No. 16-116483-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

FRANK ROBINSON
Petitioner - Appellee/Cross-Appellant

vs.

STATE OF KANSAS
Respondent-Appellant/Cross-Appellee

BRIEF OF CROSS-APPELLEE

Appeal from the District Court of Shawnee County, Kansas
Honorable Evelyn Wilson, District Judge
District Court Case No. 14CV795

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NATURE OF THE CASE

This is the response to the Cross-Appellant's brief.

STATEMENT OF ISSUES

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   c. **Trial counsel was not ineffective for failing to present testimony from a dead witness.**
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STATEMENT OF FACTS

The Statement of Facts were presented in State's Appellant's brief.

ARGUMENT AND AUTHORITIES

1. **The district court did not err in its ruling regarding trial counsel's effectiveness.**

Preservation

These issues were raised at the district court level and the district court did make ruling on the issues. (R. I, 354-385.) These issues therefore may be considered by this Court.

Standard of Review

When the district court conducts a full evidentiary hearing on an ineffective assistance of counsel claim, this Court must first determine whether the district court's findings are supported by substantial evidence and then determine whether the factual findings support the court's legal conclusions. While this Court must accept the district court's factual findings (to the extent they are supported by substantial evidence), this Court reviews its ultimate legal conclusion independently, with no required deference to its ruling. *Fuller v. State*, 303 Kan. 478, 485, 363 P.3d 373 (2015).

a. Trial counsel was not ineffective for failing to move to suppress Robinson's statement.

Argument

There was no error in failing to suppress Robinson's statements.

As argued to the district court, at the evidentiary hearing, both of Robinson's trial counsel testified that the statement was used in support of his defense. (R. XXIV, 72, 89, 94, 113, 129-31.) First, Mr. Huerter testified how in certain aspects Robinson's statements hurt him and in some aspects it helped. (R. XXIV, 89.) He testified that his strategy was to use Robinson's statements as his defense. (R. XXIV, 107.)

As noted by Mr. Belveal,

> Well, we hit on a couple different places. I mean, we used them in cross examination of the detectives, you know, couching

> the quote, unquote confessions. And, you know, Frank saying he didn't burn the house down, or if he did burn down the house, it was accidental. **Obviously, it wasn't an intentional act. So even if he did set the fire, it wasn't set in some way that was intentional.** And Joe [Huerter] hit on it again in closing argument.

(R. XXIV, 285.) (emphasis added.)

In other words, Robinson's statements were helpful to the defense because he stated that the fire was accidental, and thus not an intentional act, which directly challenges the arson charge. Notably, this strategy decision was made by trial counsel in consultation with Robinson. (R. XXIV, 90-91, 260.)

A strategy decision was made, in consultation with Robinson, not to make a legal challenge with would jeopardize the statement's admissibility. And if a legal challenge would have somehow been successful, the jury would not have been able to hear Robinson's statement. Then the pressure for Robinson to testify how the fire was accidental would have quite present.

Moreover, there were serious challenges to the suppression of Robinson's statements. To begin with, the state district court had found that Robinson's statements were made voluntarily under a *Jackson v. Denno* analysis. And the federal court had previously denied the suppression of Robinson's statements. (R. XXIV, 88.)

Regardless of whether the arrest of Robinson was challengeable or not - his argument fails because he mistakenly assumes that Robinson's statements would be suppressed. Yet even if the arrest warrant was found to be invalid, there was already probable cause to arrest Robinson. (R. XXIV, 90.)

A warrantless arrest in a public place does not violate the Fourth Amendment or the Kansas Constitution if the arrest is based on probable cause that the person has committed or is committing a felony. *State v. Ramirez,* 278 Kan. 402, 405, 100 P.3d 94 (2004). Under Kansas law, an officer is authorized to make a warrantless arrest when the officer has probable cause to believe that a person is committing or has committed a felony. K.S.A. 22–2401; *Ramirez,* 278 Kan. at 405, 100 P.3d 94; see also *State v. Hill,* 281 Kan. 136, 146, 130 P.3d 1 (2006) ("Probable cause to arrest exists when the facts and circumstances within the arresting officer's knowledge are sufficient to assure a person of reasonable caution that an offense has been or is being committed and the person being arrested is or was involved in a crime."); see also *State v. Ingram,* 279 Kan. 745, 752, 113 P.3d 228 (2005) ("In determining whether probable cause to arrest exists, a court examines the totality of the circumstances from the standpoint of an objectively reasonable officer.").

In light of Brown's statements that he made to law enforcement regarding Robinson's involvement at the time of the fire, there was probable cause to arrest Robinson for his involvement in the building catching on fire. As noted by Robinson in his brief, the decision to arrest of Robinson occurred *before* the execution of the warrant. A search warrant alone is not a basis to arrest an individual for a criminal offense. See *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 & n. 6, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978) (pointing out differing legal implications of probable cause supporting a search warrant and probable cause permitting an arrest).

As such, regardless of whether or not trial counsel pursued a *Franks* hearing to challenge the search warrant, the statements were not the product of an illegal arrest. Therefore, the statements would not have been suppressed if the search warrant had found to be invalid. Consequently, the automatic assumption that suppression of Robinson's arrest would result in the suppression of his statements is erroneous. Trial counsel thus was not ineffective for failing to challenge Robinson's arrest, and thereby his statements.

Finally, in terms of where trial counsel testified that he would have done things differently – hindsight is not the vantage point from which we judge allegations of incompetence. *Thomas v. State*, 242 N.E.2d 919 (1969).

> " 'It is one of the characteristics of human experience that hindsight often reveals alternative courses of conduct that may have produced different results if only they had been employed. Hindsight, however, is not the vantage point from which we judge allegations of incompetence. [Citation omitted.] It may be that had defendant's counsel on appeal conducted the defense at trial, he would have done things differently. Whether or not he would have fared better before the jury is a matter of conjecture. Where experienced attorneys might disagree on the best tactics, deliberate decisions made for strategic reasons may not establish ineffective counsel.' [Citation omitted.]"

State v. Kendig, 233 Kan. 890, 896, 666 P.2d 684 (1983); see also *Chandler v. United States*, 218 F.3d 1305, 1315 n. 16 (11th Cir. 2000) (en banc).

Even if this Court determines that counsel should have moved to suppress the statements, Robinson still fails to show that trial counsel's errors prejudiced the defense (errors so egregious as to deprive the petitioner of a fair trial). That is, because Robinson stated that the fire was accidental, and thus not an intentional act, his statements were helpful to the defense because his intent directly challenges the arson charge.

b. Trial counsel was not ineffective for failing to impeach Detective Hill and Fire Marshall Roberts.

Argument

Robinson argues that trial counsel should have attempted to impeach Detective Hill and Fire Marshall Roberts regarding their prior statements. First, he asserts that trial counsel should have impeached Detective Hill concerning Robinson's admission regarding the fire being an "accident."

Second, he argues that trial counsel was deficient for not impeaching Fire Marshal Robert regarding the pristineness of the gasoline can that was found at the scene.

The district court properly "found no merit" in Robinson's argument regarding the two State witnesses. (R. I, 372.) As explained by the district court, "when trial counsel's performance is one of strategy, this Court must give a 'strong presumption that counsel's conduct **falls within the wide range of reasonable professional assistance**.' " *Citing Crowther v. State*, 45 Kan. App. 2d 559, 563-64, 249 P.3d 1214 (2011). (R. I, 372.) (emphasis added).

Regarding the impeachment of Detective Hill, as noted by the district court, Robinson did not present evidence "other than a report, to show alleged inconsistencies in Detective Hill's testimony." (R. I, 372.) Given "such minimal evidence of alleged consistencies in the testimony" of Detective Hill, the district court found that trial counsel's decision not to impeach the two witnesses as argued by Robinson was not deficient.

With respect to Fire Marshal Robert, the significance of the dirtiness of the gasoline can and its location was not significant. In fact, on cross-examination, trial counsel testified how he questioned the Fire Marshal regarding the lack of fingerprints found on the gasoline can or other identifiers linking the can to Robinson. (R. XXIV, 110.) Robinson only raised

questions regarding the can's location and pristineness and fails to show how questions regarding the gasoline would rise to the level of ineffectiveness of counsel.

Should this Court find that trial counsel erred in impeaching the two State's witnesses regarding Detective Hill's testimony concerning Robinson's admission of the fire being an "accident" and the gas can, such error was not constitutionally deficient (errors so egregious that performance was less than guaranteed by the U.S. Constitution), Robinson still fails to show that trial counsel's errors prejudiced the defense (errors so egregious as to deprive the petitioner of a fair trial). The discrepancies in their testimony were miniscule.

Robinson's argument fails to illustrate the significance from these indiscrepancies, and that a jury would have "picked up" on the minor discrepancies in the witnesses' testimony. In other words, while trial counsel may have successfully impeached the two witnesses, it remains unclear that such impeachment would have had an impact with the jury. Robinson fails to show that the alleged deficient performance prejudiced him at trial. See *Edgar v. State*, 294 Kan. 828, 283 P.3d 152 (2012) (petitioner failed to show prejudice in ineffective assistance of counsel argument).

c. **Trial counsel was not ineffective for failing to present non-exculpatory statements from a deceased witness because they were inadmissible and not contradictory.**

On appeal, Robinson argues that trial counsel should have attempted to admit the statements of Lisa Miller, who had died prior to trial.

The district court was correct in finding this was not erroneous. As noted by the court,

> It is unclear whether Ms. Miller's statements actually contradicted Mr. Brown's. Ms. Miller was deceased at the time of trial. As the Petitioner's Post-Hearing Brief notes, "The only corroboration of Brown's statements provided by Miller is that Robinson was at 427 S.W. Tyler at some point prior to the fatal fire. " Post-Hearing Brief, at 23. Regardless, at the evidentiary hearing, Mr. Huerter testified as to reviewing Miller's statements to law enforcement. Mr. Huerter testified as to reviewing Miller's statements to law enforcement. Mr. Huerter stated, "if there was anything in her statements that we needed to use, it would have been difficult." Evidentiary Hearing, at 40. Mr. Huerter also suggested that it was unclear to what extent Miller's statements actually contradicted Brown's as Mr. Brown's statements were "somewhat self-impeaching" already. Evidentiary Hearing, at 40, 105-08. However, Mr. Huerter also testified that, even if he could have introduced Ms. Miller's statements into evidence, he was "not particularly" interested in introducing evidence from another witness that placed the Petitioner at the scene of the fire. Evidentiary Hearing, at 107.
>
> This represents a closer call than Mr. Huerter's decision not to call Mr. Rodriguez as a witness, but, ultimately, the Court concludes that the decision was strategic in nature. It appears that Mr. Huerter was aware of the potentially useful nature of Ms. Miller's statements, but chose not to try and introduce them both because he believed he had already sufficiently impeached Mr. Brown and because he did not wish to produce evidence from another witness that placed the Petitioner at the scene of the fire. While the failure to contradict Mr. Brown's testimony that he saw the Petitioner fleeing the scene presents a greater problem -- for instance, the court of appeals relied, in part, on Mr. Brown's statement that he saw the Petitioner fleeing from the scene of the

> fire -- it remains unclear whether Mr. Miller actually "contradicted" that statement. As with Ms. Rodriguez, Ms. Miller's statements only establish that *she* did not see the Petitioner fleeing from the scene; they do not explicitly contradict *Mr. Brown's* perception to that effect.

(R. I, 377-78.)

The statements were not exculpatory. Also, trial counsel testified that her statements had the effect of placing Robinson at the house and would not have helped his defense. (R. XXIV, 101, 103.) As noted by trial counsel, the statements placed Robinson **at the scene of the fire**.

While Robinson now asserts that her statements would have removed him from the scene, that argument fails to acknowledge the impact that Ms. Miller's out-of-court statements would have had on the jury. Naturally, in closing arguments, the State would have argued how there were **two witnesses** that placed Robinson at the house.

Further, there were certain hearsay hurdles that the defense would have had to overcome to admit the statements. Trial counsel explained this obstacle at the evidentiary hearing. (R. XXIV, 102.) Robinson disagrees, and asserts that the evidence would have been admissible under *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). But *Chambers* is distinguishable from this case. Chambers involves the admissibility of "critical evidence": a third party's confession to a murder. *Chambers,* 410 U.S. at 302.

Kansas courts have noted that state hearsay rules " 'may not be applied mechanistically to defeat the ends of justice' " and may be forced to yield when admission of hearsay **is critical to the presentation of a defense.**" *State v. Stano*, 284 Kan. 126, 134, 159 P.3d 931 (2007) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 [1973]) (emphasis added). Unlike in *Chambers*, Ms. Miller's statements may or may not have assisted the defendant. The statements of the deceased were not critical to Robinson's defense.

As noted above, the State would have used Ms. Miller's statements in closing to confirm how **two witnesses** that had placed Robinson at the house. Further, simply because the statements may have been admissible, Robinson fails to recognized how a "trial court is necessarily given considerable discretion in admitting statements under K.S.A. 2014 Supp. 60–460(d)(3)." *State v. Hobson*, 234 Kan. 133, 158, 671 P.2d 1365 (1983).

Also, in *Stano*, the Kansas Supreme Court clarified that its holding in *State v. Hills,* explaining that "it did not lead inexorably to the conclusion that a court **must admit any exculpatory statement, even if hearsay, so that a defendant may present his or her defense.**" *Stano*, 284 Kan. at 136. (emphasis added).

Additionally, "the presence or absence of an incentive to falsify or distort is a question of fact to be determined by the trial judge in light of all

the circumstances." *Hobson*, 234 Kan. at 158, 671 P.2d 1365. Here, Robinson simply asserts that Ms. Miller, who was in the same drug house as Brown, had no incentive to distort or falsify statements. That assertion is insufficient in showing that the trial court would have determined to admit the statements of the deceased witness.

The State also would have argued against the admission of the deceased witness's statements. Right before trial, the State filed a motion in limine, preventing defense from arguing a unknown party committed the offense. (R. XXIV, 32.) Likewise, any attempt by the defense to admit the unchallenged statements at trial would have certainly been challenged by the State. To argue years later that defense should have admitted these statements, fails to consider both the statutory hurdles as well as the State's own objections to the deceased's statements.

In essence, Robinson argues as if the statements would have been admitted at trial. Yet as shown in *Hobson* and *Stano*, the district court would not automatically admitted Ms. Miller's statement. Trial counsel correctly noted the hurdles in overcoming the exclusion of her statements.

Reinna Rodriguez

Robinson also asserts that trial counsel should have called Reinna Rodriguez to testify on Robinson's behalf. He claims that she would have

testified that she did not see Robinson at the scene when she approached the burning building.

In its ruling, the district court disagreed, noting,

> Had Ms. Rodriguez testified at trial consistently with the statements she allegedly made in the police report, her statements would still fail to contradict Mr. Brown's testimony; they merely establish, at best, that *she* saw no one running away from the scene of the fire, but they cannot establish that Mr. Brown did not. Thus, while Ms. Rodriguez may have called into question Mr. Brown's observations, it cannot be said that [trial counsel] performed deficiently in failing to call her as a witness."

(R. I, 377-78.) (emphasis in original). The district court was correct in finding this was not erroneous.

This is also sound trial strategy. Notably, with respect to trial strategy, " '[w]here experienced attorneys might disagree on the best tactics, deliberate decisions made for strategic reasons may not establish ineffective counsel.' " *Crease v. State*, 252 Kan. 326, 338, 845 P.2d 27 (1993) (quoting *State v. Kendig*, 233 Kan. 890, 896, 666 P.2d 684 [1983]). The Kansas Supreme Court explained that trial counsel may make a strategic choice regarding the choice of witnesses "without input from his client." *Thompson v. State,* 293 Kan. 704, 270 P.3d 1089 (2011) (choice of witnesses belongs to counsel) (emphasis added).

Reasonable defense tactic

Notably, "if the counsel's act was the result of a reasonable defense tactic, then this court will find his assistance to have been competent and effective." *State v. Logan*, 236 Kan. 79, 83, 689 P.2d 778 (1984). Trial counsel testified regarding his defense tactics and how the defense strategy did not involve presenting testimonial evidence of another person placing Robinson at the fire's location. (R. XXIV, 107.)

Robinson cannot show that this alleged error prejudiced his defense.

Even if this Court determined the strategic decision not to try and admit any of Miller's prior statements was constitutionally deficient (errors so egregious that performance was less than guaranteed by the U.S. Constitution), Robinson still fails to show that trial counsel's errors prejudiced the defense (errors so egregious as to deprive the petitioner of a fair trial). As shown above, Robinson cannot show that Miller's statements were admissible, or that if they were admissible how those statements would have changed the trial's outcome. Notably, the State would have used Miller's statements to support its theory of the case.

Rather, Robinson is simply dissatisfied with the strategic decision not to use Ms. Miller's statements. Consequently, Robinson's attach on counsel's strategic decision regarding the prior statements

and the impeachment of Mr. Brown fails to meet the legal standard of establishing ineffective assistance of counsel.

d. Trial counsel did not prevent Robinson from testifying.

In his 60-1507 motion, Robinson asserts that trial counsel prevented Robinson from testifying in his defense. Yet at the evidentiary hearing, trial counsel testified how the decision to testify was Robinson's decision alone. (R. XXIV, 118-19, 265-66, 278-82.) Robinson's second defense attorney testified, "we would have given him our opinion on the matter but we would have always said to him, its completely up to you." (R. XXIV, 266.) He explained how the testimony of Robinson would not have assisted in his defense because he would not be a good witness on the stand, "His memory was very poor as to the facts of the case, largely because of drug use. And our suggestion to him, repeated suggestion to him, was that he not testify but if he wanted to he could." (R. XXIV, 281.) Additionally, Robinson's argument that he was pressured by trial counsel fails in light of his waiver in open court, of his right to testify. (R. XII, 191-192.)

In *State v. Olivas*, 2005 WL 217166 (filed on Jan. 28, 2005) (unpublished)(attached), the defendant also argued that he was pressured to waive his right to testify. There, this Court found from its review of the record that the defendant had twice declined to testify. More importantly, there is nothing to demonstrate he was pressured by his attorney not to

testify or that the defendant would have testified but for his attorney. Accordingly, this Court ruled that the claim failed. *Olivas*, 2005 WL 217166 at *1.

Likewise, in this case, a review of the record also shows the Robinson had declined to testify. As noted above, in open court, Robinson stated that the decision not to testify was his own. (R. XII, 191-92.) Further, Robinson never testified at the evidentiary hearing that, but for his defense attorney, he would have testified. (R. XXIV, 2.) In fact, Robinson never testified at the evidentiary hearing on his 1507 motion. (R. XXIV, 2.) As such, the district court correctly held that this claimed error by Robinson did not result in ineffective assistance of counsel. (R. I, 379.)

Robinson cannot show prejudice if this Court finds that trial counsel had erred in allegedly pressuring Robinson not to testify. At the evidentiary hearing, trial counsel testified how the testimony of Robinson would not have assisted in his defense because he would not be a good witness on the stand: "His memory was very poor as to the facts of the case, largely because of drug use. And our suggestion to him, repeated suggestion to him, was that he not testify but if he wanted to he could." (R. XXIV, 281.) Given this, this Court should not find that Robinson was prejudiced if he was in fact pressured not to testify. This Court should find that trial counsel did not prevent Robinson from testifying.

e. Trial counsel was not ineffective for stipulating to a non-prejudicial element of the arson offense.

Robinson was charged with committing aggravated arson. (R. I, 355.) The elements for aggravated arson are:

1. That the defendant intentionally damaged the building and/or property of Titan Investments L.L.C. by means of fire;
2. That the defendant did so without the consent of Titan Investments L.L.C.
3. That at the time there was a human being in the building;
4. And that this act occurred on or about the 8th day of August, 2006, in Shawnee County, Kansas.

(R. XIII, 48.) See K.S.A. 21-3719. At trial, trial counsel stipulated to the one non-prejudicial element, namely that the fire was set without the consent of Titan Investments. In other words, there was no authority to set the building on fire.

In his 60-1507 motion, Robinson asserts that the stipulation of this one element of arson prejudiced Robinson. In support, he argues that had he not stipulated to the element, he could have cross-examined the owner of the building's condition.

This argument fails. First, the stipulation to this element assisted Robinson in his defense. As stated by Robinson's trial counsel, having the jury hear another witness regarding the fire would only hurt his defense:

> There could either be a stipulation or there's going to have to be their witnesses put on the stand and one more witnesses that's talking about somebody lighting this on fire without their permission. I'd rather not have a jury hear that, there's no benefit to it. If there no chance - there's absolutely no chance we were going to establish that the owner of the property had given permission to burn it down.

(R. XXIV, 78-79.)

The live testimonial evidence regarding this simple element would have harmed the defendant in "having another witness testify to the fire." (R. XXIV, 78-79.) Here, the element of having no authority to set the building on fire was not critical to the State's case against Robinson. For instance, during closing arguments, the State briefly mentioned the element in its discussion of the evidence against Robinson. (R. XIII, 60.)

Also, Robinson argues that defense could have cross-examined about the condition of the building. The State's questions would only be focused on the lack of permission to set the building on fire, and not on the dilapidated condition of the building. Thus any questions on cross-examination regarding the building's condition would be beyond the scope of direct examination. The State would have objected to the questions because they would have been outside the scope of direct examination.

Robinson, however, fails to acknowledge that those questions would be outside the scope of direct examination. See *State v. Westfahl*, 21 Kan. App. 2d 159, Syl. ¶ 3, 898 P.2d 87 (1995) ("The scope of cross-examination is a

matter within the sound discretion of the trial court and, absent a clear showing of abuse, the exercise of that discretion will not constitute prejudicial error. ") That is, if the witness had testified, he likely would have only testified to the authority not to set the building on fire. See *State v. Canaan*, 265 Kan. 835, 853, 964 P.2d 681 (1998) (district court judge properly limited cross-examination that went beyond the scope of the direct examination.). The likelihood of defense's ability to cross-examine the witness regarding the building condition was not present.

As explained by the district court, "choosing to refrain from presenting a jury with repeated conversations about "lighting" of a fire was reasonable. (R. I, 380.)

Lastly, in *Thompson v. State,* 293 Kan. 704, 718–19, 270 P.3d 1089 (2011), in a 1507 motion, the defendant argued that his trial counsel was ineffective because he stipulated to the admission of a videotaped interview of the victim, Thompson's young daughter. Thompson argued that his trial counsel should not have stipulated to the videotaped interview's admission without requiring the State to satisfy K.S.A. 22–3433(a) (now repealed). Under K.S.A. 22–3433(a), the recording of a statement of a child crime victim younger than 13 is admissible only if nine conditions are met.

At the evidentiary hearing on Thompson's K.S.A. 60–1507 motion, Thompson's trial counsel testified that he had discussed whether to put the

young child on the stand with Thompson, but Thompson "had expressed concern that S.T. would carry the burden of having put her father in prison." *Thompson*, 293 Kan. at 707. Thompson's counsel said he was "not going to put that little girl through cross examination," although S.T. was present for trial.

"Under these circumstances, we see no deficient performance by trial counsel in stipulating to admission of the videotape[.]" *Thompson*, 293 Kan. at 719. The *Thompson* court found that trial counsel had "pursued a strategy to maximize the opportunity to assail the videotaped interview method without directly attacking the young and presumably vulnerable [child]." *Thompson*, 293 Kan. at 719. Further, the court noted, trial counsel consulted Thompson even though he could have made this strategic choice without input from his client. The court thereby determined that Thompson was "unable to show that this decision fell below an objective standard of reasonableness." *Thompson*, 293 Kan. at 719.

Similarly, Robinson was not prejudiced by trial counsel's strategy to stipulate to the non-prejudicial element of arson. He also is not entitled to reversal and remand for new trial based on trial counsel's stipulation to the non-prejudicial element of arson. Robinson as in *Thompson*, is unable to show that this decision fell below an objective standard of reasonableness.

Robinson cannot show prejudice if this Court finds the stipulation was in error. The stipulation of the element, by its nature, could not have affected the result of the trial, and thus there is no prejudice.

f. There was no cumulative error.

Cumulative error will not be found when the record fails to support the errors raised on appeal by the defendant. *State v. Walker*, 283 Kan. 587, 594, 153 P.3d 1257 (2007). One error is insufficient to support reversal under the cumulative effect rule. *State v. Anthony*, 282 Kan. 201, 217, 145 P.3d 1 (2006).

In *Bell v. State*, No. 90,101, 2004 WL 324388 (filed Feb. 20, 2004)(unpublished)(attached), an appeal based on a 1507 motion, this Court explained that cumulative error is only found when the errors are considered collectively, "may be so great as to require reversal of the defendant's conviction." The test is "whether the totality of circumstances substantially prejudiced the defendant and denied the defendant a fair trial. No prejudicial error may be found upon this cumulative effect rule, however, if the evidence is overwhelming against the defendant.' *State v. Lumbrera*, 252 Kan. 54, Syl. ¶ 1, 845 P.2d 609 (1992)." *State v. Plaskett*, 271 Kan. 995, 1022, 27 P.3d 890 (2001).

The *Bell* court found that the petitioner had "failed to present substantial evidence of mistakes by trial counsel that would support his

cumulative error claim." *Bell v. State*, 2004 WL 324388 at *3. The *Bell* court concluded the district court did not err in concluding Bell was represented by competent counsel and received a fair trial. *Bell v. State*, 2004 WL 324388 at *3.

Likewise, after reviewing the record and briefs, this Court should find that any trial errors were harmless or not substantiated. There was no cumulative error in this case. In order to have cumulative error, there must be multiple errors in the trial. See *State v. Lumbrera*, 252 Kan. 54, Syl. ¶ 1,

Here, as asserted in Appellant's brief, trial counsel did not error in not challenging the State's expert regarding whether an accelerant was used or that the fire was incendiary. Trial counsel explained why he did not present an expert witness. Further, as explained above, there was no error in failing to suppress Robinson's statements. Additionally, as explained above, trial counsel was not ineffective for how he cross-examined Detective Hill and Fire Marshall Roberts. Nor was he defective for not pursuing the admittance of the statements of a dead witness. As noted by the district court, her statements were not exculpatory and she also would have had similar credibility problems as Brown. This court should also find that, as explained by trial counsel, he did not prevent Robinson from testifying, nor was he ineffective for stipulating to a non-prejudicial element of arson. Because of the lack of errors, this Court should not find cumulative error. See *Thompson*

v. *State,* 293 Kan. at 721 (finding no error, the cumulative error rule is inapplicable).

Conclusion

This Court should reject the Cross-Appellant's arguments presented in its cross-appeal that the district court erred in not finding trial counsel ineffective for failing to suppress statements.

Respectfully submitted,

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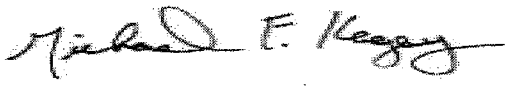

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CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2017, a copy of this Cross-Appellee's Brief was served on Jean Phillips, #14540 at phillips@ku.edu.

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104 P.3d 1024 (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.
Arnoldo D. OLIVAS, Appellant.

No. 91,516.
|
Jan. 28, 2005.
|
Review Denied May 3, 2005.

Appeal from Sedgwick District Court; Karen Langston, judge. Opinion filed January 28, 2005. Affirmed.

Attorneys and Law Firms

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Before ELLIOTT, P.J., CAPLINGER, J., and WAHL, S.J.

MEMORANDUM OPINION

PER CURIAM.

*1 Arnoldo D. Olivas a/k/a Arnoldo Villa (Olivas) appeals the denial of his motion to vacate the judgment of his rape conviction due to ineffective assistance of counsel.

We affirm.

The performance and prejudice prongs of the ineffective assistance of counsel inquiry are mixed questions of facts and law requiring plenary review. *Easterwood v. State,* 273 Kan.

361, 370, 44 P.3d 1209, *cert. denied* 537 U.S. 951, 123 S.Ct. 416, 154 L.Ed.2d 297 (2002); see *Chamberlain v. State,* 236 Kan. 650, 656-57, 694 P.2d 468 (1985).

Even assuming the performance prong has been met, Olivas fails to meet the prejudice prong test.

With respect to the performance prong, Olivas' reliance on *United States v. Gray,* 878 F.2d 702, 714 (3d Cir.1989), is misplaced. *Gray* is clearly distinguished from the present case.

First, in the present case, there were only three potential eyewitnesses at the El Bolongo; police questioned them all and all said they were not present when the rape took place. No one could have corroborated Olivas' version of the event because only A.C.R. and Olivas were in the bathroom.

Second, the *Gray* court noted the prosecution's case was weak because it offered no evidence to rebut Gray's testimony, one officer recanted his testimony and the other detective's testimony contradicted that of all other witnesses. 878 F.2d at 713. In the present case, the State presented strong evidence from A.C.R., the police officers who interviewed her after the rape, the nurse who examined and interviewed her, and also the photo evidence showing the injuries she sustained.

Third, the *Gray* court found that if certain evidence had been presented, the witness could have provided essential background information and the like. 878 F.2d at 713-14. Here, Olivas presented no witnesses at his posttrial evidentiary hearing.

On appeal, Olivas ignores both the factual distinctions from *Gray,* but also Kansas case law. For example, in *Cellier v. State,* 28 Kan.App.2d 508, 520, 18 P.3d 259, *rev. denied* 271 Kan. 1035 (2001), we held counsel's presumptive deficient failure to pursue a diminished capacity defense did not result in prejudice when defendant presented no evidence at trial or at his posttrial hearing that he lacked the specific intent to commit the crime.

Simply put, in the present case, no potential witnesses were presented that may have caused the jury to have reasonable doubt if heard at trial.

Olivas presented no testimony at his posttrial hearing from any witnesses who could remotely corroborate his theory that A.C.R. lured him into the bathroom in an effort to get some cocaine or that the sexual contact was consensual.

Also, Olivas argues for the first time that attorney Islas persuaded him not to testify at his trial and, thus, the court was denied the opportunity to hear his defense of (1) consensual

sexual contact with A.C.R., and (2) that A.C.R. lied because she was dating Vacquera, who owed Olivas a $15,000 drug debt. Our review of the record shows Olivas twice declined to testify and there is nothing to demonstrate he was pressured by Islas not to testify or that Olivas would have testified but for Islas. This claim fails.

*2 Finally, Olivas claims that because Islas did not present defense witnesses at trial, the court lost the opportunity to hear those witnesses buttress the testimony he claims he would have given. But Olivas fails to explain why he did not present those witnesses himself at his posttrial hearing. And while Olivas makes reference to vague statements the witnesses might have made, he ascribes no particular testimony to any particular witness. Where there is no support in the record for potential testimony, a person cannot claim ineffective assistance of counsel. See *State v. Betts,* 272 Kan. 369, 388-89, 33 P.3d 575 (2001). This claim fails.

Clearly, when given the opportunity at his posttrial hearing to produce witnesses who could support his innocence and thus cast doubt on the State's case had it been heard at trial, Olivas did neither.

Olivas was not prejudiced by Islas' performance and was not deprived of a fair trial.

Affirmed.

All Citations

104 P.3d 1024 (Table), 2005 WL 217166

84 P.3d 636 (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.

Gary J. BELL, Sr., Appellant,
v.
STATE of Kansas, Appellee.

No. 90,101.
|
Feb. 20, 2004.
|
Review Denied May 26, 2004.

Synopsis
Background: Following affirmance on direct appeal of movant's conviction for intentional second-degree murder, 266 Kan. 896, 975 P.2d 239, he filed motion for habeas corpus relief, alleging ineffective assistance of counsel. The Sedgwick District Court, Tom Malone, J., denied motion. Movant appealed.

Holdings: The Court of Appeals held that:

[1] counsel's failing to present testimony of witnesses who were not present at shooting was not prejudicial, and

[2] movant failed to present substantial evidence of mistakes by trial counsel that would support his cumulative error claim.

Affirmed.

Appeal from Sedgwick District Court; Tom Malone, judge. Opinion filed February 20, 2004. Affirmed.

Attorneys and Law Firms

Michael P. Whalen, of Law Office of Michael P. Whalen, of Wichita, for appellant, and Gary J. Bell, Sr., appellant pro se.

Lesley A. Isherwood, assistant district attorney, Nola Foulston, district attorney, and Phill Kline, attorney general, for appellee.

Before GREENE, P.J., ELLIOTT, J., and KNUDSON, S.J.

MEMORANDUM OPINION

PER CURIAM.

***1** Gary J. Bell, Sr., appeals the district court's denial of his K.S .A. 60-1507 motion, alleging ineffective assistance of trial counsel. Also raised on appeal is a claim of ineffective assistance of 60-1507 counsel.

We affirm. The district court's findings are supported by substantial competent evidence sufficient to support its conclusions of law. In addition, Bell's claim of ineffective assistance of 60-1507 counsel is not properly before us.

Bell's jury trial conviction for intentional second-degree murder was affirmed in *State v. Bell,* 266 Kan. 896, 975 P.2d 239, *cert. denied* 528 U.S. 905, 120 S.Ct. 247, 145 L.Ed.2d 207 (1999), and the court's opinion provides a full statement of the underlying facts.

Bell's K.S.A. 60-1507 Motion and Procedural Overview

In his pro se motion, Bell alleged ineffective assistance of counsel and instances of pretrial and trial error. The district court summarily denied Bell's motion. On appeal, a panel of this court dismissed the claims that were raised or should have been raised in Bell's direct appeal but remanded to the district court for further hearing to consider his claim of ineffective assistance of counsel in pretrial preparation and whether cumulative error compromised his right to a fair trial. *Bell v. State,* No. 85,820, unpublished opinion filed March 22, 2002.

Counsel was appointed to represent Bell at the evidentiary hearing, which was held before the same judge who presided over Bell's trial. Bell testified on his own behalf and described the interaction he had with trial counsel before trial. He testified he gave both counsel and an investigator from the Public Defender's Office names of eight people who could testify about the relationship between him and his ex-wife in an effort to refute the State's theory

that he killed the victim out of jealousy. None of these potential witnesses were present when the shooting occurred, however. Bell's counsel did not call any of these witnesses to testify at trial. Further, Bell testified counsel and the investigator met with him only a half dozen times before trial. Regarding cumulative error, Bell argued the record of the case spoke for itself.

The investigator testified on the State's behalf that he was requested to contact five potential witnesses, and despite his efforts to contact those witnesses, he was able to contact only one. Bell's trial counsel did not testify, as she could not be located.

After taking the matter under advisement to review the trial transcripts, the district court found Bell's allegations of ineffective assistance of counsel in pretrial preparation were supported only by Bell's testimony. Regarding Bell's claim that counsel was ineffective for failing to investigate certain potential witnesses, the court found none of those persons would have been critical to his defense, as none of them were present during the shooting. Rather, based on Bell's assertions of their potential testimony, they only would have testified that Bell was not a jealous man, and such testimony would have become cumulative. The court further found, even though jealousy was the State's theory of Bell's motive, motive was not an element of the crime that the State needed to prove.

***2** Ultimately, the court found Bell's allegations of ineffective assistance of counsel were without merit, as the overall record easily demonstrated that Bell's trial counsel was well-prepared for trial and she displayed a high level of professional ability. Further, the court found, based on the totality of the record, that Bell was not denied a fair trial based on cumulative error. Accordingly, the court denied Bell's motion in its entirety.

Standard Of Review

When an evidentiary hearing has been conducted in the district court, the standard of review for an appeal from the denial of a K.S.A. 60-1507 motion is for the appellate court to determine whether the district court's factual findings are supported by substantial competent evidence and whether those findings are sufficient to support its conclusions of law. *Lumley v. State,* 29 Kan.App.2d 911, 913, 34 P.3d 467 (2001), *rev. denied* 273 Kan. 1036 (2002). Substantial evidence is evidence that possesses both relevance and substance and furnishes a substantial basis of fact from which the issues can reasonably be resolved. 29 Kan.App.2d at 913, 34 P.3d 467. This court must accept as true the evidence and all inferences drawn therefrom tending to support the district court's findings. 29 Kan.App.2d at 913, 34 P.3d 467.

To succeed on a claim that counsel's assistance was so defective as to require reversal of a conviction, a defendant must establish " '(1) counsel's performance was deficient, which means counsel made errors so serious that counsel's performance was less than that guaranteed by the Sixth Amendment, and (2) the deficient performance prejudiced the

defense, which requires showing counsel's errors were so serious they deprived defendant of a fair trial." ' *State v. Kirby,* 272 Kan. 1170, 1194, 39 P.3d 1 (2002) (quoting *State v. Hedges,* 269 Kan. 895, 913, 8 P.3d 1259 [2000]). These performance and prejudice prongs are mixed questions of law and fact requiring de novo review. See *Easterwood v. State,* 273 Kan. 361, 370, 44 P.3d 1209, *cert. denied* 537 U.S. 951, 123 S.Ct. 416, 154 L.Ed.2d 297 (2002).

In *State v. Betts,* 272 Kan. 369, 387-88, 33 P.3d 575 (2001), our Supreme Court provided the following guidance on the evaluation of an ineffective assistance of counsel claim:

> "Judicial 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 within the wide range of reasonable professional assistance. [Citation omitted.] 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. A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. [Citation omitted.]"

Discussion

[1] We are somewhat handicapped in our review of Bell's claims because his court-appointed trial counsel did not testify at the 60-1507 hearing. Bell testified that the various individuals whose names were given to counsel could have refuted the State's theory he shot the victim in a jealous rage. We do know from the investigator's testimony that not all of the potential witnesses were located or interviewed. Under these circumstances, we cannot conclude as a matter of law counsel's apparent lack of action was a matter of trial strategy. "Choices made by counsel after a less than complete investigation can be reasonable, but only to the extent that the decision to limit or forego certain investigation is reasonable under the circumstances." *State v. Sanford,* 24 Kan.App.2d 518, 523, 948 P.2d 1135, *rev. denied* 262 Kan. 967 (1997).

***3** However, it is significant that the district judge who presided at both the criminal trial and the 60-1507 hearing concluded: "[T]he overall record easily satisfies this Court that [trial counsel] was well-prepared for the trial, and in fact, displayed a high level of professional ability throughout the entire proceedings ." The trial judge's first-hand knowledge of the trial proceedings put him in the best position to evaluate counsel's performance. See *Gilkey v. State,* 31 Kan.App.2d 77, 78-79, 60 P.3d 351, *rev. denied* 275 Kan. ---- (2003).

In any event, it is not necessary we make a detailed analysis under the performance prong of an ineffective counsel claim if the movant fails to prove prejudice. See *State v. Pink,* 236 Kan. 715, 732, 696 P.2d 358 (1985), *overruled in part on other grounds, State v. Van Cleave,* 239 Kan. 117, 716 P.2d 580 (1986).

Based on Bell's characterization of the various individuals' potential testimony, it is apparent their testimony would not have bolstered Bell's claim of self-defense as none of the individuals were present at the shooting or in a position to give *res gestae* evidence. Further, as noted by the district court, the State did not have to prove motive as an essential element of the homicide. Finally, we have carefully reviewed the record and agree with the district court's conclusions that the evidence supporting Bell's guilt was strong. There was no reasonable likelihood that the outcome of the trial would have been different if one or more of the individuals would have given anecdotal evidence on a matter largely tangential to the central issue of the defendant's guilt or innocence.

[2] For somewhat similar reasons, the issue of cumulative error Bell raises in his pro se brief must be rejected. In addition, many of the procedural and evidentiary issues presented to demonstrate cumulative error were raised on direct appeal and decided adversely to Bell's contentions. It is unseemly that Bell attempts to resurrect the same issues by repackaging them as an ineffective assistance of counsel claim. Be that as it may be, we also note:

> " 'Cumulative trial errors, when considered collectively, may be so great as to require reversal of the defendant's conviction. The test is whether the totality of circumstances substantially prejudiced the defendant and denied the defendant a fair trial. No prejudicial error may be found upon this cumulative effect rule, however, if the evidence is overwhelming against the defendant.' *State v. Lumbrera,* 252 Kan. 54, Syl. ¶ 1, 845 P.2d 609 (1992)." *State v. Plaskett,* 271 Kan. 995, 1022, 27 P.3d 890 (2001).

We have examined the record and readily conclude any trial errors were harmless or not substantiated. Bell has failed to present substantial evidence of mistakes by trial counsel that would support his cumulative error claim. We conclude the district court did not err in concluding Bell was represented by competent counsel and received a fair trial.

***4** Finally, we turn to Bell's claim of ineffective assistance of 60-1507 counsel. Generally, an appellate court will not consider an allegation of ineffective assistance of counsel raised for the first time on appeal. *State v. Mann,* 274 Kan. 670, 691, 56 P.3d 212 (2002). There are recognized exceptions to this general rule. See *State v. Mincey,* 265 Kan. 257, 267, 963 P.2d 403 (1998). However, before us is a less than complete record to address such an issue, and we would ultimately be required to engage in speculation to craft a decision. This we decline to do.

Affirmed.

All Citations

84 P.3d 636 (Table), 2004 WL 324388

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