

NOT DESIGNATED FOR PUBLICATION

No. 124,278

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

JAMES M. PHILLIPS,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; SEAN M.A. HATFIELD, judge. Opinion filed July 14, 2023.
Affirmed.

Angela M. Davidson, of Wyatt & Davidson, LLC, of Salina, for appellant, and *James M. Phillips*,
appellant pro se.

Julie A. Koon, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*,
attorney general, for appellee.

Before GREEN, P.J., HURST, J., and TIMOTHY G. LAHEY, S.J.

PER CURIAM: James Michael Phillips appeals the district court's summary dismissal of his K.S.A. 60-1507 motion alleging ineffective assistance of appellate counsel in his direct appeal. This court finds that the motion, files, and records of the case conclusively show that Phillips is not entitled to relief on any of his claims and, therefore, the district court's summary dismissal is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

In 2016, a jury convicted Phillips of attempted first-degree murder, attempted second-degree murder, attempted aggravated kidnapping, two counts of attempted kidnapping, two counts of attempted aggravated robbery, criminal damage to property, and fleeing or attempting to elude an officer. The facts underlying Phillips' convictions are relevant to his current claims and were summarized by a panel of this court on direct appeal:

"Shortly after [A.S.] and [A.F.], the store manager, opened the AT&T store for the day on August 11, 2015, Phillips entered, carrying the box for a cell phone he already owned. He asked about activating a new phone. [A.S.] took Phillips toward the back of the store and showed him prepaid plan options.

"While [A.S.] was discussing the options with Phillips, [a customer, J.D.] entered the store in need of help with her text messages. [A.F.] began helping [J.D.] at the main counter in the center of the store. When [A.S.] and Phillips returned to the center of the store, Phillips pulled out a gun, aimed it at the women, and said: '[T]his is not a joke, take me to your back room where the phones are.' At trial, [A.S.] testified:

"Q. What's [Phillips] doing with this gun?

"A. At that moment he was just kind of waiving [*sic*] it back and forth at the three of us in the location.'

"[A.F.] testified:

"Q. Where exactly on your body was he pointing the gun?

"A. I mean, it was mid level. I mean, it is kind of a hard question to say, I mean, he was just pointing the gun at all of us.

"Q. So he's swinging it around making sure that he gets each one of you?

"A. Yes.'

"[A.S.] and [A.F.] began to comply, but [J.D.] refused. She headed toward the front of the store, and said: 'I'm not having it.' Phillips warned [J.D.] that he would shoot her if she did not comply. When [J.D.] slipped behind a display kiosk, Phillips shot her in the arm and the torso and then fled without any cell phones. Meanwhile, [A.F.] and [A.S] slipped out the back door and made their way to a neighboring store in the strip mall where [A.F.] called 911. [J.D.] survived but spent 114 days in the hospital, lost hearing in one ear, lost part of her lung, and ultimately had to have both of her hands and feet amputated.

"Phillips got into an SUV and drove off. Derby Police Officer Larry Hampton spotted Phillips and pursued him. Other officers joined in the chase. Phillips proceeded at a high rate of speed and fired three shots at the pursuing Officer Hampton. Phillips eventually lost control of the SUV and clipped a Wichita police car before running into a ditch. He attempted to run but was quickly apprehended. When interviewed at the police station, Phillips admitted all of his actions but denied that he intended to kill anyone.

"Phillips was charged with attempted capital murder, attempted first-degree murder, two counts of attempted kidnapping, attempted aggravated kidnapping, two counts of attempted aggravated robbery, criminal damage to property, and fleeing or attempting to elude an officer. Phillips represented himself at trial, where the main issue in dispute was Phillips' intent. Phillips claimed he had not intended to kill either Julie or Officer Hampton.

"The jury found Phillips guilty of the lesser included crime of attempted second-degree murder of Officer Hampton (as opposed to attempted capital murder) but guilty of the remaining eight charges, including the two counts of attempted aggravated robbery. The district court sentenced Phillips to 372 months in prison." *State v. Phillips*, No. 117,566, 2018 WL 3673181, at *1-2 (Kan. App. 2018) (unpublished opinion).

While Phillips elected to represent himself at trial and filed his notice of appeal pro se, the district court appointed Phillips appellate counsel from the Capital Appellate Defender Office to represent him in his direct appeal.

In his direct appeal, Phillips' asserted two claims: (1) The prosecutor committed reversible error in closing argument by repeatedly engaging in burden-shifting; and (2) his two convictions for attempted aggravated robbery were multiplicitous because the evidence did not show that he intended to take property from each individual but rather only from the store.

A panel of this court rejected the prosecutorial-error claim but found that Phillips' convictions for attempted aggravated robbery of the two separate victims were multiplicitous and effectively punished him twice for a single criminal act in violation of the Fifth Amendment to the United States Constitution and section 10 of the Kansas Constitution Bill of Rights. *Phillips*, 2018 WL 3673181, at *1, 4-5. The panel therefore reversed one of Phillips' attempted aggravated robbery convictions, but the case was not remanded for resentencing because Phillips' primary crime of conviction was attempted first-degree murder. 2018 WL 3673181, at *4.

On January 27, 2020, Phillips filed a lengthy pro se K.S.A. 60-1507 motion, alleging his appellate counsel rendered ineffective assistance of counsel for failing to argue the following six issues in his direct appeal:

- (1) There was insufficient evidence to support Phillips' attempted kidnapping convictions;
- (2) There was insufficient evidence to support Phillips' attempted aggravated kidnapping conviction;
- (3) There was insufficient evidence to support Phillips' attempted second-degree murder conviction;

- (4) There was insufficient evidence to support Phillips' attempted first-degree murder conviction;
- (5) Phillips' due process rights were violated when the district court failed to make an adequate inquiry into possible juror bias and the extraneous influence of the jury by the bailiff; and
- (6) The district court abused its discretion by denying Phillips the appointment of standby counsel.

Phillips also argued that his appellate counsel rendered ineffective assistance for raising the prosecutorial-error claim. The State filed a response to Phillips' motion, and Phillips subsequently filed a reply to the State's response.

The district court summarily dismissed Phillips' K.S.A. 60-1507 motion, stating that an evidentiary hearing was not necessary because "[a] review of the petition, files, and records in the case conclusively show the petitioner is entitled to no relief." The court explained:

"Petitioner fails to show appellate counsel's representation fell below an objective standard of reasonableness. Petitioner further fails to demonstrate that appellate counsel would have been successful on any of the issues raised in the petition. Petitioner's request for 1507 relief is denied."

Phillips subsequently filed a pro se notice of appeal and a motion for appointment of appellate counsel. After withdrawal of his appointed counsel, Phillips sought and was granted the right to proceed pro se in this appeal from the district court's summary dismissal of his 60-1507 motion. In addition to the brief filed by his appointed counsel before she withdrew, Phillips also filed a pro se supplemental brief and a pro se reply brief.

DISCUSSION

On appeal, Phillips concedes that he has abandoned several of the claims asserted in his K.S.A. 60-1507 motion. Thus, on appeal, Phillips only asserts that his appellate counsel rendered ineffective assistance by failing to raise the following four issues: (1) The violation of his due process rights because the district court did not adequately inquire into possible juror bias and the bailiff's influence on the jury; (2) insufficient evidence supported his attempted kidnapping convictions; (3) insufficient evidence supported his attempted aggravated kidnapping conviction; and (4) insufficient evidence supported his attempted first-degree murder conviction. Phillips failed to brief and does not challenge the district court's determination that he was not entitled to relief on the remaining of ineffective assistance of appellate counsel claims asserted in his K.S.A. 60-1507 motion. See *State v. Meggerson*, 312 Kan. 238, 246, 474 P.3d 761 (2020) ("Issues not briefed or not adequately briefed are deemed waived or abandoned. . . . A point raised incidentally in a brief but not argued is also deemed abandoned.").

When evaluating a prisoner's K.S.A. 60-1507 motion, a district court may follow one of three procedural paths:

"(1) The court may determine that the motion, files, and case records conclusively show the prisoner is entitled to no relief and deny the motion summarily; (2) the court may determine from the motion, files, and records that a potentially substantial issue exists, in which case a preliminary hearing may be held. If the court then determines there is no substantial issue, the court may deny the motion; or (3) the court may determine from the motion, files, records, or preliminary hearing that a substantial issue is presented requiring a full hearing." *White v. State*, 308 Kan. 491, 504, 421 P.3d 718 (2018) (quoting *Sola-Morales v. State*, 300 Kan. 875, 881, 335 P.3d 1162 [2014]).

When, as here, the district court summarily denies the motion, this court conducts a de novo review to determine whether the motion, files, and records of the case conclusively

establish that the movant is not entitled to relief. K.S.A. 2022 Supp. 60-1507(b); *Beauclair v. State*, 308 Kan. 284, 293, 419 P.3d 1180 (2018).

To prevail on his claim of ineffective assistance of appellate counsel, Phillips must show:

"(1) counsel's performance, based upon the totality of the circumstances, was deficient in that it fell below an objective standard of reasonableness; and (2) defendant was prejudiced to the extent there is a reasonable probability that, but for counsel's deficient performance, the appeal would have been successful." *Khalil-Alsalaami v. State*, 313 Kan. 472, Syl. ¶ 23, 486 P.3d 1216 (2021).

When reviewing claims of ineffective assistance of appellate counsel, courts must "employ a strong presumption that counsel's conduct was reasonable." *Miller v. State*, 298 Kan. 921, 931, 318 P.3d 155 (2014); see *Holmes v. State*, 292 Kan. 271, Syl. ¶ 4, 252 P.3d 573 (2011) ("A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."). This court employs "highly deferential scrutiny" in evaluating the effectiveness of appellate counsel's performance. *Holmes*, 292 Kan. at 277; see, e.g., *Moncla v. State*, 285 Kan. 826, 832, 176 P.3d 954 (2008) ("[W]e are highly deferential in scrutinizing [appellate counsel's] conduct.").

On appeal, Phillips alleges that his appellate counsel failed to raise an issue on direct appeal that Phillips believes could have been meritorious. "[F]ailure to raise an issue on direct appeal is not per se ineffective assistance." *Miller*, 298 Kan. at 932; see *Baker v. State*, 243 Kan. 1, Syl. ¶ 4, 755 P.2d 493 (1988) ("The failure of counsel to raise an issue on appeal is not, per se, to be equated with ineffective assistance of counsel."). "The process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail is the hallmark of effective appellate advocacy." *Baker*, 243 Kan. 1, Syl. ¶ 1 (citing *Smith v. Murray*, 477 U.S. 527, 106 S. Ct. 2661, 91 L. Ed. 2d 434 [1986]).

In determining whether appellate counsel acted objectively reasonably in deciding whether to include issues in its direct appeal, the Kansas Supreme Court has explained:

"In an appeal from a criminal conviction, appellate counsel should carefully consider the issues, and those that are weak or without merit, as well as those which could result in nothing more than harmless error, should not be included as issues on appeal." *Baker*, 243 Kan. 1, Syl. ¶ 5.

Additionally, appellate counsel is not required to assert a claim just because the defendant requests an issue be raised. 243 Kan. 1, Syl. ¶ 5. Appellate advocacy requires discretion, and "[s]ound appellate advocacy does not require counsel to dilute the effect of otherwise worthwhile claims with others reasonably determined to be unlikely to provide any relief." *Moncla*, 285 Kan. at 832.

Notably—as a result of his appellate counsel's assistance—Phillips' direct appeal was partially successful. As a result of his direct appeal, a panel of this court reversed one of his attempted aggravated robbery convictions, which provides some evidence that his appellate counsel provided at least somewhat effective representation.

The district court did not err in determining that the motion, files, and records conclusively show that his appellate counsel did not render ineffective assistance of counsel for failing to argue the insufficiency of the evidence to support Phillips' convictions for attempted kidnapping, attempted aggravated kidnapping, and attempted murder in the first degree.

In both his K.S.A. 60-1507 motion and appellate brief, Phillips argues that his appellate counsel rendered ineffective assistance in his direct appeal for failing to argue that there was insufficient evidence to support his convictions for attempted kidnapping, attempted aggravated kidnapping, and attempted murder in the first degree. It is important to recognize that this court is not determining whether the State presented sufficient evidence to support these convictions. Rather, it is analyzing whether Phillips'

appellate counsel rendered ineffective assistance by not raising those issues in Phillips' direct appeal.

In evaluating appellate counsel's effectiveness, this court must review what Phillips' appellate counsel would have had to demonstrate to prevail on those claims. To demonstrate that the State failed to present sufficient evidence to support these convictions, Phillips' appellate counsel would have been required to demonstrate that, reviewing the evidence in the light favorable to the State, no reasonable fact-finder could have found him guilty beyond a reasonable doubt. *State v. Aguirre*, 313 Kan 189, 209, 485 P.3d 576 (2021). "This is a high burden, and only when the testimony is so incredible that no reasonable fact-finder could find guilt beyond a reasonable doubt should we reverse a guilty verdict." *Meggerson*, 312 Kan. at 247. In conducting this analysis, this court does not reweigh the evidence, resolve conflicts in the evidence, or pass on the credibility of witnesses. *Aguirre*, 313 Kan. at 209.

Phillips alleges that the State presented insufficient evidence to support three separate "attempted" convictions, which required the State to show that Phillips made "any overt act toward the perpetration of a crime" and that, at the time of those overt acts, he intended "to commit such crime." See K.S.A. 2022 Supp. 21-5301(a). Phillips argues there was insufficient evidence to support his attempted kidnapping and attempted aggravated kidnapping convictions because his "attempt to move the employees to the back of the store was incidental to the attempted robbery." Phillips further argues there was insufficient evidence to support his conviction for attempted first-degree murder because, although he threatened to shoot the women, he never threatened to kill them and had no intent to kill anyone.

Kidnapping is defined as "the taking or confining of any person, accomplished by force, threat or deception, with the intent to hold such person . . . to facilitate flight or the commission of any crime." K.S.A. 2022 Supp. 21-5408(a)(2). And aggravated

kidnapping is defined as "kidnapping, as defined in subsection (a), when bodily harm is inflicted upon the person kidnapped." K.S.A. 2022 Supp. 21-5408(b). In support of his claims, Phillips relies on the Kansas Supreme Court's decision in *State v. Buggs*, 219 Kan. 203, 547 P.2d 720 (1976), in which the court held:

"If a taking or confining is alleged to have been done to facilitate the commission of another crime, to be kidnapping the resulting movement or confinement:

"(a) Must not be slight, inconsequential and merely incidental to the other crime;

"(b) Must not be of the kind inherent in the nature of the other crime; and

"(c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection." 219 Kan. 203, Syl. ¶ 10.

Viewing the evidence in the light favorable to the State, a reasonable, rational fact-finder could have found beyond a reasonable doubt that Phillips' attempt to move the three women to the back of the store and away from the entrance was not merely incidental to his act of committing robbery. Phillips pointed a gun at the three women and told them he would shoot them if they did not go to the back room of the store. He then repeatedly shot at, and struck, one of them who refused. Given these facts, this court cannot say that no reasonable, rational fact-finder could have found Phillips guilty of attempted kidnapping or attempted aggravated kidnapping. A reasonable, rational fact-finder could have found that Phillips' attempt to move or confine the employees was not slight or inconsequential, and that it was undertaken in an attempt to make the robbery substantially easier to commit or lessen the risk of detection. See *Buggs*, 219 Kan. 203, Syl. ¶ 10.

First-degree murder is defined as "the killing of a human being committed . . . [i]ntentionally, and with premeditation." K.S.A. 2022 Supp. 21-5402(a)(1). Phillips argues that the State presented insufficient evidence to prove that he intended to kill the customer when he shot her because he never threatened to kill her, but only threatened to shoot her. A person acts intentionally when "it is such person's conscious objective or desire to engage in the conduct or cause the result." K.S.A. 2022 Supp. 21-5202(h). Criminal intent may be inferred from acts, circumstances, and inferences reasonably deducible from the defendant's conduct. *State v. Betancourt*, 301 Kan. 282, 302, 342 P.3d 916 (2015). Viewing the evidence in the light favorable to the State, this court cannot say that no reasonable, rational fact-finder could reasonably infer from Phillips' threat to shoot—and act of shooting the customer *twice*—that Phillips intended to kill her.

Moreover, during his closing argument at trial, Phillips admitted numerous times that he was guilty. On one occasion, Phillips stated to the jury, "I told you guys at opening statements I'm not trying to pull an OJ here. I'm guilty. I did things wrong. I deserve the punishment." On another occasion, Phillips stated, "We're here for you guys to decide this dispute, Count 1 and Count 2. Counts 3, 4, 5, 6, 7, 8, 9, I'm guilty. You can watch the interview. It tells you that." *Phillips*, 2018 WL 3673181, at *5. Given Phillips' admissions and the evidence viewed in the light favorable to the State, there was sufficient evidence upon which a reasonable, rational fact-finder could rely to support Phillips' convictions for attempted kidnapping, attempted aggravated kidnapping, and attempted murder in the first degree.

Under this court's strong presumption of reasonable performance and highly deferential scrutiny, this court cannot say that Phillips' appellate counsel's performance fell below an objective standard of reasonableness for not raising these insufficiency of the evidence claims in his direct appeal.

The district court did not err in determining that the motion, files, and records of this case conclusively showed that Phillips was not entitled to relief on his claim that his appellate counsel rendered ineffective assistance for not arguing in his direct appeal that the district court abused its discretion in not sufficiently inquiring into alleged potential juror misconduct.

In both his K.S.A. 60-1507 motion and pro se supplemental appellate brief, Phillips argues that his appellate counsel rendered ineffective assistance by not arguing in his direct appeal that the district court abused its discretion by not sufficiently inquiring into a potential juror misconduct issue. In addressing an allegation of juror misconduct, the district court conducts a two-step inquiry to determine if either a mistrial or new trial is warranted: "(1) whether juror misconduct occurred, and (2) if so, whether the misconduct substantially prejudiced the right to a fair trial, meaning whether the State can show beyond a reasonable doubt that the misconduct did not affect the trial's outcome." *State v. Longoria*, 301 Kan. 489, Syl. ¶ 27, 343 P.3d 1128 (2015). On appeal, this court reviews the district court's determination for an abuse of discretion. 301 Kan. 489, Syl. ¶ 27.

During trial, someone found a parking pass with a standard juror stamp on the back that contained a handwritten list of what appeared to be the names of the 14 jurors in the case. The district court brought this to the attention of the parties and admonished that

"I think everybody is aware that nobody under any circumstances should in any way put any pressure on any juror, should not have any contact with any juror until the case is completed and they have been released from all their admonitions, and if somebody contacts them thereafter and they do not wish to discuss the case, then that should be the end of it. Any further actions by anybody could be considered contempt of court, could also subject them to other potential criminal charges."

The court explained that the bailiff showed the parking pass to the jurors and none of them claimed ownership of the ticket, which the court found to be "a little bit puzzling." The court speculated that it may belong to a juror who did not want to claim it for various reasons.

Phillips expressed concern about why someone would have written down the juror names, "Judge, I'm concerned, they are handwritten that somebody was deliberately trying to—seems kind of fishy. There was some ulterior motive for writing it down and carrying it out and then denying or accepting responsibility for the particular ticket." Phillips further stated:

"I don't see any innocent reason for someone to have handwritten specifically in the seats, you know, each individual juror's names. If it was to get, as you said, getting to know someone's name or whatnot, but you know, someone is not owning up for a reason. . . .

. . . .

"I feel like the Court should get to the bottom of it before we even move forward."

In response to Phillips' concerns, the district court evaluated the possibility that juror misconduct had occurred and whether such potential misconduct posed a risk of prejudice to Phillips. The district court explained:

"I mean, I could bring them in here and cross them, but I don't know that that—first of all, I don't—I don't know if it would get us anywhere and it would really put them in a tough situation. And if somebody owned up to it, I still don't know what that would do. They all know each other. If it was one of the 14 of them, here's kind of my thought process in this. If it was one the 14 of them, then they are together, they are communicating, hopefully not about the trial, they are directed not to, but they will be

shortly. They just have first names. It is marked juror. That information at this point would give them no more or less access to any of those folks than they are going to have because they are going to be in the same room, unless they are one of the two alternates and we'll sequester the alternates. We'll keep them here at least through the day. And they won't be able to have any contact with the other members of the jury. The other 12 members of the jury will be together, will be able to communicate, so it may be that they are embarrassed. It may be there is something that's not right about it, but I'm not seeing how any of that could effect in any way their verdict one way or the other in the case. And it is not beyond the remote possibility that it belonged to somebody else. I don't know how they would have gotten ahold of it because it is stamped juror, but I'm puzzled. I certainly understand your puzzlement, I'm of the same puzzlement. I'm just in thinking through I don't see how the answer to the question who did this or whose document, that little document was, would any way prejudice the State or the defendant, you know, if they are unwilling to own up to it."

The district court turned the parking pass over to an investigator who stated that he would prepare a report and, in turn, would give the pass to courthouse security to follow up. The district court then instructed that the "report and any other reports should be provided to the defendant." The district court was ultimately unconvinced that any juror misconduct occurred. It further explained that it could not envision how a juror writing down all the juror names could have prejudiced Phillips' right to a fair trial.

As with the prior inquiry, this court is not analyzing whether the district court sufficiently inquired into the alleged potential juror misconduct. Rather, this court must determine whether Phillips' appellate counsel rendered ineffective assistance by not challenging the district court's evaluation of the potential juror misconduct in Phillips' direct appeal. This court finds no evidence that Phillips' appellate counsel was objectively unreasonable for not raising this juror misconduct issue in the direct appeal. Phillips' appellate counsel would have had to demonstrate that the district court abused its discretion in not finding juror misconduct or resulting prejudice. Phillips presents no

evidence of actual juror misconduct that would support a finding that the district court abused its broad discretion. Phillips merely speculates about the potential misconduct.

This court affords appellate counsel a strong presumption of reasonable performance. Under this deferential standard, this court cannot say that Phillips' appellate counsel's performance fell below an objective standard of reasonableness by not raising this issue in his direct appeal. There is no evidence supporting Phillips' allegations of juror misconduct, and appellate counsel is not required to raise every possible issue on appeal regardless of its merit.

CONCLUSION

The motion, files, and records of the case conclusively show that Phillips is not entitled to relief on his claims of ineffective assistance of counsel. Therefore, the district court did not err in summarily dismissing his K.S.A. 60-1507 motion. The judgment of the district court is affirmed.

Affirmed.