as three people that he thought would be helpful for us. And then there was one, a separate individual, that we believed, based on the context of everything that we had, that may have been potentially another suspect. Don't know that Frank had necessarily given us that third person—or that other person, but that was Chuckie Praylow. We believed that he would, potentially, be an alternate suspect. And part of our strategy was, you know, at least in some regards, to suggest that there was another person that could have committed this crime. (R. XXIV, 263.)

Regarding the process of tracking down potential alibi witnesses, Mr. Belveal testified,

> There were two to three people, two, I think, that Frank really thought would potentially be able to alibi him. And a third person that –my recollection is that, you know, may have been somebody that could say, well, he was around this apartment or whatever lot. We were able to make contact with at least one of those people and ultimately what they told us wasn't helpful. (R. XXIV, 264.)
>
> ...
>
> I can't recall if we made contact with two out of three, or just one out of the three, but I know we were not able to find all three of them. (R. XXIV, 264.)

Mr. Huerter testified that going into trial he believed he had a good defense for the case. (R. XXIV, 48.)

Gene Gietzen

Mr. Gietzen is a forensic scientist and owner of Forensic Consulting. (R. XXIV, 132.) Mr. Gietzen testified that in 2009 he was contacted by Mr. Huerter's firm regarding Robinson case. (R. XXIV, 132-33.) Mr. Gietzen was provided a 21 page report, two diagrams, laboratory reports, and evidence custody documents. (R. XXIV, 133-34.) Mr. Gietzen testified that he was asked to review the materials and assist as a consulting expert. (R. XXIV, 133.)

Mr. Gietzen testified that he provided a timeline and a 22 page document containing a list of recommended cross-examination questions. (R. XXIV, 134; Petitioner's Exhibit 23, R. XXIX, 784-804.) He also had an hour long telephone conference with Mr. Huerter. (R. XXIV, 135.) Mr. Gietzen stated that he was not asked to make a determination of the cause and origin of the fire in this case. (R. XXIV, 136.) Mr. Gietzen was requested to assist with cross-examination questions and there "was no case review or any other type of examination." (R. XXIV, 136.)

Mr. Gietzen was not a member of the National Association of Fire Investigators (NAFI) or the International Association of Arson Investigators (IAAI). (R. XXIV, 136). However, he had attended the FBI's arson analysis course in Quantico, Virginia, for the laboratory analysis of debris from arson cases and has testified in courts regarding those results. (R. XXIV, 136-37.)

Paul Bieber

Mr. Bieber was not a witness during the criminal trial. Mr. Bieber was retained specifically for the K.S.A. 60-1507 hearing. Mr. Bieber testified that he is "a fire investigator that assists Innocence Projects and public defender offices with case review and consultation on arson cases." (R. XXIV, 174.) Mr. Bieber has a certification from the

NFAI and was a member of that organization as well as the IAAI. (R. XXIV, 175.) Mr. Bieber reviewed the fire investigation report of Special Agent Monty, the written report of the "dog handler," considerable testimony from Robinson's trial, and a few witness statements. (R. XXIV, 177.)

Mr. Bieber used the "Guide to Fire and Explosion Investigations," a publication from the National Fire Protection Association, commonly referred to as "NFPA 921," to evaluate Special Agent Monty's methods. (R. XXIV, 178-79; 217.) Special Agent Monty was not just a fire investigator, or a fire expert, but an actual criminal investigator. (R. XXIV, 218.) Mr. Bieber acknowledged that Special Agent Monty could testify about the fire investigation and the fire scene, as well as the witness statements and how all of that was reviewed in order to make his conclusions. (R. XXIV, 219.)

Mr. Bieber produced a report that identified "areas of concern" regarding Special Agent Monty's cause and origin determinations about the fire. (R. I, 69-83; XXIV, 178.) Based on Mr. Bieber's review of the reports and documents in Robinson's case, it was his opinion that the negative corpus methodology was employed by Special Agent Monty in this case. (R. XXIV, 186-87.) The 2008 edition of the NFPA 921, stated the following with regard to the concept of negative corpus, "[t]he elimination of all causes other than the application of an open flame is a finding that may be justified in limited circumstances, where the area of origin is clearly defined and all other potential heat sources at the area of origin can be examined and credibility eliminated." (R. XXIV, 218.)

Mr. Bieber's opined that Special Agent Monty's use of the negative corpus method did not comply with NFPA 921. (R. XXIV, 187.) Although, he had to admit that in 2009, when this matter went to trial, the negative corpus methodology would have been a proper finding under the NFPA 921. (R. XXIV, 218.)

Mr. Bieber also questioned Special Agent Monty's conclusion regarding the speed of the fire. (R. XXIV, 189-93.) Mr. Bieber testified that the fact that the house at 427 Tyler had a "balloon frame construction" was a factor in the fire, and caused the fire to move more quickly throughout the home. (R. XXIV, 196.) Mr. Bieber further testified regarding the purpose of a fire investigation:

> The purpose of a fire investigation is to determine the origin and the cause, or – and the development of a fire or an explosion. Whether the fire was caused through an accidental – has an accidental nature or an intentional nature, that – those are factors that are concluded through an arson investigation, through a criminal investigation, they're not answered by forensic science or by a fire scene examination that's described in NFPA 921. So even if you know the ignition source, and you know the first fuel ignited, and you have the understanding of the circumstances that brought those together, that does not determine the accidental or intentional nature of a fire. That's information, conclusions that can be used to inform a fact finder whether a crime was committed or who might have been involved. But those are not the expert – that's not an expert conclusion of a forensic fire scene examiner. (R. XXIV, 214.)

Mr. Bieber's ultimate conclusion was that the ignition source and cause of the fatal fire was "undetermined," and the first fuel ignited was "unknown and undetermined." (R. XXIV, 188; 215-16.) He further stated,

> ***The only area that I have an opinion on are the conclusions based on forensic fire scene examination. The cause of the fire. The area of origin. How the fire developed. I don't have an opinion much less an expert opinion on the accidental or intentional nature of how the fire began.*** (R. XXIV, 215-16.) (emphasis added).

Robinson's Federal Court Counsel

During the K.S.A. 60-1507 evidentiary hearing, Robinson's counsel called as witnesses two members of the Federal Public Defender's Office that handled his case during the time it was pending in federal court. Mr. Kirk Redmond and Ms. Melody Brannon testified regarding their representation of Robinson and the

work they would have performed had this matter proceeded to trial in federal court. (R. XXIV, 144-80; 222-45.)

The District Court's Ruling

Judge Wilson found that Robinson's right to effective counsel was violated because his trial counsel failed to sufficiently present expert testimony to refute the claims made by the State's fire investigators. (R. I, 362.) Judge Wilson also found that Mr. Huerter performed an insufficient investigation into the use of an arson causation expert and "did not bother" to seek a continuance in order to secure the assistance of a qualified expert. (R. I, 369.) Judge Wilson further stated, "[b]y failing to contradict Agent Monty with testimony – or even assistance – of a qualified arson expert, then, trial counsel performed deficiently and, in doing so prejudiced the Petitioner." (R. I, 371.)

Judge Wilson also held that Mr. Huerter failed to adequately impeach Detective Wheeles. (R. I, 371.) Further, "counsel should have impeached this inconsistency in the Detective's testimony, but failed to do so. Counsel's performance to the impeachment of Detective Wheeles' testimony was, therefore, deficient." (R. I, 373.)

Judge Wilson also made a finding that Mr. Huerter's failure to contact all alibi witnesses identified by Robinson constituted "a perfunctory attempt at investigation, at best." (R. I, 376.) Further, "[c]ounsel did not properly investigate the alibi witnesses identified by Petitioner, and thus counsel's performance was deficient." (R. I, 376.)

Judge Wilson then found that, the two alleged deficiencies, taken together, along with a "questionable" decision by trial counsel in not attempting to introduce a recorded statement from a witness who was deceased prior to trial, and the failure to contradict the State's fire investigator, constituted cumulative error. (R. I, 381.) The State appeals from Judge Wilson's order granting the Robinson's Petition. (R. I, 386.)

ARGUMENTS AND AUTHORITIES

I. The district court erred in finding that Robinson's counsel was deficient and that the deficiency was prejudicial to his case.

Preservation

The issue was preserved for appeal. Following the evidentiary hearings, the State submitted its proposed findings of fact and conclusions of law and argued that the district court deny Robinson's claim for relief. (R. I, 179-223; 329-53.) The district court ultimately granted Robinson's Petition. (R. I, 354-85.) Therefore, the issue was raised and ruled on below and preserved for appeal. *State v. Godfrey*, 301 Kan. 1041, 1043, 350 P.3d 1068 (2015); Kan. Sup. Ct. Rule 6.02(a)(5).

Jurisdiction

The State may appeal an unfavorable disposition of a K.S.A. 60-1507 motion in the same manner as a final judgment in a civil proceeding. *Moll v. State*, 41 Kan.App.2d 677, 204 P.3d 659 (2009); *McHenry v. State*, 39 Kan.App.2d 117, 119, 177 P.3d 981 (2008); Kan. Sup. Ct. Rule 183(k).

Standard of Review

Following a full evidentiary hearing on a K.S.A. 60-1507 motion, the district court must issue findings of fact and conclusions of law regarding all issues presented. Kan. Sup. Ct. Rule 183(j). An appellate court reviews the district court's findings of fact to determine whether they are supported by substantial competent evidence and sufficiently support the district court's conclusions of law. *Bellamy v. State*, 285 Kan. 346, 354-55, 172 P.3d 10 (2007); *State v. Adams*, 297 Kan. 665, 669, 304 P.3d 311 (2013). The district court's ultimate conclusions of law, however, are reviewed de novo. 297 Kan. at 669.

This court gives deference to the district court's findings of fact, accepting as true the evidence and any inferences that support or tend to support the district court's factual findings. *Bellamy v. State*, 285 Kan. at 355. Substantial evidence is defined as evidence possessing both relevance and substance. It furnishes a substantial basis of fact from which the issues presented can be reasonably resolved. *State v. Brown*, 300 Kan. 542, 546, 331 P.3d 781 (2014). Specifically, substantial evidence refers to legal and relevant evidence that a reasonable person could accept as being adequate to support a conclusion. *State v. Walker*, 283 Kan. 587, 594-95, 153 P.3d 1257 (2007).

This standard of review applies when the district court grants a K.S.A. 60-1507 motion and the State appeals. *McHenry v. State*, 39 Kan.App.2d 117, 119-20, 177 P.3d 981 (2008).

Analysis

The Standard:

When, as in this case, the defendant's K.S.A. 60-1507 motion is premised upon an allegation of ineffective assistance of counsel, the defendant 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, 104 S.Ct. 3562, 82 L.Ed.2d 864 (1984); *Thompson v. State*, 293 Kan. 704, 715, 270 P.3d 1089 (2011).

In *Strickland*, the United States Supreme Court articulated a two pronged test needed in order to succeed on a claim of ineffective assistance of counsel. First, a defendant must show first that counsel's performance was deficient and, second, that counsel's deficient performance sufficiently prejudiced the defendant as to deprive him of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674,

reh. denied 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864 (1984); *Edgar v. State*, 294 Kan. 828, 837, 283 P.3d 152 (2012).

The first prong of the *Strickland* test requires a showing that counsel's representation fell below an objective standard of reasonableness; but there is a strong presumption that counsel's performance did in fact fall within the wide range of reasonable professional conduct. *Strickland*, 466 U.S. at 687; 294 Kan. at 838.

If a defendant successfully establishes that counsel's performance was deficient under the first prong of the *Strickland* test, the defendant also must show that he or she was prejudiced by counsel's deficient performance. *Strickland*, 466 U.S. at 687; *Edgar*, 294 Kan. at 837. "To show prejudice, the defendant must show 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." *Crowther v. State*, 45 Kan.App.2d 559, 563-63, 249 P.3d 1214, *rev. denied* 293 Kan. ___ (2011); *State v. Bricker*, 292 Kan. 239, 246, 252 P.3d 118 (2011); *State v. Cheatham*, 296 Kan. 417, 431, 292 P.3d 318 (2013).

Ineffective assistance of counsel does not turn on what is "prudent or appropriate, but only on what is constitutionally compelled." *United States v. Cronic*, 466 U.S. 648, 665, n. 38, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). "Surmounting *Strickland's* high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010).

A. Judge Wilson erroneously concluded that Robinson's use of a consulting expert witness simply wasn't good enough.

The expert witness issue must be put into context. Special Agent Monty determined through his investigation that the fire which destroyed 427 Southwest Tyler

and killed Marvina Washington was not caused by an act of nature, mechanical defect, or other accidental means. Therefore, giving rise to the negative corpus finding. Under the NFPA 921 guidelines, Special Agent Monty (whose qualifications as an expert in this field are undisputed) properly concluded at the time that the fire was intentionally set. That finding was consistent with the NFP 921. However, sometime around 2011, the NFPA 921 was revised in regard to the negative corpus finding. The revision suggested that a negative corpus finding should now only be classified as "inconclusive".

Judge Wilson heard the testimony of the two lead attorneys for Robinson's defense team regarding their process of obtaining an expert witness and the strategy decisions related to how best to use their expert. Judge Wilson heard from both the consulting expert as well as expert obtained for the 1507 hearing. While the expert at the 1507 hearing testified that the methodology related to the negative corpus finding has changed since the trial, it was, nonetheless, a perfectly valid finding when it was made by Special Agent Monty and at the time of trial.

Here, the initial question is: Was Mr. Huerter's decision to use Mr. Gietzen as a consulting expert objectively reasonable? The answer: Yes. This is not a case where there was simply a failure to procure a necessary expert. Here, the defense team not only procured and utilized the expert witness, they engaged in a strategy decision as to how best to utilize their expert – and even consulted with Robinson on that decision.

Generally, it is within the province of a lawyer to decide what witnesses to call, whether and how to conduct cross-examination, and other strategic and tactical decisions. *Sola-Morales v. State*, 300 Kan. 875, 887, 325 P.3d 1162 (2014). Strategic choices made after a thorough investigation of law and facts relevant to plausible options are virtually unchallengeable, and strategic choices made after less than

complete investigation are reasonable precisely to the extent that reasonable judgments support the limitations on investigation. *Fuller v. State*, 303 Kan. 478, 488, 363 P.3d 373 (2015); *State v. Cheatham*, 296 Kan. 417, 432, 292 P.3d 318 (2013).

The decision whether to call a particular witness is a matter of trial strategy so long as counsel conducted some investigation and had enough information upon which to base that decision. *Winter v. State*, 210 Kan. 597, Syl. ¶ 2, 502 P.2d 733 (1972); *State v. Lewis*, 33 Kan.App.2d 634, 645, 111 P.3d 636 (2003). "Even though experienced attorneys may disagree on the best tactics or strategy, deliberate decisions based on strategy may not establish ineffective assistance of counsel." *Flynn v. State*, 281 Kan. 1154, 1165, 136 P.3d 909 (2006).

"The benchmark for judging any claim of ineffectiveness must be whether the attorney's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Cheatham*, 296 Kan. 417, Syl. ¶ 3. The sphere of reasonable professional conduct is broad; therefore, judicial scrutiny of counsel's performance is highly deferential and requires consideration of all the evidence before the judge or jury. *Harris v. State*, 288 Kan. 414, 416, 204 P.3d 557 (2009).

In considering whether the attorney's work was substandard, this court 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, 687, 104

S.Ct. 2052, 80 L.Ed.2d 674, *reh. denied* 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864 (1984).

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); LaFave, 3 Criminal Procedure § 11.10(c) (2d ed. 1999) ("Since *Strickland* 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.").

Instead of applying the *Strickland* analysis related to whether or not the decision to utilize Mr. Gietzen as a consulting expert was objectively reasonable, Judge Wilson's opinion was speculative hindsight analysis concluding that she would have made a different decision than Mr. Robinson's defense team – and that other practitioners would have made different or better choices. In determining whether or not the legal strategy pursued by Mr. Robinson's defense team was reasonable under the totality of the circumstances and in light of prevailing norms, the district court went far beyond whether or not the investigation supported the pursuit of an expert witness was itself reasonable. *Wiggins v. Smith*, 539 U.S. 510, 523, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) ("[O]ur principal concern... is not whether counsel should have presented a mitigation case. Rather we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of [the defendant's] background *was itself reasonable.*") (emphasis in the original).

Judge Wilson concluded that Mr. Huerter failed to sufficiently "present expert testimony to refute the claims made by the State's fire investigators" and that Mr. Huerter performed an "insufficient investigation" into the use of an arson causation expert. (R. I, 362, 369.) Judge Wilson held, "[t]his insufficient investigation undermines

Mr. Huerter's claim that his failure to seek 'another' expert was strategic in nature." (R. I, 369.) However, the facts presented in this case do not support Judge Wilson's conclusion that Mr. Huerter was deficient.

Importantly, at the evidentiary hearing, there was conflicting testimony presented on the capacity in which Mr. Gietzen was hired to assist with the case. The factual findings on this issue are ambiguous and unclear in Judge Wilson's Memorandum Decision and Order. Judge Wilson does not explicitly make any credibility findings nor does she resolve the conflict in the evidence on this point. The problem with the inadequate factual findings by Judge Wilson here is that if she accepted Mr. Huerter's testimony in regards to procuring an expert witness, then as a matter of law, Mr. Huerter was not deficient. The facts fail to support Judge Wilson's legal conclusion that Mr. Huerter provided ineffective assistance of counsel in retaining Mr. Gietzen as a consulting expert.

The facts are not sufficient to overcome the strong presumption that Mr. Huerter was effective in his representation of Robinson. The case law is clear and well settled that "[j]udicial scrutiny of 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 in the wide range of reasonable professional assistance. [Citation omitted.]" *State v. Betts*, 272 Kan. 369, 387-88, 33 P.3d 575 (2001).

Here, Mr. Huerter's testimony established that his use of Mr. Gietzen as a consulting expert was undoubtedly trial strategy, and that decision was made after sufficient investigation. Mr. Huerter testified that he contacted Mr. Gietzen as an expert in the area of arson investigation, and based on the initial feedback he received from Mr. Gietzen, he determined that it would not be beneficial to the defense to have him

testify at trial. (R. XXIV, 12, 93-94.) Mr. Huerter determined that it would be better to simply use Mr. Gietzen as a consulting expert to help "develop the questions we might ask of the State's expert." (R. XXIV, 12, 93-94.)

Mr. Huerter specifically recalled, "there wasn't anything that [Mr. Gietzen] thought he could do as far as getting on the stand that would specifically refute the State's expert." (R. XXIV, 13.) Mr. Huerter was concerned with putting Mr. Gietzen on the stand to testify because Mr. Gietzen "would probably have to testify that he really could not state any different conclusion than [the State's expert]. Last thing I want to do is put somebody up [there] that's going to bolster [the State's] case." (R. XXIV, 58.)

With that in mind, Mr. Huerter made an informed decision not to have Mr. Gietzen testify and trial or prepare a written report. (R. XXIV, 14.) When Mr. Huerter found out that Mr. Gietzen could not contradict the State's expert's findings, he did not want any kind of report on that because then the State would be entitled to that report and could subpoena Mr. Gietzen and call him as a witness to bolster their case. (R. XXIV, 59.) Mr. Huerter thoroughly explained his decision not have Mr. Gietzen testify or obtain a written report from him. (R. XXIV, 59.)

Mr. Huerter then discussed how he chose to use Mr. Gietzen as a consulting expert. Mr. Huerter testified that Mr. Gietzen provided areas where he could attack Special Agent Monty's assumptions and conclusions. (R. XXIV, 14.) When asked why Mr. Huerter did not seek another expert, Mr. Huerter responded, "[w]ell, for one thing I generally don't go around trying to find people that are opinions for hire because they generally, you know, blow up in your face." (R. XXIV, 15, 59.) Mr. Huerter further testified that it was much more impactful to have Special Agent Monty admit the flaws in his own report. Mr. Huerter stated, "[i]n my experience, that's more powerful to a jury

– they think everybody can hire an expert ... But if you get the opposing side's expert to admit your point, that carries much more weight." (R. XXIV, 84.)

In assessing the constitutional significance of Mr. Huerter's investigation into obtaining an expert witness, the court must recognize that "reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 2463, 162 L.Ed.2d 360 (2005).

Moreover, reasonably diligent counsel is not always required to consult an expert as part of pretrial investigation in a case involving the use of expert witnesses by the State. "A defendant's lawyer does not have a duty in every case to consult experts even if the government is proposing to put on expert witnesses. There may be no reason to question the validity of the government's proposed evidence or the evidence may be so weak that it can be demolished on cross-examination." *Miller v. Anderson*, 255 F.3d 455, 459 (7th Cir. 2001).

In this case, Mr. Huerter's process in obtaining and using Mr. Gietzen as an expert witness was not constitutionally deficient. Mr. Huerter obtained a list of experts from BIDS, and Mr. Gietzen was on that list. Mr. Huerter then contacted Mr. Gietzen. Mr. Gietzen told Mr. Huerter that he could not provide an alternative explanation for cause and origin of the fire and could not definitively contradict Agent Monty. Mr. Huerter determined that calling Mr. Gietzen to testify would be detrimental to the defense, as Mr. Gietzen's testimony would likely be used to bolster the State's case. Mr. Gietzen was deliberately asked not testify or prepare a formal written report, so the State would not have another piece of evidence supporting their case. Mr. Huerter requested Mr. Gietzen be used in a consulting capacity, and Mr. Gietzen provided useful insight as to how to best attack Agent Monty on cross-examination. Mr. Gietzen prepared a list of

questions to ask on cross-examination and areas for the defense to focus their inquiry. (Petitioner's Exhibit 23, R. XXIX, 784-804.)

Also, Mr. Huerter did not believe that shopping around for another expert witness to testify at trial would be helpful to the defense. "Counsel is not required to continue looking for experts just because the one he has consulted gave an unfavorable opinion." *Sidebottom v. Delo*, 46 F.3d 744, 753 (8th Cir. 1995). Mr. Huerter believed that the jury would see right through a hired expert and it would be much more beneficial to have Agent Monty acknowledge the deficiencies and flaws in his own report. Mr. Huerter successfully accomplished this in his cross-examination of Agent Monty at trial. Where defense counsel's "extensive cross-examination of the government's expert strongly suggests they consulted an expert," or where the State's "evidence may be so weak that it can be demolished on cross-examination," defense counsel's investigation and pursuit of a defense may be deemed sufficient. *Ruis v. United States*, 221 F.Supp.2d 66, 82, (D.Mass.2002), *aff'd*, 339 F.3d 39 (1st Cir. 2003); *Miller*, 255 F.3d at 459. Additionally, in "many instances cross-examination will be sufficient to expose defects in an expert's presentation." *Harrington v. Richter*, 562 U.S. 86, 111, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). Thus, the fact that Mr. Huerter did not seek out another expert was objectively reasonable in this case.

Mr. Belveal's testimony further supported the conclusion that the decision to use Mr. Gietzen as a consulting expert was reasonable trial strategy. Mr. Belveal stated that the attorneys looked at the list of approved experts from BIDS as well as researched experts on their own. (R. XXIV, 275-76.) Mr. Belveal testified he would have looked at the proposed expert's CV, experience, and availability to come testify at trial. (R. XXIV, 275, 277.) Mr. Belveal noted that Mr. McDonald worked on finding an expert witness

and talked with many possible experts on the phone before deciding on Mr. Gietzen. (R XXIV, 275-77.)

Mr. Belveal provided Mr. Gietzen with relevant portions of the case file and spoke to him on the phone several times. (R. XXIV, 252, 277-78.) Mr. Belveal indicated that "some of what he told us was beneficial to us," and some of his other conclusions were not helpful for the defense. (R. XXIV, 252, 278.) Mr. Belveal remembered that there were specific areas that Mr. Gietzen suggested they ask Agent Monty about and explained how to attack his analysis. (R. XXIV, 279-80.) Mr. Belveal did not believe obtaining another expert was necessary based on the information they received from Mr. Gietzen. (R. XXIV, 281.)

Here, the court had extended testimony from Mr. Huerter explaining, to the best of his memory, his investigation into an arson expert and decision on how to use Mr. Gietzen. Mr. Huerter's testimony regarding the investigation of an expert witness was affirmed by Mr. Belveal. The fact that Mr. Huerter did not use Mr. Geitzen (or any expert) as a testifying expert was objectively reasonable and was not per se deficient. Judge Wilson did not evaluate Mr. Huerter's performance by determining whether his investigation and use of Mr. Gietzen in a consulting capacity was strategic, but simply did not like Mr. Huerter's decision not to pursue a second expert to testify at trial. "But *Strickland* does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert and equal and opposite expert from the defense." *Harrington v. Richter*, 562 U.S. 86, 111, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011).

Judge Wilson disagreed with Mr. Huerter's decision in using an expert witness for only assisting him on cross examination questions, and believed Mr. Huerter should

have hired a second expert to testify at trial. However, that is simply not the standard to establish whether Mr. Huerter's performance was deficient.

In *Ferguson v. State*, 276 Kan. 428, 78 P.3d 40 (2003), the defendant argued she was deprived of her constitutional right to effective assistance of counsel because trial counsel failed to properly investigate the cause of the fire and failed to present expert testimony from an arson investigator at trial. At the 1507 hearing, trial counsel testified that he sent the reports of the State's experts and other relevant documents to another expert for review. 276 Kan. at 448. Trial counsel stated that the information the expert provided "was not particularly helpful to me, or in my view, particularly helpful to the defense..." 276 Kan. at 448.

Our Supreme Court upheld the district court's conclusion that trial counsel was not deficient for failing to employ an expert arson investigator because trial counsel indicated he chose not to present expert testimony as a matter of strategy. 276 Kan. at 449; *Ferguson v. Werholtz*, No. 04-3413-JTM, 2006 WL 2092460 (D. Kan. July 27, 2006) ("[b]oth the Kansas District Court and Kansas Supreme Court appropriately determined that trial counsel's decisions in this respect were tactical trial decisions which did not fall outside the bounds of what a reasonable attorney might undertake"). Here, as in *Ferguson*, Mr. Huerter's decision not to present expert testimony was a tactical decision.

In *Mullins v. State*, 30 Kan.App.2d 711, 46 P.3d 1222 (2002), a panel of this court addressed the issue of ineffective assistance of counsel based on the failure to hire an expert witness. In *Mullins*, the defendant was convicted of committing sex offenses against a child based primarily upon the testimony of the victim. The defendant filed a K.S.A. 60-1507 motion alleging ineffective assistance of counsel based on counsel's failure to hire an expert in child interviewing techniques. Notably, at the evidentiary

hearing, Mullins' counsel offered no strategic reason for failing to consult with an expert. The district court denied relief.

On appeal, the *Mullins* panel held that it was "compelled" to reverse the district court because of the "essentially uncontroverted record at the 1507 hearing." 30 Kan.App.2d at 718. The only evidence presented at the evidentiary hearing supported a finding of ineffective assistance of counsel. The panel noted, the State "did little cross-examination of Mullins' witnesses to provide the trial court with any support for determining whether Mullins' trial counsel was effective." 30 Kan.App.2d at 718. The panel was clear to limit its ruling to the facts of the case, "[u]nder the facts of this case, it is held: (1) [d]efense counsel was ineffective for failing to ever consider hiring an expert, whether for use at trial or for use in preparation of cross-examination of the State's witnesses..." 30 Kan.App.2d at 711.

However, in this case, the evidence presented at the K.S.A. 60-1507 hearing was the opposite of that in *Mullins*. In *Mullins* the only evidence before the court supported a finding of ineffective assistance; here the evidence of Mr. Huerter's testimony demonstrated that his decision to use Mr. Gietzen as a consulting expert was strategic and he offered a detailed explanation for this decision.

Moreover, in *Mullins*, the only evidence that a crime occurred was the child victim's testimony that went unchallenged by defense counsel. Here, we have substantial direct and circumstantial evidence of Robinson's guilt. Particularly damming were Robinson's unprompted statement to law enforcement that the fire "was an accident." (R. XII, 125, 161-62.)

The State briefly mentions this evidence here, and will fully address the all of the evidence presented against Robinson at trial in the subsection below, addressing the prejudice prong of *Strickland*.

Judge Wilson's determination that Mr. Huerter's investigation was insufficient based on the timing of when he contacted Mr. Gietzen was erroneous. At a pretrial hearing, on June 26, 2009, Mr. Huerter indicated that he would be seeking an expert witness to assist with the case and discussed funding. (R. VII, 5.) At another hearing on July 27, 2009, Mr. Huerter stated that he "only anticipated having a consulting expert." (R. VIII, 4.)

At the evidentiary hearing, Mr. Huerter testified that had Mr. Gietzen provided any valuable expert opinion he would have sought more time to review this information, if he needed it. Because Mr. Gietzen was not helpful, and could not provide any direct contradiction to Special Agent Monty's conclusions, Mr. Mr. Huerter did not need additional time to analyze the expert opinion. Again, Judge Wilson viewed this information in hindsight which is exactly what *Srickland* seeks to prevent. *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (reliance on "the harsh light of hindsight" to cast doubt on a trial that took place now more than 15 years ago is precisely what *Strickland* seeks to prevent); *Bell v. Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); see also *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

Additionally, Judge Wilson's conclusion that Mr. Gietzen was not a "qualified expert" was not supported by the facts and legally incorrect. Judge Wilson made a specific finding that "as Mr. Gietzen *himself* made clear, he was *not* an expert in arson or fire investigations. He was neither a member of the [NFAI] nor the [IAAI]." (R. I, 366.)

Judge Wilson concluded that "the purported expert was, in fact, not an expert at all in the essential subject matter of the trial..." (R. I, 368.) Simply because Mr. Gietzen was not a member of two national associations of arson investigators did not make him unqualified to be an expert witness.

Mr. Gietzen testified that he was forensic scientist and owner of Forensic Consulting. (R. XXIV, 132.) Mr. Gietzen attended the FBI arson analysis class in Quantico, Virginia, for the laboratory analysis of debris from arson cases. (R. XXIV, 136.) Mr. Gietzen also assisted on homicide cases that involved fire and provided crime scene investigation assistance. (R. XXIV, 137.) "Experience alone can qualify a witness to give expert testimony." See *Farmer v. Paccar, Inc.*, 562 F.2d 518, 528-29 (8th Cir. 1997); *United States v. Markum*, 4 F.3d 891, 896 (10th Cir. 1993). Based on Mr. Gietzen's years of experience and relevant training, he was a qualified expert witness. The facts presented on this issue did not support Judge Wilson's legal conclusion that Mr. Gietzen was not a qualified expert.

Judge Wilson also placed undue weight on testimony from the two federal public defenders that were previously on the case, Mr. Kirk Redmond and Ms. Melody Brannon, to support her decision that Mr. Huerter was deficient. The testimony provided by Mr. Redmond and Ms. Brannon as to what they would have done had the case proceeded to trial simply highlights the differences in the strategic choices of attorneys. *Drennan v. State*, No. 102,090, 2010 WL 4393915 (Kan.App. 2010) (unpublished opinion) ("The fact that Whalen's trial strategy differs from the trial strategy suggested by Ney [at the 1507 hearing] does not make Whalen's performance deficient when considering a collateral attack on a conviction.").

Even though experienced attorneys might disagree on the best tactics or strategy, deliberate decisions based on strategy may not establish ineffective assistance of counsel. *Flynn v. State*, 281 Kan. 1154, 1165, 136 P.3d 909 (2006). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom." *Strickland*, 466 U.S. at 690. Mr. Redmond and Ms. Brannon's testimony that they would have presented an expert witness to testify at trial was simply their trial strategy, and does not establish that Mr. Huerter's performance deficient because he chose not to do the same.

Judge Wilson's role was not to determine whether another attorney would agree with Mr. Huerter's decision or would have continued to search for another expert witness and had them testify at trial. There are "countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674, *reh. denied* 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864 (1984). Rare are the situations in which the "wide latitude counsel must have in making tactical decisions" will be limited to any one technique or approach." 466 U.S. at 689. Therefore, Judge Wilson's use of this testimony in her decision to support her conclusion that Mr. Huerter was deficient in his performance was legally incorrect.

Mr. Huerter's investigation into an expert witness was tactical and thorough. Judge Wilson's contrary conclusion was an unreasonable application of *Strickland.*

B. Judge Wilson's determination that the impeachment of Detective Wheeles was deficient was erroneous.

In addition to being deficient in his investigation of an expert witness, Judge Wilson found trial counsel deficient in two other respects: failing to impeach Detective Wheeles and failing to properly investigate alibi witnesses. Judge Wilson erred as a matter of law when she made these conclusions.

Judge Wilson easily dismissed Robinson's claims that Mr. Huerter was ineffective for failing to impeach Fire Marshal Wally Roberts and Detective Hill. However, Judge Wilson found trial counsel's failure to impeach Detective Wheeles' testimony "more significant." (R. I, 371-72.) At a federal hearing, Detective Wheeles testified that after Robinson was arrested, he *Mirandized* Robinson and noted the time in a notebook that he had with him. (R. XXIX, 95.) At trial, Detective Wheeles testified that he "noted" the time, but did not have a notebook with him when he transported Robinson. (R. XII, 147-48.) Mr. Huerter testified that he reviewed all of the prior hearings from federal court and could not offer a reason why he Detective Wheeles was not impeached on this point. (R. XXIV, 78.) Judge Wilson found that Mr. Huerter's failure to impeach Detective Wheeles about a notebook that he allegedly carried was deficient.

In fact, Mr. Huerter did not question Detective Wheeles at trial in this matter. Mr. Belveal actually conducted the examination of Detective Wheeles. (R. XXIV, 133.) Apparently, Robinson's counsel and Judge Wilson were also under the belief that Mr. Huerter had performed the questioning of Detective Wheeles at trial. In her Memorandum Decision and Order, Judge Wilson noted, "As the Petitioner's Post-Hearing Brief admits, this failure to impeach Detective Wheeles was 'not the most significant fact for the defense,' although it attempts to argue that Mr. Huerter's failure

to impeach Detective Wheeles is 'uniquely indicative of the sub-standard assistance Huerter provided in the case.'" (R. I, 372-373.) Judge Wilson incorrectly relied on Mr. Huerter's testimony as to why Detective Wheeles was not impeached regarding his notebook. Judge Wilson's reliance on Mr. Huerter's testimony was misplaced.

During the cross-examination of Detective Wheeles, Mr. Belveal spent significant time asking detailed questions about the first interview Detective Wheeles had with Robinson and about certain interview techniques he used. (R. XII, 133-144.) Mr. Belveal then asked Detective Wheeles about what occurred in the car after Robinson was arrested. (R. XII, 147.) Mr. Belveal specifically asked Detective Wheeles "[y]ou have your notebook there?" (R. XII, 147.) Mr. Belveal asked, "[d]idn't you make a note of the time in your notebook?" (R. XII, 147.) Detective Wheeles responds, "I said I noted it." (R. XII, 147.) Mr. Belveal again asked Detective Wheeles, [s]urely, you have one of [those] little flip notebooks detectives use?" (R. XII, 147.) Detective Wheeles agreed, but stated he did not have a notebook with him in the car at that time. (R. XII, 147-48.) Mr. Belveal asked several times if Detective Wheeles had a handheld recorder or whether there was a recording device inside the patrol car. (R. XII, 145-47.)

Mr. Belveal continued to question whether Detective Wheeles had a notepad, "[y]ou're going out to arrest the prime suspect in your case and you're telling me you don't have a notepad?" and "there's a conversation in front of you and you're not making notes?" (R. XII, 149.) Detective Wheeles admitted that his written report came from memory and that at least an hour or two passed before he wrote his report. (R. XII, 149.)

Clearly, the purpose of this cross-examination was to challenge Detective Wheeles' credibility and memory of what Robinson stated in the patrol car following his

arrest. Mr. Belveal directly challenged Detective Wheeles' testimony that he "noted" the time when Robinson was *Mirandized*, but did not have his notebook. Mr. Belveal's questions attacked Detective Wheeles' preparedness and challenged the reliability of his testimony. The cross-examination of Detective Wheeles was detailed and certainly called into question the reliability of what happened in the car following Robinson's arrest.

While Mr. Belveal did not impeach, or refresh Detective Wheeles' recollection regarding his testimony in federal court years earlier regarding the notepad, he provided a strong and thorough cross-examination regarding Detective Wheeles' work product. Judge Wilson erred when she concluded that the failure to impeach Detective Wheeles with his previous testimony amounted to ineffective assistance of counsel.

C. Judge Wilson's determination that Mr. Huerter was deficient for failing to call alibi witnesses was erroneous.

In his initial pleading, Robinson made the conclusory argument that, "he has an alibi, Robert Hunter, who could put Robinson at Sharon Anderson's apartment at the time of the second fire. This information was known to trial counsel at the time of the preliminary hearing." (R. I, 63.) At the evidentiary hearing, Robinson did not call Hunter to testify, provide an affidavit of what Hunter would testify about, or offer any evidence whatsoever to support this allegation. Robinson failed ask either trial counsel about Hunter, if they spoke to him, or did any investigation into Hunter specifically. In Robinson's closing brief, he again argued that Hunter could provide an alibi and was known to counsel at the time of the preliminary hearing. (R. I, 314.) Robinson argued that "without explanation Huerter decided to ignore Hunter as a possible alibi." (R. I, 314.)

Despite the complete lack of evidence to support Robinson's allegation on the alibi claim, Judge Wilson concluded that Mr. Huerter's failure to contact all alibi witnesses identified by Robinson constituted a "perfunctory attempt at investigation, at best." (R. I, 376.) Judge Wilson not only disregarded the fact that it was Robinson's burden to show that his trial counsel failed to investigate or call Hunter as an alibi witness, she undoubtedly used the wrong standard when determining whether trial counsel failed to investigate potential alibi witnesses.

At the evidentiary hearing, Mr. Belveal testified that Robinson had two or three people he believed could serve as alibi witnesses. After making contact with the witnesses they could find, the witnesses did not provide an alibi for Robinson, nor were they helpful to Robinson's defense. (R. XXIV, 274-75.) Mr. Belveal testified "[o]ne of the things I was saying was that we tracked down what we believed were potential witnesses for the case. Frank had one or two people that he thought would alibi him." (R. XXIV, 274.) Mr. Belveal further testified:

> There were two to three people, two, I think, that Frank really thought would potentially be able to alibi him. And a third person that – my recollection is that, you know, may have been somebody that could say, well, he was around this apartment or whatever lot. We were able to make contact with at least one of those people and ultimately what they told us wasn't helpful.
>
> I can't recall if we made contact with two out of three or just one out of the three, but I know we were not able to find all three of them. (R. XXIV, 275.)

Judge Wilson failed to consider this evidence with a strong presumption that trial counsels' investigation fell within the wide range of reasonable professional conduct. Had she done so, the evidence presented clearly establishes that trial counsels'

investigation of any potential alibi witnesses was complete, thorough, and virtually unchallengeable.

Judge Wilson isolated one piece of Mr. Belveal's testimony and used it to determine that trial counsel did not properly investigate the alibi witnesses identified by Robinson. Importantly, there was no testimony or evidence at the evidentiary hearing that establish that Robinson himself identified Hunter as an alibi witness. The evidence established that Hunter's name only came from the testimony of Anderson at the preliminary hearing. Mr. Huerter testified that he was aware of Anderson's testimony from the preliminary hearing and that she "really just lacked credibility." (R. XXIV, 118.) Mr. Huerter testified:

> There was an – and it's the witness I referenced from the preliminary hearing, I believe at one point. One of her stories was she saw Frank – Frank was at her apartment or something at the time that the fire would have occurred. But she also indicated in another statement that Frank had come over to her house and his clothes smelled of gasoline. And further inquiry of her, she, I believe – I believe, if I'm getting this right, if I'm recalling the right witness, she had a multiple personality disorder and just really lacked credibility.
>
> So the only alibi witness that ever sort of presented themselves also testified that Frank had come over around the same time of the fire smelling like gasoline and had some significant impairments of being a witness, so I didn't have anything else to work with that I was aware of. (R. XXIV, 118.)

Mr. Huerter further testified that he had discussions with the other attorneys and Robinson about whether or not to call Anderson and determined that her testimony would have been too damaging. (R. XXIV, 119.) Mr. Huerter testified:

> Yeah. And in a case like this, you know, if – if I am basing the case primarily on being able to impeach the State's witnesses and I turn around and put somebody on the witness stand in my case in chief that is less credible than anyone that the State has called, I kind of lose some of the impact of the impeachment that we've done on the State's witnesses. Because the last thing they're going to see is this person who may get on

> the witness stand and repeat prior statements, 'Yeah Frank came over to my house and his clothes reeked of gasoline. I know because I have a very sensitive nose.' She talked about allergies and she just sort of rambled about things. (R. XXIV, 119-20.)

Given the investigation that Mr. Huerter conducted into the credibility of Anderson, it was not objectively unreasonable for him to determine not to call her as an alibi witness for Robinson or further investigate Hunter.

Moreover, Mr. Belveal testified that they were "not able to find all three" of the potential alibi witness, which is not equivalent to failing to make contact with all three potential alibi witnesses as Judge Wilson concluded. Mr. Belveal did not testify that they deliberately failed to contact all of the alibi witnesses, but stated that they could not find all of them. This is an important distinction as it further supports the substantial investigation of the alibi witnesses and that trial counsel was simply unable to find the witnesses. The failure to find witnesses after investigation is not the same as intentionally failing to contact known witnesses.

Also, it is likely that Mr. Belveal's testimony that there was a witness who could have testified that Robinson was "around this apartment or whatever lot" was describing Anderson and her testimony that Robinson was at her apartment at the time the fire occurred. Applying the proper presumption, trial counsel's investigation did not fall below an objective standard of reasonableness.

The cases cited by Judge Wilson in support of her conclusion are plainly distinguishable from the facts of this case. In *State v. Shumway*, 48 Kan.App.2d 490, 293 P.3d 772, *rev. denied* 298 Kan. 1203 (2013), a panel of this court held that failing to call an alibi witness to refute the State's theory of the crime was not strategic and was below

minimum standards when the decision left the State's case unchallenged and when no other evidence advanced the attorney's strategy of proving the defendant's innocence.

Unlike in *Shumway*, the State's case was challenged by extensively attacking Agent Monty's determination that the fire was intentionally started and challenging the credibility of the State's other witnesses who placed Robinson at the scene of the fire. And there was other evidence proving Robinson's innocence, mainly his own testimony that he did not start the fire and that if he did it was an accident.

State v. Thomas, 26 Kan.App.2d 728, 993 P.2d 1249 (1999), *aff'd* 270 Kan. 17, 11 P.3d 1171 (2000), is also clearly distinguishable from the present case. In Thomas, defense counsel attempted to present an alibi defense without complying with the statutory notification requirements. Here, however, Robinson makes no claim that trial counsel attempted to present an alibi defense but was prevented from doing so because he did not comply with the statutory requirements. In this case, following a thorough investigation and Mr. Huerter's discussion of the alibi defense with Mr. Belveal and Robinson, he made a strategic and tactical decision not to employ an alibi defense.

In *State v. Sanford*, 24 Kan.App.2d 518, 522-23, 948 P.2d 1135, *rev. denied* 262 Kan. 967 (1997), a panel of this court found ineffective assistance of counsel when defense counsel was provided with the names of potential alibi witnesses, but admitted that he ceased trying to contact them after speaking with one witness who said none of the other witnesses would help the defendant. The *Sanford* case is also distinguishable. Unlike the defense counsel in *Sanford*, Mr. Belveal did not admit that he failed to investigate these witnesses. To the contrary, Mr. Belveal testified that he was able to make contact with one of those witnesses, who was not helpful, and could not find the

other two witnesses. And as noted above, here there was no evidence that Robinson provided Hunter's name as an alibi witness to either trial counsel.

Finally, it should be noted that when Robinson voluntarily went to the police station the day of the fire, he was specifically asked by Detective Wheeles if there was anyone that could verify his whereabouts at the time of the fire. The only name that Robinson provided to the police at that time was his girlfriend, Rebecca Clark. However, Ms. Clark was also interviewed by law enforcement the day of the fire and did not corroborate Robinson's alibi. (R. XXIX, 75-81.)

D. Judge Wilson incorrectly concluded that Robinson established prejudice.

Even if this court agrees with Judge Wilson and determines that Mr. Huerter failed to sufficiently present expert testimony to refute Agent Monty's testimony, Robinson did not meet his burden to prove he was prejudiced by this deficient performance.

Under the second prong of the ineffective assistance of counsel analysis, Robinson must show that there is a reasonable probability that the proceeding would have produced a different result if not for Mr. Huerter's deficient performance. A reasonable probability is a probability sufficient to undermine confidence in the outcome. See *Phillips v. State*, 282 Kan. 154, 144 P.3d 48 (2006).

In regards to whether Mr. Huerter's deficient performance prejudiced Robinson, Judge Wilson concluded, "[p]lainly, it did." (R. I, 369.) Judge Wilson relied on the opinion issued by a panel of this court in Robinson's direct appeal to summarize the "critical importance of the State's fire expert." (R. I, 369.) Judge Wilson also highlighted Mr. Bieber's testimony from the evidentiary hearing which criticized Agent Monty's use

of the "negative corpus" analysis to reach the conclusion that a liquid accelerant was used to start the fire. (R. I, 369-71.)

Judge Wilson stated:

> Mr. Bieber raises a number of other infirmities with Agent Monty's determination, but the cogent point is this: had trial counsel obtained the services of a qualified expert, be it for cross-examination purposes or testimony purposes, trial counsel would have been able to undermine Agent Monty's conclusions far more effectively than he was ultimately able to do. Without this evidentiary counterweight, Mr. Huerter could not effectively contradict the insinuations and conclusions presented by Agent Monty—thus allowing the jury, in the words of the court of appeals, to "fairly ... disregard [the Petitioner's] equivocations and qualification to the detective about whether he started the fatal fire."
>
> By failing to contradict Agent Monty with the testimony—or even the assistance—of a qualified arson expert, then, trial counsel performed deficiently and, in so doing, prejudiced the Petitioner. (R. I, 371.)

In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. See *Wong v. Belmontes,* 558 U.S. 15, 27, 130 S.Ct. 383, 175 L.Ed.2d 328 (2009); *Strickland*, 466 U.S. at 693. Instead, *Strickland* asks whether it is "reasonably likely" the result would have been different. *Strickland*, 466 U.S. at 696.

Mr. Bieber's actual conclusion about the cause and origin of the fire is key when addressing prejudice. Importantly, Mr. Bieber did not conclude that the fire was not incendiary or that an expert would have testified as such. Mr. Bieber simply concluded that the cause and origin of the fatal fire was "undetermined." (R. XXIV, 188; 215-16.) Specifically, Mr. Bieber testified ***"I don't have an opinion much less an expert opinion on the accidental or intentional nature of how the fire began."*** (R. XXIV, 216.) Mr. Bieber could not definitively state that Agent Monty's conclusion was incorrect or that

the cause of the fire was accidental. Mr. Bieber merely demonstrated a divergence of expert opinion on appropriate methodology, in hindsight, now that the 2011 version of the NFPA 921 no longer endorses the use of the negative corpus method.

Mr. Bieber testified that in 2008 and 2009, the time of Robinson's case, the use of the negative corpus method was a "finding consistent with the NFPA 921" and that it was acceptable until 2011. (R. XXIV, 218.) Mr. Bieber also testified that Agent Monty was unique in the fact that he was not just a scientific fire investigator, but an actual criminal investigator who used other information such as witness statements, and Robinson's interview to reach his conclusion that the fire was incendiary. (R. XXIV, 218-19.)

Even assuming Agent Monty's analysis was inconsistent with the NFPA 921, the failure of Mr. Huerter to challenge Agent Monty's non-use of NFPA does not automatically render him ineffective. While NFPA 921 is widely accepted as the standard guide in the field of fire investigation, it is not the only reliable method of fire investigation. *Manuel v. MDOW Ins. Co.*, 791 F.3d 838, 845 (8th.Cir. 2015). Also, courts have said that a failure to strictly adhere to NFPA 921 does not render an investigation per se unreliable or incomplete. *Pekarek v. Sunbeam Prods., Inc.,* 672 F.Supp.2d 1161, 1175 (D. Kan. 2008).

Moreover, regardless of whether negative corpus is approved by the NFPA, "the absence of an accidental explanation for a fire frequently has been cited as a sufficient basis for a finding of arson." *Somnis v. Country Mut. Ins. Co.,* 840 F.Supp.2d 1166, 1171 (D.Minn. 2012); see also *Hickerson v. Pride Mobility Prods. Corp.*, 470 F.3d 1252, 1257-58 (8th Cir. 2006). Regardless of whether it was an NFPA 921 approved method, Agent Monty's methodology was reliable.

Even if Mr. Huerter could have more sufficiently challenged the use of Agent Monty's negative corpus methodology, which was an accepted methodology at the time of the fire investigation, at most, Mr. Bieber would have testified that the cause of the fire was unknown or "undetermined." It is unclear how this expert testimony, which could not conclude that the fire was not intentionally set, but simply conclude that the cause of the fire was "undetermined," established a reasonable probability that the proceeding would have produced a different result.

Moreover, there was a substantial amount of direct and circumstantial evidence pointing to Robinson's guilt. Robinson had a motive to start the fire and confessed to starting the fire. (R. XII, 125, 161-64, 168.) Judge Wilson failed to address any of this other evidence against Robinson in her analysis of the prejudice prong in this case.

The State established a strong motive for Robinson to start the fire based on his interactions with the downstairs tenants before the fatal fire. Shortly before the second fire, the downstairs tenant, Ernest "Bump" Brown ("Bump"), saw Robinson. (R. XI, 72.) Robinson came up to the window and "Bump" told him to get inside the apartment. (R. XI, 73.)

Robinson came inside and asked "Bump" if he had any crack cocaine to sell, and "Bump" answered, "no, not today." (R. XI, 73-74.) "Bump" told Robinson to go up to the upstairs tenant, Washington's, apartment and that "she's probably got some." (R. XI, 74.) Robinson replied, "[f]uck Marvina and everybody up there." (R. XI, 75.) "Bump" testified that Robinson sounded "kinda angry" when he made that statement. (R. XI, 76.) Robinson then left the apartment. (R. XI, 76.) A few minutes later the house was overwhelmed by flames, and "Bump" fled from the house. (R. XI, 79-80.) As "Bump" was

running around to the front of the house to escape the fire, he saw Robinson quickly walking away from house. (R. XI, 85.)

Also, Robinson confessed to starting the fire. The day after the fire, Robinson was taken into custody at his girlfriend's house. (R. XII, 116). Immediately after Robinson was handcuffed he told the detectives, "it was an accident." (R. XII, 161-62.) Robinson continued to tell the detectives that it was an accident as they were walking toward the car so he could be taken down to the Law Enforcement Center (LEC). (R. XII, 163-64.) While driving to the LEC and after being *Mirandized*, Robinson again told the detectives that the fire on Southwest Tyler was an accident. (R. XII, 125.)

Detectives Hill and Wheeles testified that Robinson said that the fire was an accident and that he did not intend for anyone to get hurt. (R. XII, 128, 164, 167, 170.) Robinson stated that he was in the back area smoking, lighting matches, and throwing them into the basement and caused the fire. (R. XII, 128, 133, 164.) Robinson told Detective Hill that a little while after he had been throwing matches in the basement he smelled smoke. (R. XII, 164-165). After that, Robinson told Detective Hill he spoke with "Bump" who told him that there had been a fire in the basement. (R. XII, 165.) Robinson said he thought he could have accidentally set the fire in the basement. (R. XII, 165.)

Detective Hill then asked Robinson if he could have been smoking crack and throwing matches before the basement fire, and Robinson said yes. (R. XII, 166.) Robinson said he saw the flames jump up, got scared, and left. (R. XII, 166.) Detective Wheeles also testified that Robinson confirmed that he was at 427 Southwest Tyler the morning of the fire, and left the area on foot. (R. XII, 128, 165.) Robinson further told Detective Hill that he was not mad at anyone who lived in these apartments, but felt that

they had disrespected him by not giving him ten dollars worth of cocaine he wanted. (R. XII, 168).

During Robinson's second interview at the LEC he stated, "I didn't do it on purpose." (R. XII, 169, 182.) Robinson further stated, "I know I didn't do it on purpose, if I did do it at all." (R. XII, 169, 182.) Detective Hill testified that he told Robinson, "you know you set the fire," to which Robinson responded, "yeah." (R. XII, 169.)

In *Wilkins v. State*, 286 Kan. 971, 190 P.3d 957 (2008), our Supreme Court also addressed the issue failing to hire or consider hiring an expert witness and whether that constituted deficient performance under *Strickland*. In *Wilkins*, the defendant filed a K.S.A. 60-1507 motion arguing his trial counsel was ineffective for numerous reasons including the failure to hire or consider hiring an expert. 286 Kan. at 975. At the evidentiary hearing, Wilkins presented testimony from trial counsel, the dental expert who testified at trial and identified the victim, a forensic odontologist, and another criminal defense attorney. 286 Kan. at 975.

Trial counsel testified that he did not consult with any experts in preparation for trial and did not cross-examine the State's dental expert. 286 Kan. at 976. Trial counsel testified that he had no idea whether the dental expert's methodology or conclusions were sound or whether they could be challenged. 286 Kan. at 976. Trial counsel also admitted that he was "unable to fully understand [the dental experts] forensic testimony." 286 Kan. at 976. The forensic odontologist testified that in his opinion the expert's methodology was not supported in the scientific community and the expert's conclusions were not valid. 286 Kan. at 977. Defense counsel criticized trial counsel and testified that trial counsel's failure to cross-examine the dental expert was "absolutely incredible" and unreasonable. 286 Kan. at 977.

The district court held that trial counsel was generally "effective and sufficient" and denied the motion. 286 Kan. at 978. However, a panel of this court concluded that trial counsel's failure to "consult with any forensic dental experts," despite his lack of knowledge in that field; and his failure to refute the dental expert's technical evidence amounted to deficient performance under the first prong of *Strickland*. 286 Kan. at 984. The panel concluded that the defendant was entitled to a new trial.

Our Supreme Court granted the State's petition for review. The Court held that under the totality of the circumstances and the standard of review, the question of whether the defendant met his burden was a close call. 286 Kan. at 984-85. Even if the Court assumed that his trial counsel was deficient, the Court held that the defendant did not meet his burden to prove prejudice. 286 Kan. at 985. The expert that the defendant presented at the hearing did not actually include an assertion that the remains were not that of the victim, but merely demonstrated a divergence of expert opinion on methodology. 286 Kan. at 985. There was also substantial evidence aside from the dental forensics testimony that the defendant killed the victim. 286 Kan. at 985. The Court held that there was no reasonable probability that that, but for what may be deemed as trial counsel's deficient performance on the dental forensics expert issue, the result of the trial would have been different. 286 Kan. at 985. The Court reversed the decision of the Court of Appeals and affirmed the district court's denial of the motion.

Here, as in *Wilkins*, there is no reasonable probability that but for Mr. Huerter's deficient performance in calling an expert witness to testify at trial, the result of the trial would have been different.

In light of the substantial evidence of Robinson's guilt, there is no reasonable probability that calling an expert witness to testify would have affected the outcome of

the trial. See *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011); *Thompson v. United States*, 436 Fed.Appx. 669 (7th Cir. 2011) (Court held that petitioner failed to meet the prejudice prong of the *Strickland* standard because at most, Thompson's proposed expert would have concluded that "the cause of the fire was 'undetermined'" and "there was plenty of other evidence from which a rational jury could find that [petitioner] caused the fire."); *Michigan Millers Mut. Ins. Corp. v. Benfield*, 140 F.3d 915, 922 (11th Cir. 1998) (holding that even excluding the testimony of a cause and fire origin expert that a fire was intentional based on the negative corpus methodology a reasonable jury could still have found from circumstantial evidence that there was an incendiary cause of the fire).

Additionally, here on cross-examination, Mr. Huerter challenged Agent Monty's conclusion that the fire was set intentionally, questioned his methodology, and criticized his assumptions. (R. XII, 3-20.)

Mr. Huerter's closing also focused on attacking Agent Monty's conclusion and noted that the State quickly moved its focus from arguing the evidence supported intentional murder to reckless murder or voluntary manslaughter. (R. XII, 69.) In fact, the State argued that if you take out Agent Monty's testimony, or if Agent Monty "got it wrong" then they would still convict him of unintentional murder based on the other evidence presented. (R. XIII, 61-63.)

Even if Special Agent Monty's conclusion that the fire appeared to have been intentionally set on the stairs using an open flame and a flammable liquid was never heard by the jury, the State still had strong evidence against Robinson. The State established a motive for Robinson to set the fire, as he was angry at the upstairs tenant, and felt he was disrespected by "Bump" when he did not share some crack cocaine with

him, he was seen leaving the house immediately after the fire, and most importantly, he confessed that he started the fire. Given this evidence, the jury could still disregard Robinson's claims that he accidentally started the fire and did not mean to kill anyone. The State presented evidence that Robinson had both the opportunity and the means to start the fire. Even assuming the jury was presented with expert testimony that the fire was classified as "undetermined," in light of all of the other evidence of Robinson's guilt, he was not prejudiced.

Lastly, Robinson failed to establish that he was prejudiced cumulatively in this case and Judge Wilson erred in her conclusion that he did so. Cumulative trial errors, when considered collectively, may require reversal of the defendant's convictions when the totality of the circumstances substantially prejudiced the defendant and denied him a fair trial. *Thompson v. State*, 293 Kan. 704, 721, 270 P.3d 1089 (2011). Cumulative error has been considered in an ineffective assistance of counsel claim. 293 Kan. at 721.

Although Judge Wilson concluded that prejudice was established by the cumulative error of all three alleged deficiencies of Robinson's counsel, she failed to state what specific prejudice resulted from the failure to impeach Detective Wheeles and insufficient investigation of the alibi witness. Likely, it is because there simply is no evidence Robinson was prejudiced on these two points. Judge Wilson focused solely on the ability to properly refute Special Agent Monty's testimony had Robinson presented his own expert witness.

Robinson did not meet his burden to establish that he was prejudiced by trial counsel's failure to impeach Detective Wheeles on the issue of whether or not he had a notebook at the time Robinson was arrested. Even if Mr. Belveal had impeached Detective Wheeles on this point, and had him admit that he had previously testified that

he carried a notebook, this discrepancy would not have made a difference in the outcome of the trial. Moreover, without specifically pointing out Detective Wheeles' prior testimony, Mr. Belveal challenged Detective Wheeles' memory and the reliability of his testimony.

Moreover, Robinson admitted that the failure to impeach Detective Wheeles was "not the most significant fact for the defense," and Judge Wilson noted this in her decision. (R. I, 373.) As such, it cannot be said that the failure to impeach this small detail was so serious it deprived Robinson of a fair trial.

In regards to the failure to call Hunter as an alibi witness, Robinson did not prove he was prejudiced. At the evidentiary hearing, Robinson did not call Hunter to testify, provide an affidavit of what Hunter would testify about, or offer any evidence whatsoever to support his alibi defense. Robinson failed ask either trial counsel about Hunter, if they spoke to him, or did any investigation into Hunter specifically. Presenting an alibi defense or establishing what Hunter would have testified to at trial was critical to determine whether Robinson established prejudice. Without presenting Hunter or any witnesses or evidence to establish Robinson's alibi defense, he did not establish that he was prejudiced. See *State v. Cheatham*, 296 Kan. 417, 292 P.3d 318 (2013).

CONCLUSION

For the above and foregoing reasons, the State respectfully requests that the Kansas Court of Appeals reverse the district court's determination that Mr. Huerter was ineffective and that Robinson was prejudiced by his deficient performance and affirm Robinson's original convictions and sentence.

Respectfully submitted,

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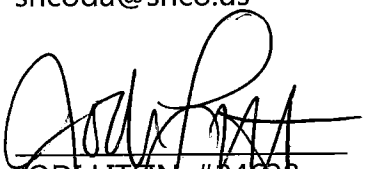

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I hereby certify that on April 26, 2017, a copy of this **Brief of Appellant** was served by email to:

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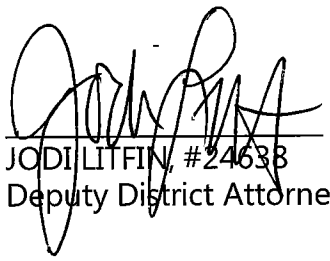

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286 P.3d 239 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Frank Jerome ROBINSON, Appellant.

No. 105,281.
|
Oct. 5, 2012.
|
Review Denied Aug. 29, 2013.

Appeal from Shawnee District Court; Jan W. Leuenberger, Judge.

Attorneys and Law Firms

Meryl Carver–Allmond, of Kansas Appellate Defender Office, for appellant.

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

Before GREENE, C.J., MALONE and ATCHESON, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** Defendant Frank Robinson appeals from his convictions for reckless second-degree murder and aggravated arson following a jury trial in Shawnee County District Court. Robinson contends the evidence failed to establish the required mental state for the murder charge and the district court impermissibly limited his lawyer's examination of potential jurors. He also says he was assessed fees for his appointed lawyer without a sufficient hearing. Robinson's arguments establish no error, so we affirm in all respects. We review the points in order after outlining the pertinent facts and procedural history.

Facts and Case History

The State charged Robinson with felony murder and aggravated arson on the theory he set a fire in an apartment building in Topeka in which a tenant living on the second floor died. The building contained four apartments, two of which were occupied—one upstairs and one downstairs. In August 2006, when the fire and the death occurred, the tenants in both apartments sold crack, and the place was known to law enforcement officers as a drug house. Shortly before the fatal fire, the girlfriend of the downstairs tenant smelled smoke. The tenant and his girlfriend found a small fire in the basement and extinguished it. The tenant then saw Robinson and told him to get inside because firefighters would be there soon. Robinson asked the tenant to give him a small amount of crack. But the tenant demurred and suggested Robinson try upstairs. Robinson replied, "Fuck Marvina [the upstairs tenant] and everybody up there ." Robinson then left the apartment.

A few minutes later, the downstairs tenant's girlfriend said she again smelled smoke. This time the house was engulfed in flames. As the pair fled the apartment, they saw Robinson walking away. The upstairs tenant, who was older and blind, could not escape and died in the fire.

The responding firefighters found an especially intense fire in the hallway and on the stairs to the second floor of the building. A fire investigator testified at Robinson's trial that the fire appeared to have been intentionally set on the stairs using an open flame, such as a lighter, and a flammable liquid.

Robinson turned himself into the Topeka police the same day as the fire. In an initial interview with one detective, Robinson denied any responsibility for the fire. But Robinson later told another detective that he had been at the house and had asked the downstairs tenant for some crack. He said he felt as if the tenant had disrespected him by not offering him some. According to the detective, Robinson agreed that he could have been smoking crack in the hall of the apartment and throwing lighted matches on the floor. Robinson characterized the fire as an accident and, if he caused it, he hadn't intended to hurt anyone. In the interview, Robinson also qualified his inculpatory statements by adding: "I can't say whether I did it [caused the fire] or didn't, but I know I was smoking right there."

***2** The jury acquitted Robinson of felony murder but found him guilty of the lesser included offense of reckless second-degree murder and of aggravated arson. The

district court sentenced Robinson to a presumptive prison term of 438 months and postrelease supervision of 36 months. The district court also ordered Robinson to pay $3,215.16 in restitution and to reimburse the Board of Indigents' Defense Services (BIDS) $2,500 for his appointed lawyer. Robinson timely appealed.

Evidence of Intent to Support Reckless Second–Degree Murder

To prove reckless second-degree murder, the State had to show Robinson killed another person, here the upstairs tenant, "unintentionally but recklessly under circumstances manifesting extreme indifference to the value of human life." K.S.A. 21–3402(b). The physical acts precipitating the death need not be reckless or careless and may be intentional. See *State v. Deal,* 293 Kan. 872, Syl. ¶ 2, 269 P.3d 1282 (2012); *State v. Robinson,* 261 Kan. 865, 934 P.2d 38 (1997) (A conviction for reckless second-degree murder was supported where the defendant intentionally struck the victim with golf club during melee; the blow inflicted fatal head wound, but the defendant disclaimed any intent to kill and said he meant to hit the victim in the arm to quell the confrontation.). Rather, the defendant may be convicted despite the absence of any conscious desire or intent to kill if the acts are so likely to lead to the death that the defendant demonstrated an extreme disregard for that consequence. *Deal,* 293 Kan. at 885–86 (The offense of reckless second-degree murder "focuses culpability on whether a killing is intentional or unintentional, not on whether a deliberate and voluntary act leads to the death."); *Robinson,* 261 Kan. at 875–76 (Reckless second-degree murder requires greater culpability than involuntary manslaughter reflecting "extreme" recklessness regarding the potential loss of life.). That is, the statute treats a defendant's gross indifference to an obvious causal connection between his or her conduct and the death of another person as the legal and moral equivalent of an actual intent to kill.

In *Deal,* the court noted that some decisions issued after *Robinson* may have obscured the interpretation laid down in *Robinson* and seemed to look at the nature of the conduct itself as intentional or unintentional. *Deal,* 293 Kan. at 885. But the court explicitly rejected any such implications in those cases as incorrectly stating the law. 293 Kan. at 885. We note that the Kansas Supreme Court issued *Deal* after Robinson filed his brief.

Robinson contends the evidence fails to support the jury's finding of an unintentional killing because he engaged in deliberate conduct: knowingly dropping lighted matches in the hallway of the apartment building. In reviewing a challenge to the sufficiency of the evidence, we accept the evidence in a light most favorable to the prevailing party, here the State. *State v. Trautloff,* 289 Kan. 793, 800, 217 P.3d 15 (2009); *State v. Pham,* 281 Kan. 1227, 1252, 136 P.3d 919 (2006).

***3** The evidence, taken in a light supporting the verdict, demonstrates Robinson deliberately engaged in conduct causing two fires in short succession, the second set on or near the stairs to the second floor where he knew an older, physically impaired woman lived. Essentially, Robinson admitted he caused the fire, although he disclaimed any intent to kill. A jury fairly could disregard his equivocations and qualification to the detective about whether he started the fatal fire. An arson investigator testified the second fire appeared to have been set on or immediately next to the stairway using a flammable liquid as an accelerant. Robinson, of course, was seen in the immediate vicinity of the building—he was running from it as the second fire rose up the stairs, turning the only passageway to the second floor into an inferno. Robinson's declarations to the downstairs tenant showed him to be angry. Robinson believed the downstairs tenant had "disrespected" him. At the same time, Robinson pointedly voiced hostility and disdain for the upstairs tenant, identifying her by name. That established a motive for the fire, whether Robinson meant only to harass and severely inconvenience the tenants rather than to kill them. It also showed Robinson knew the woman living upstairs and, therefore, should have been well aware of her physical limitations that would impede any escape from the fire.

The evidence, then, brings the case well within the scope of reckless second-degree murder outlined in *Deal* and *Robinson.* Here, Robinson's actions in starting the fire were deliberate and intentional, rather than accidental or careless. But contrary to his argument, that does not render a reckless second-degree murder charge inapplicable or unproven. The evidence otherwise supports the jury's finding of an extreme indifference to human life. In short, Robinson caused a fast-burning fire in the stairway area of an occupied apartment building knowing that an upstairs resident was older and impaired. While that might not be as proximate as hitting a person in the head with a golf club, it demonstrates the sort of gross and callous indifference to the high risk of death attendant to an action or course of conduct necessary to satisfy the statutory intent requirement.

Robinson relies heavily on *State v. Perez,* 294 Kan. 38, 261 P .3d 532 (2012), but that reliance is misplaced. In that case, the court found no clear error in failing to give a reckless second-degree murder instruction. The State charged Perez with felony murder as the triggerman

repeatedly firing a shotgun into the home of a rival gang member. One of the shots struck and killed a child staying there. A codefendant testified that Perez announced his intention to kill the gang leader in the attack. Although Perez did not testify, he framed his defense around the theory he did not participate in the crime. Given the evidence in the case, the court ruled Perez had failed to show the absence of a reckless second-degree murder instruction created clear error. 294 Kan. at 47.

***4** Robinson argues that repeatedly firing a shotgun into a house evinces a more profound disregard for human life than the State's version of his conduct in this case, so if there was no error in not giving an instruction on reckless second-degree murder in *Perez,* then he couldn't be found guilty of that offense on the facts of this case. But the argument ignores the unrefuted evidence that Perez intended to kill—a state of mind inconsistent with reckless second-degree murder—and the standard of review requiring a showing of clear error. Here, there is no comparable evidence of intent to kill. Robinson's statements to the police are to the contrary and support a conviction for reckless second-degree murder.

The jury's verdict was supported in the evidence, and that evidence established the particular intent required to prove reckless second-degree murder.

Limitation on Voir Dire Examination

Robinson contends the district court improperly limited his lawyer's examination of prospective jurors and, in so doing, compromised his right under the Sixth Amendment to the United States Constitution to a fair and impartial jury. He also contends the district court cut off the examination in violation of K.S.A. 22–3408. The statute permits a district court to limit the questioning of potential jurors to prevent "harassment" and "unnecessary delay" or when the manner or subject of the inquiry "serves no useful purpose." K.S.A. 22–3408. And a district court wields the inherent authority to reasonably regulate a trial or other proceedings. See *State v. Williams,* 259 Kan. 432, 446, 913 P.2d 587, *cert. denied* 519 U.S. 829 (1996); *Knutson Mortgage Corp. v. Coleman,* 24 Kan.App.2d 650, 652–53, 951 P.2d 548 (1997). The "nature and scope of the voir dire examination is entrusted to the sound discretion of the trial court." *State v. Reyna,* 290 Kan. 666, Syl. ¶ 16, 234 P.3d 761 (2010). A trial court's limitations on the manner of questioning jurors will be considered for abuse of discretion so long as the circumstances permit the parties to empanel an impartial jury. 290 Kan. 666, Syl. ¶ 16.

A trial court may be said to have abused its discretion if the result it reaches is "arbitrary, fanciful, or unreasonable." *Unruh v. Purina Mills,* 289 Kan. 1185, 1202, 221 P.3d 1130 (2009). That is, no reasonable judicial officer would have come to the same conclusion if presented with the same record evidence. An abuse of discretion may also occur if the court fails to consider or to properly apply controlling legal standards. *State v. Woodward,* 288 Kan. 297, 299, 202 P.3d 15 (2009). A trial court errs in that way when its decision " 'goes outside the framework of or fails to properly consider statutory limitations or legal standards.' " 288 Kan, at 299 (quoting *State v. Shopteese,* 283 Kan. 331, 340, 153 P.3d 1208 [2007]). Finally, a trial court may abuse its discretion if a factual predicate necessary for the challenged judicial decision lacks substantial support in the record. *State v. Ward,* 292 Kan. 541, Syl. ¶ 3, 256 P.3d 801 (2011) (outlining all three bases for an abuse of discretion).

***5** In this case, Robinson's lawyer chose to use extended analogies and examples to illustrate certain points or issues upon which he then examined the prospective jurors. The district court limited three of the lawyer's narratives, prompting Robinson's complaint on appeal. We need not burden the opinion with a recitation of the particulars of those narratives. The parties are familiar with them, and they are in the trial and appellate records. One generally introduced the topics of presumption of innocence and burden of proof. The second dealt with assessing credibility, and the last raised the related issue of witnesses being honest but mistaken, on the one hand, or liars, on the other.

There is nothing inherently impermissible or objectionable about a storytelling approach to jury selection, so long as the analogies or narratives do not misstate legal concepts or otherwise confuse jurors. No such problems appear to have infected what Robinson's lawyer was doing. By the same token, however, a district court need not prolong jury selection because one or the other lawyer or both wish to paint numerous colorful and time consuming word pictures in figuring out which potential jurors to strike.

The trial record reflects that Robinson's counsel actually got to do most of the painting he wished. And he did not proffer sketches of any masterpieces left undone. The district court did not limit the particular question put to the jurors during voir dire or the overall time Robinson's lawyer could spend. Rather, the district court merely reined in the lawyer's use of several narrative set pieces, fn doing so, the district court neither stepped outside its statutory or inherent authority nor prevented examination of potential jurors to explore their ability to serve fairly. At most, the district court kept Robinson's lawyer from

conducting the examination in exactly the way he wished to. While the members of this panel would not necessarily act uniformly in the same way as the district court did, we do uniformly conclude some other judges would have similarly limited the voir dire. The district court, therefore, did not abuse its discretion, and Robinson suffered no discernible prejudice.

On appeal, Robinson points to a seeming inconsistency in the jury verdicts as indicative of some sort of prejudice flowing from the limitations on voir dire. Although the verdicts are unusual, their character indicates no sentiment against Robinson and, if anything, suggests just the opposite. Robinson correctly points out that the aggravated arson conviction, which he does not challenge on appeal, is legally sufficient to support the charge of felony murder submitted to the jury. The verdict acquitting him of felony murder and convicting him of reckless second-degree murder, as a lesser included offense, is difficult to reconcile with the verdict convicting him of aggravated arson. But, as Robinson concedes, the law requires no such reconciliation in a case tried to a jury. *State v. Meyer,* 17 Kan.App.2d 59, 64–66, 832 P.2d 357 (1992). The courts accept seemingly inconsistent verdicts supported in the evidence. 17 Kan.App.2d at 65.

***6** This is such a case. As we have discussed, the evidence supported the reckless second-degree murder conviction. The evidence also supported the aggravated arson conviction. And there is nothing inherently incompatible with those two verdicts in the sense the elements of one, if proven, would negate one or more elements of the other. See PIK Crim. 4th 54.140 (elements of second-degree murder); PIK Crim. 4th 58.170, PIK Crim. 4th 58,180 (elements of arson and aggravated arson). The jurors seemingly could have convicted Robinson of felony murder based on the underlying conviction for aggravated arson. That the jurors did not fails to advance an argument that they held some prejudice against Robinson. Their verdicts gave Robinson a break. More to the point here, however, Robinson advances no convincing or logical argument that had his lawyer been allowed to complete his storytelling voir dire as he wished, the jurors would have returned a fully consistent verdict—one convicting him of felony murder or acquitting him of the homicide altogether.

In short, the district court committed no error in overseeing the jury selection process.

Payment of BIDS Reimbursement

Robinson contends the district court failed to inquire sufficiently about his financial resources and obligations at the sentencing hearing and, therefore, improperly ordered him to reimburse BIDS $2,500 for the services of his appointed trial lawyer. The fee assessment is regulated through K.S.A. 22–4513. The amount is essentially treated as a civil judgment imposed on the defendant. The statute requires that the trial court "shall take account of the financial resources of the defendant and the nature of the burden that payment of such sum will impose." K.S.A. 22–4513(b).

The district court must make that determination at the time the assessment is ordered. *State v. Robinson,* 281 Kan. 538, 546, 132 P.3d 934 (2006) ("[T]he sentencing court, at the time of the initial assessment, must consider the financial resources of the defendant and the nature of the burden that payment will impose *explicitly,* stating on the record how those factors have been weighed in the court's decision."). While the statute permits a defendant to later request modification of a BIDS assessment because of "manifest hardship," that process cannot replace the district court's studied determination of an appropriate amount in the first instance. 281 Kan. at 544.

The district court asked Robinson about his education and his training and experience in trades or occupations. Robinson told the district court he was a certified mechanic and charged $14 an hour for that work. The district court inquired about bank accounts, personal property, or other assets Robinson had that might be used to pay restitution or the BIDS reimbursement. The requested BIDS reimbursement came to $7,400. The district court acknowledged concern about how marketable Robinson's skills would be upon his release from prison. So the district court reduced the amount to $2,500. The district court sufficiently established and considered Robinson's particular circumstances and came to a reasoned conclusion as to the BIDS reimbursement. The decision was free of error.

***7** Affirmed.

All Citations

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240 P.3d 986 (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.

Thomas J. DRENNAN, Jr., Appellant,
v.
STATE of Kansas, Appellee.

No. 102,090.
Oct. 29, 2010.

Appeal from Sedgwick District Court; Anthony J. Powell, Judge.

Attorneys and Law Firms

Stephen M. Joseph, of Joseph & Hollander, P.A., of Wichita, for appellant.

Boyd K. Isherwood, assistant district attorney, Nolo Tedesco Foulston, district attorney, and Steve Six, attorney general, for appellee.

Before MALONE, P.J., HILL and ATCHESON, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** In the trial of Thomas J. Drennan Jr., for the strangulation murder of his girlfriend, Drennan raised an intoxication defense. Drennan argued the State could not prove a premeditated intentional killing because when the victim died, his severe alcoholic intoxication prevented him from forming the legal intent to kill, as well as preventing his ability to form any premeditation. Although defense counsel had talked to a psychologist before trial about the effects of alcoholic intoxication on a person's ability to form such intent, counsel chose not to call the expert to testify for two reasons. First, by not calling the psychologist, defense counsel chose to avoid a "battle of the experts" with the State—a battle that is often, in counsel's experience, confusing to a jury. Second, the circumstances of this crime, where the victim was severely beaten and then strangled to death over several minutes, augured ill for a defense focused only on premeditation.

In this action, Drennan argues his trial lawyer's performance was deficient because he did not call an expert to explain to the jury how alcoholic intoxication prevented Drennan from premeditating the death of his girlfriend. In a collateral attack on a conviction such as this, a defendant cannot prove a claim of deficient performance of counsel if a decision to not present expert testimony is a result of reasonable trial strategy. Because the record reveals the professional choices made by defense counsel here were part of a reasonable trial strategy, we hold the district court correctly denied habeas corpus relief to Drennan. We affirm the denial of his K.S.A. 60–1507 motion.

While he was extremely intoxicated, Drennan fought with his girlfriend and strangled her to death.

The district court sentenced Drennan in 2003 to a 50–year sentence for the first-degree murder of his girlfriend, Shelbree Wilson. Our Supreme Court affirmed his conviction in *State v. Drennan,* 278 Kan. 704, 101 P.3d 1218 (2004). The Supreme Court opinion gives the details of the crime and we do not repeat them here. But several facts brought out at the trial are pertinent to the issues raised in this case: Drennan had been drinking large amounts of alcohol on the evening before the murder, and the victim's death was not instantaneous.

First, Randy Prideaux, a friend of Drennan for many years, testified at trial that on the evening of the murder, he and Drennan drank several beers at a local restaurant. After awhile, Prideaux went home and Drennan remained at the restaurant. Later, at about 1:30 in the morning, Drennan awakened Prideaux by knocking on Prideaux's back door. Drennan wanted to "hang out," but Prideaux was not in the mood for company so he drove Drennan to the house Drennan shared with his girlfriend and left him there. Prideaux described Drennan as extremely intoxicated at that time, unsteady on his feet, and not very coherent.

Next, two employees of a different bar testified at trial that they had seen Drennan drinking on the night of the murder. Drennan himself said he had gone to a different bar and had drunk tequila and beer for several hours after meeting with Prideaux. Drennan maintained that he had experienced an alcoholic blackout and he did not remember going to Prideaux's place, he did not know how he got home, he did not remember any confrontation

with his neighbor, and he did not remember a fight with his girlfriend.

*2 Then, the forensic pathologist testified that the cause of Wilson's death was lack of oxygen to the brain due to strangulation. The victim had a variety of abrasions and contusions; some of her more serious injuries included several rib fractures, a small laceration of the liver, and hemorrhaging of the neck muscles. The left side of her hyoid bone was fractured, a condition resulting almost exclusively from manual strangulation. The victim also had bruising on her fingertips consistent with trying to pull a cord or ligature away from her neck. The pathologist stated it would have taken at least 4 minutes of continuous pressure blocking blood and oxygen from reaching the victim's brain before brain death occurred. After 4 minutes, the damage was irreversible.

After our Supreme Court's confirmation of his conviction, Drennan, in 2005, filed a K.S.A. 60–1507 motion alleging his court-appointed trial attorney violated his constitutional right to effective counsel. Drennan claimed his counsel's performance was deficient, arguing his lawyer "failed to present available expert testimony to explain the effect of alcohol intoxication on cognition in general and to render an opinion that [Drennan's] state of intoxication was such that he could neither premeditate a murder nor form the specific intent to kill." The district court ordered an evidentiary hearing on this claim.

At the evidentiary hearing, a psychologist and a different defense counsel offered support for Drennan's motion; his trial counsel and the State's attorney provided evidence to the contrary.

The district court heard extensive evidence concerning this motion for habeas corpus relief, which we briefly recount. Trial counsel testified that he chose not to call an intoxication expert to testify at trial regarding premeditation because he believed he had a strategy that would be more effective. Also, he was not interested in a "battle of the experts" and he did not believe there were many qualified experts who could say that alcohol alone can wipe out a person's ability to premeditate. Dr. Theodore Moeller, a clinical psychologist, testified that it is possible for a person to intend to commit an act, but not to premeditate that same act because of severe intoxication. Richard Ney, a criminal defense attorney, testified that trial counsel's choice to not call an expert in Drennan's case fell below the reasonable duty of care a defense counsel owes his or her client. The State's attorney who prosecuted the case testified she does not find psychological testimony particularly helpful to jurors and indicated she would have certainly challenged an expert's testimony in this case. The prosecutor also testified that Drennan's own testimony at trial fully advanced his "blackout theory."

The district court concluded that trial counsel was not ineffective because "it was reasonable trial strategy" for him to pursue a voluntary intoxication defense without the aid of an expert. The district court reasoned that counsel had presented ample evidence of intoxication, had investigated the possibility of presenting an intoxication expert, and had deliberately chosen not to present an expert—a strategic, objectively reasonable decision. Drennan now asks us to overturn this ruling.

We review some fundamental points of law.

*3 When reviewing an appeal of a K.S.A. 60–1507 motion after the district court has taken evidence on the matter, we must decide whether substantial competent evidence supports the factual findings of the district court and whether those findings are sufficient to support the court's conclusions of law. Substantial evidence is evidence that possesses both relevance and substance and it furnishes a substantial basis of fact from which the issues can reasonably be resolved. We must accept as true the evidence and all inferences drawn from the evidence that tend to support the findings of the district judge. *Bledsoe v. State,* 283 Kan. 81, 88, 150 P.3d 868 (2007).

In order to obtain relief in this type of action, a defendant must prove two things: first, counsel's performance was deficient; second, counsel's deficient performance was so serious it prejudiced the defense and deprived the defendant of a fair trial. Under the first element, considering all the circumstances, the defendant must show that counsel's representation fell below an objective standard of reasonableness. Our scrutiny of counsel's performance must be highly deferential. Further, while making our judgment on the matter, we must try to eliminate the distorting effects of hindsight, try to reconstruct the circumstances of counsel's challenged conduct, and then evaluate the conduct from counsel's perspective at the time the conduct occurred. Also, our courts recognize a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. 283 Kan. at 90, 150 P.3d 868.

General allegations are not persuasive in this endeavor. When demonstrating deficiency, the defendant must identify the acts or omissions made by counsel that are not the result of reasonable professional judgment. Strategic choices made after a thorough investigation of the law and the facts are virtually unchallengeable. Moreover, courts consider strategic choices made after less than a complete investigation reasonable to the extent that reasonable professional judgment supports any

limitation of investigation. Basically, then, the defendant bears the burden of demonstrating that trial counsel's alleged deficiencies were not the result of trial strategy. See *Rowland v. State,* 289 Kan. 1076, 1083–84, 219 P.3d 1212 (2009). Once the defendant proves deficient performance, we move to the second element that must be proved.

At this point, the defendant must next show prejudice resulting from counsel's performance. In other words, the defendant must show there is 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. At this stage of the analysis we review de novo the district court's inquiry, as it involves mixed questions of law and fact. *Bledsoe,* 283 Kan. at 90–91, 150 P.3d 868. The legal conclusions of the district court do not bind us.

We conclude that trial counsel did have a reasonable trial strategy and implemented appropriate tactics in an endeavor to achieve a reasonable goal.

***4** While defending someone charged with a serious crime, a lawyer and client must carefully determine what goal they intend to achieve in the prosecution. Further, they must carefully select what legal strategy to follow and what tactics to employ to fulfill their strategy. For defense counsel, such choices are based on their knowledge of the law, professional experiences, and an understanding of the facts of the case. Lawyers often differ in opinion about such choices. Reasonable professional choices are not grounds to overturn a conviction. To do that, a defendant must "show that counsel's decision was not a tactical one but, rather, revealed ineptitude, inexperience or lack of preparation." 3 LaFave, Israel, King & Kerr, Criminal Procedure § 11.10(c) (3d ed.2007).

At this point, a brief review of the testimony given at the K.S.A. 60–1507 hearing by Michael Whalen, Drennan's court-appointed trial attorney, is helpful to our inquiry. Whalen testified that in preparing for Drennan's trial, he did not specifically consider presenting a defense based on the idea that Drennan lacked the ability to premeditate as opposed to the idea that he lacked the ability to form intent. Whalen testified that he consulted Dr. Robert Barnett approximately 10 days prior to trial to discuss the effects of alcoholic intoxication on a person's ability to form intent, but he admitted that they did not discuss premeditation. Dr. Barnett told Whalen that he could not testify that a person could be so influenced by alcohol that he could not form intent.

Then, Whalen said he chose to defend Drennan based on a lack of intent. Whalen believed that if he proved a lack of intent, he eliminated the element of premeditation as well. When asked whether his focus was on intent, Whalen explained:

> "I think, based upon the facts of the case, that's probably correct, yeah. Because you also have to keep in mind that this woman was severely beaten before she was killed and I think that kind of went against really kind of the idea that this was a spur of the moment thing. And the autopsy revealed that she had a lacerated liver, her hyoid bone had been broken, there was a lot that went on prior to her being suffocated."

In other words, Whalen reasoned that the "better strategy" was to attack intent. As far as his decision to not call an expert to testify regarding premeditation—something Whalen agreed laypersons probably would not understand—Whalen explained:

> "Because I had a strategy that I believed would be more effective. A couple of different things, one, the strategy that I chose and how we presented it, from picking the jury through opening statement through the presentation of evidence to closing argument, was consistent, I believed it worked with the evidence that we had. And the fact that in this case the jury was out for quite a while, I believe this was—that one, it was effective.
>
> "Two, I wasn't really interested in having an expert testify to get into a battle of the experts or to go beyond really the lay person's—I felt that the evidence was better suited to showing a jury what mental state Tom was in through his interview, which was shown to the jury, through the information from Mr. Prideaux.
>
> ***5** "And there was the conscious fear of putting an expert up on the stand and having Ms. Parker question him about well, are you saying that a person can't form intent in any situation, were you there, and having it turned around and also used against us....
>
> "And I really don't believe that there are that many qualified or valid experts who would be able to say that alcohol alone wiped out somebody's ability to act or premeditation or have intent."

The trial transcript reveals that Whalen pursued this

strategy from the very start of the trial. In his opening statement, Whalen argued that Drennan was drinking heavily and intoxicated on the evening of the victim's murder. Whalen asked the jury to consider the "key question" of whether Drennan inflicted injuries to the victim "with premeditation." During Whalen's closing statement, the clear focus of his argument was that Drennan lacked *intent* to kill the victim due to alcoholic intoxication. In passing, Whalen refuted premeditation several times. For example, Whalen argued: "[I]f an individual is intoxicated to the point that they're not capable of creating the state of mind to specifically intend, I'm going to kill this person, or the state of mind premeditating, then they cannot be found guilty of these charges of either first degree murder or second degree murder."

Then, at the 60–1507 hearing, Whalen testified that he reviewed every reported Kansas case dealing with the effects of voluntary intoxication as it pertained to *intent* and did online research regarding the effects of alcohol. Whalen admitted he did no pretrial research specifically dealing with the element of premeditation. He felt that expert testimony would break the flow of the case and would not be helpful. Whalen stated his choice to present the testimony as he did fit with what he believed to be the appropriate approach to the case.

Two Kansas cases impel us to hold that Whalen's performance was not deficient. In *Ferguson v. State,* 276 Kan. 428, 447–48, 78 P.3d 40 (2003), our Supreme Court rejected Ferguson's claim that the district court erred in concluding trial counsel was not deficient for failing to employ an expert arson investigator and an accountant. In that case, the trial counsel indicated he chose not to present expert testimony as a matter of strategy in conformance with his theory of defense.

Then, in *State v. Holmes,* 278 Kan. 603, 629, 102 P.3d 406 (2004), our Supreme Court held that when a decision to not present expert testimony is a result of reasonable trial strategy, a defendant cannot demonstrate deficient performance for purposes of an ineffective assistance of counsel claim. In that case, Holmes killed his girlfriend after ingesting heroin, cocaine, and smoking crack. In his appeal, Holmes claimed his defense counsel was ineffective for failing to employ a drug expert to explain the effects of drug use. Although Holmes did not identify an expert witness that could have testified, he alleged that an expert could have explained the effects of high drug usage. In rejecting this claim, our Supreme Court observed that (1) sufficient evidence of the substantial effects of drug use was placed before the jury through other witness testimony; and (2) ' "expert" ' testimony was presented to the jury through defense counsel's cross-examination of the forensic pathologist regarding the effects of cocaine. The court concluded Holmes had not demonstrated that defense counsel's alleged deficiencies were not the result of strategy. 278 Kan. at 630, 102 P.3d 406.

***6** Whalen's testimony indicates that his choice to defend Drennan based solely on a lack of intent—and the resulting decision to not present expert testimony regarding the element of premeditation—was based on a legitimate trial strategy. The evidence did not favor a lack of premeditation. After all, the physical evidence of the beating suffered by the victim and her strangulation for at least 4 minutes support premeditation. In *State v. Appleby,* 289 Kan. 1017, 1064, 221 P.3d 525 (2009), our Supreme Court found there were facts to support the element of premeditation where the victim was beaten and strangled. Also, in *State v. Gunby,* 282 Kan. 39, Syl. ¶ 9, 144 P.3d 647 (2006), the court stated: "Premeditation is the process of thinking about a proposed killing before engaging in the homicidal conduct, but it does not have to be present before a fight, quarrel, or struggle begins. Death by manual strangulation can be strong evidence of premeditation." For a similar holding see *State v. Scott,* 271 Kan. 103, 108, 21 P.3d 516, *cert. denied* 534 U.S. 1047, 122 S.Ct. 630, 151 L.Ed.2d 550 (2001). On the other hand, if Whalen successfully challenged the element of intent, Drennan could not be convicted of either first-degree murder or second-degree murder. Although Whalen's strategy was ultimately unsuccessful and may not have been the chosen strategy of other attorneys, it was nevertheless a reasonable strategy.

Going on, we examine more closely the issue of not calling an expert. Drennan has not shown that Whalen was deficient for failing to present the testimony of an expert witness. Whalen testified he wished to avoid a "battle of the experts"—a strategic decision. The State's attorney testified that because she does not find psychological testimony particularly helpful to jurors, she generally focuses on the evidence and facts of the case. Her testimony indicated she would have certainly challenged an expert's testimony in this case. Drennan has not shown that Whalen's failure to present Dr. Moeller's views was deficient. Additionally, we must point out that the jury heard Dr. Moeller's general theme by way of jury instruction No. 13. That instruction stated voluntary intoxication could be a defense where the evidence showed that intoxication impaired Drennan's faculties such that "he was incapable of forming the necessary state of mind of premeditation *or* the necessary intent to kill Ms. Wilson." (Emphasis added.) By following this instruction, the jury could have convicted

Drennan of a lesser crime due to his intoxication. Obviously the jury was not so convinced.

Finally, Drennan highlights the testimony of Ney, the criminal defense attorney. At the K.S.A. 60–1507 hearing, Ney said that in a case where voluntary intoxication was the defense, the failure to call an expert witness fell below the standard of care for the conduct of the defense. Ney agreed that jurors would probably not understand the effect of alcoholic intoxication on a person's ability to premeditate. Ney also agreed that it is possible for a person to form the intent to kill but not premeditate the killing because of intoxication. Ney testified that an expert could explain whether alcohol severely limited Drennan's higher intellectual functions and prevented him from thinking the matter over beforehand. Even though Ney's testimony is compelling to a certain extent, it simply highlights the differences in the strategic choices of attorneys. The fact that Whalen's trial strategy differs from the strategy suggested by Ney does not make Whalen's performance deficient when considering a collateral attack on a conviction.

*7 Finally, we cannot say that Drennan was prejudiced by his counsel's trial performance. We cannot conclude there is a reasonable probability that, but for counsel's deficient performance, the result of Drennan's trial would have been different. See *Bledsoe,* 283 Kan. at 90, 150 P.3d 868. As we previously noted, our Supreme Court in *Appleby* found that the facts supported the element of premeditation where the victim was beaten and strangled. 289 Kan. at 1064, 221 P.3d 525. Here, the evidence showed the victim sustained various abrasions, contusions, and injuries, including multiple rib fractures, laceration of the liver, hemorrhaging of the neck muscles, a fractured hyoid bone, and bruised fingertips consistent with trying to pull a cord or ligature away from her neck, and she died from strangulation. There was overwhelming support for the element of premeditation. Trial testimony indicated it would have taken at least 4 minutes of continuous pressure blocking blood and oxygen from reaching her brain before brain death occurred. Evidence also indicated she had obtained two protection-from-abuse orders against Drennan prior to her murder. In one order, she alleged Drennan had put his hands around her neck to choke her. Also, in the past, she had suggested to others that Drennan would kill her.

We affirm the district court's denial of Drennan's motion.

All Citations

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