NOT DESIGNATED FOR PUBLICATION

No. 124,495

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

MIKA LEE THILLE,
Appellant.

MEMORANDUM OPINION

Appeal from Saline District Court; RENE S. YOUNG, judge. Opinion filed August 25, 2023. Affirmed.

Ryan J. Eddinger, of Kansas Appellate Defender Office, for appellant.

Natalie Chalmers, assistant solicitor general, and Kris W. Kobach, attorney general, for appellee.

Before ISHERWOOD, P.J., SCHROEDER, J., and TIMOTHY G. LAHEY, S.J.

ISHERWOOD, J.: A jury convicted Mika Lee Thille of reckless second-degree murder for the shooting death of Justin Willingham. Thille pursued this appeal because he believes the validity of his convictions is questionable. The foundation he relies on in support of that contention is that the jury was never given the opportunity to consider whether his conduct was better classified as either voluntary or involuntary manslaughter and because the district court denied his claim that he was entitled to a new trial given the subpar representation his attorney provided. A thorough analysis of Thille's claims, in conjunction with the record of the trial, fails to yield any indication that errors occurred

which undermine the legitimacy of his conviction. Accordingly, his murder conviction and the denial of his motion for new trial are affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

In November 2018, Thille traveled to Salina from Topeka with his new girlfriend, Kayla Sitton, and his infant son, so that he could introduce Sitton to his friends and family. The plan was for Valerie Vogel, his son's maternal aunt, to watch the child at a hotel while the new couple socialized with those they came to visit.

Not long after Thille dropped his son off, Thille's brother, Max, stopped by Vogel's hotel room. Max and Vogel share children together. The couple disputes exactly what transpired during their time together in that room. According to Max's version of events, he told Vogel he wanted to leave, and she expressed a desire to join him, so he called for a ride. He claims that when the ride arrived, Vogel asked him to put her bags in the car and as he did, Vogel disappeared. So, he left without her but did not return her bags inside before doing so. By contrast, Vogel claims she fell asleep after Max arrived and he later woke her up demanding $500. She agreed to give him the money but when she attempted to retrieve it from her bags Max grabbed the bags, a struggle ensued, and he ultimately took off with them.

Vogel contacted Thille to report her altercation with Max. She shared that she recently received an insurance check for $2300 following a car accident and, because Max was the only other person with knowledge of the check, she suspected he took the bags with the belief that the money was concealed somewhere within. In actuality, she had hidden the money elsewhere in the hotel room.

Thille was at Shannon "One-Hit" Bryant's house when he received Vogel's call. Thille, Sitton, and Bryant left together and drove directly to the motel to pick up Thille's son and Vogel. The group dropped the child off with Vogel's mother then set out for Janis Grunder's home in hopes of finding Max. Upon learning he was not there, Thille called Max and learned he was at Justin Willingham's house, so the group set their sights in that direction.

While at Willingham's, Max purchased and ingested heroin, then placed Vogel's bags in another room of the house. Winnie Hogan, Jennifer Bingham, and Sierra Haas were also at the house. Max was chatting with Willingham when he received the call from Thille demanding the return of Vogel's bags. He assured Thille he would return the bags in roughly twenty minutes then hung up the phone and went to hang out with Bingham in her room. Unbeknownst to Max, Thille and his group were already en route to Willingham's house.

Upon arrival, Thille parked behind Willingham's house then Vogel led the group to the front door. Willingham was positioned in the doorway and Vogel yelled that she knew Max was inside and he needed to return her bags.

The nature of Willingham's residence is most aptly described as a drug house. For that reason, there are varying perceptions concerning the events that transpired after Thille's arrival. Thille claimed he pushed past Vogel and ordered Willingham to get Max and return Vogel's belongings to her. He claimed that Willingham reached for a gun at his hip, so Thille pushed him and struck him in the face. By his account the struggle carried the two men inside and at some point, Willingham's gun discharged. Thille recalled falling backwards and Max yelling at him following the gunshot. He then collected himself and fled through the front door.

For her part, Vogel claimed that Thille, Sitton, and Bryant all entered the house while she remained outside. While she could not see inside, she could hear yelling and a scuffle followed by two gunshots. Upon hearing gunfire, she sought refuge at a friend's house nearby.

Sitton claimed she was the last to exit the vehicle and that Vogel and Bryant waited alongside the residence while Thille made his way inside. She likewise opted to enter the home and, upon doing so, found Thille and Willingham engaged in fisticuffs. She heard a gun go off just as Thille shoved Willingham and then looked on as Thille drew a gun and fired multiple shots at Willingham. Sitton fled and hid in a van she found a short distance away. After seeing Thille drive away, she ran to a nearby house and asked the neighbor to call 911. She also attempted to contact Vogel and Thille, but her messages went unanswered.

Bingham was busy with a project in her room during the incident and only emerged at the sound of gunshots. When she did so, she saw Willingham on the floor and two women standing nearby discussing their inability to call 911 because their phones had been shut off. Bingham returned to her room to make that call and asserted that Max opened her door a short time later then somehow ended up on the floor with his hands in the air pleading "No Mika. Don't." She claimed that Thille was standing over Max but denied seeing anything in his hands. Even so, she promptly fled out of the back door of the house.

Hogan provided an account in which he watched from his bedroom as Willingham opened the front door. Two gunshots were allegedly fired immediately thereafter, and he saw Willingham fall to the ground. Hogan claimed that Thille walked down the hallway past his room and that he purportedly heard Max say, "What the hell, Mika?" before Thille ran out of the house. Hogan said he went to Willingham and remained by his side until he passed. While doing so he noticed two bullet wounds in Willingham's chest.

Hogan ran out of the back of the house. He told Bingham later that he saw Thille shoot Willingham.

Bingham and Hogan both claimed that an unknown person shot at the house a few weeks before this incident, which prompted Willingham to acquire and begin carrying a gun.

Haas was sleeping off a heroin high when the incident occurred and allegedly awoke to Max screaming for someone to call 911. She made her way into the kitchen at the same time law enforcement entered the house, and she saw Willingham's body in the living room.

The version of events Max recalled was that Thille remained on the porch as Vogel, and a man unknown to Max, entered the residence. Vogel demanded the return of her bags, then verbally dressed Willingham down for selling heroin to [Max]. He had no memory of any physical altercations but did see Willingham draw a gun from his waistband and fire two shots into the ground. Max hit the ground for cover just as two more shots were fired, including the round that fatally struck Willingham.

Max initially started to flee but turned back to call 911 and then promptly left again so as not to be present when the police arrived. He proceeded on to a friend's house where Thille and Vogel also happened to be. Thille was purportedly upset and crying that he did not shoot Willingham, but a fight erupted between him and Max, nonetheless. Vogel ducked out as soon as the fight started.

A few hours after the incident occurred, Thille's mother met Thille and Vogel at Walmart to pick up Thille's son. During that outing, Vogel received a text communicating that her face and Thille's were on the website for a local news outlet. She shared the text

with Thille, and he recommended that they surrender to police. Both eventually turned themselves in later that day and Thille was taken into custody.

The State charged Thille with first-degree premeditated murder, felony murder, attempted first degree murder, aggravated burglary, and attempted aggravated robbery and the case proceeded to a jury trial. Prior to deliberations, the district court determined that the jury should also receive instructions for the lesser-included offenses of intentional second-degree murder, reckless second-degree murder, and attempted second-degree murder. The jury ultimately found Thille guilty of reckless second-degree murder and acquitted him of all other charges.

Thille filed a motion asserting that he should receive a new trial because he was denied effective assistance of counsel. He subsequently filed two supplemental motions, also seeking a new trial. The court appointed new counsel and conducted an evidentiary hearing to flesh out Thille's claims but ultimately denied his motions upon finding that his trial counsel's performance fell within the wide range of reasonable professional assistance. The court then sentenced Thille to serve a 438-month prison sentence.

Thille now timely brings his case before us for an assessment of whether his jury received the full range of instructions to which he was entitled and whether the district court erred in denying his motion for new trial.

LEGAL ANALYSIS

The district court properly declined Thille's request for a voluntary manslaughter instruction as it was not factually appropriate under the facts and circumstances of Thille's case.

In his first contention of error Thille claims that a jury instruction for voluntary manslaughter was legally and factually warranted under the sudden quarrel and imperfect

self-defense theories, and therefore, the district court erred when it denied his request for the same. The State responds that the instruction was not factually appropriate.

When analyzing jury instruction issues, appellate courts follow a three-step process:

> "'(1) determining whether the appellate court can or should review the issue, i.e., whether there is a lack of appellate jurisdiction or a failure to preserve the issue for appeal; (2) considering the merits of the claim to determine whether error occurred below; and (3) assessing whether the error requires reversal, i.e., whether the error can be deemed harmless.'" *State v. Holley*, 313 Kan. 249, 253, 485 P.3d 614 (2021).

Proceeding with the first step, the record reveals that Thille requested that the district court issue the challenged instruction. Whether a party preserves an instructional issue affects this court's reversibility inquiry at the third step of the analysis. Because Thille properly preserved the issue for appeal by virtue of his request, any error we identify is reversible only if we also determine the error was not harmless. *Holley*, 313 Kan. at 254.

At the second step, we analyze whether the instruction was legally and factually appropriate, using an unlimited review of the entire record. In determining whether the instruction was factually appropriate, we must determine whether there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, that would have supported the instruction. *Holley*, 313 Kan at 255.

The district court concluded that the requested instruction was not legally appropriate "based upon the incident taking place at Mr. Willingham's dwelling." Presumably, it was led to that conclusion by the State's argument at the instructions conference that Thille instigated a fight with Willingham on Willingham's front porch, and, under those circumstances, Willingham was "legally privileged to use deadly force."

So, the State's argument went, for his killing during the course thereof to be reduced to voluntary manslaughter was "absurd." But in our view, the fact the killing occurred in Willingham's residence better aligns with an analysis for whether the instruction was factually warranted.

The district court reached its conclusion in error. Rather, an instruction on a lesser included crime is legally appropriate and a lesser included crime includes a lesser degree of the same crime. *State v. Gentry*, 310 Kan. 715, 721, 449 P.3d 429 (2019). In descending magnitude, the five recognized degrees of homicide are capital murder, first-degree murder, second-degree murder, voluntary manslaughter, and involuntary manslaughter. *State v. Pulliam*, 308 Kan. 1354, 1362, 430 P.3d 39 (2018). Thus, voluntary manslaughter is a lesser included offense of first-degree premeditated murder and Thille's requested instruction was legally appropriate. *Gentry*, 310 Kan. at 721.

Moving forward, we must now decide whether the instruction was factually appropriate. K.S.A. 2022 Supp. 22-3414(3) provides that, "[i]n cases where there is some evidence which would reasonably justify a conviction of some lesser included crime as provided in subsection (b) of K.S.A. 2022 Supp. 21-5109, and amendments thereto, the judge shall instruct the jury as to the crime charged and any such lesser included crime." The Kansas Supreme Court has also held that lesser included offense instructions must be given when there is some evidence, viewed in a light most favorable to the defendant, that would reasonably justify a *conviction* of some lesser included crime. *State v. Haygood*, 308 Kan. 1387, 1408, 430 P.3d 11 (2018) (Emphasis added).

K.S.A. 2021 Supp. 21-5404(a) defines voluntary manslaughter as knowingly killing a human being "(1) Upon a sudden quarrel or in the heat of passion; or (2) upon an unreasonable but honest belief that circumstances existed that justified use of deadly force under K.S.A. 2022 Supp. 21-5222, 21-5223 or 21-5225, and amendments thereto." It is Thille's position that the instruction was warranted under both general theories.

1. *Sudden quarrel or heat of passion*

The key elements comprising this theory of the offense are an intentional killing and legally sufficient provocation. *State v. Bernhardt*, 304 Kan. 460, 475, 372 P.3d 1161 (2016). "Heat of passion" has been defined as "'any intense or vehement emotional excitement of the kind prompting violent and aggressive action, such as rage, anger, hatred, furious resentment, fright, or terror,' based 'on impulse without reflection.'" 304 Kan. at 475-76 (quoting *State v. Hayes*, 299 Kan. 861, 864, 327 P.3d 414 [2014]). In analyzing the factual propriety of a voluntary manslaughter instruction under the heat of passion theory, appellate courts consider whether there was a provocation present that was sufficient to deprive a reasonable person of self-control and induce that person to abandon reason and act out of passion. *State v. Uk*, 311 Kan. 393, 397-98, 461 P.3d 32 (2020). A sudden quarrel, such as an unforeseen angry altercation, dispute, taunt, or accusation, may fall under the heat of passion umbrella and constitute sufficient provocation. *State v. Brownlee*, 302 Kan. 491, 513, 354 P.3d 525 (2015). The determination is made through use of an objective standard. *Gentry*, 310 Kan. at 723.

Thille argues that the eruption of a sudden quarrel between him and Willingham provided the necessary justification for issuance of the instruction in his case. The lens he encourages us to look through in weighing the merits of his claims portrays a situation where he encountered Willingham at the front door of Willingham's residence when he demanded to speak to Max, and something immediately felt off about the situation; a suspicion confirmed when Willingham allegedly reached for a weapon at his hip. According to Thille, Willingham's actions prompted him to lash out and strike Willingham in the face which then gave rise to their tussle. It was at this point, so says Thille, that Willingham fired two shots into the ground prompting, the State argues, Thille to draw his own gun. Thille argues that his version of events is corroborated by Sitton's testimony wherein she stated that the first shots were fired by Willingham.

Distilling it down, Thille seemingly views Willingham's act of reaching for his hip during their quarrel as sufficient provocation to warrant a voluntary manslaughter instruction. Viewing the evidence in a light most favorable to Thille, Willingham's conduct falls short of the type of provocation that deprives a reasonable person of self-control and induces them to act impulsively or contrary to reason. We do not reject the notion that the two men engaged in a scuffle, but caselaw has emphasized that mere evidence of an altercation between parties, standing alone, does not support a finding for sufficient provocation. *State v. Northcutt*, 290 Kan. 224, 234, 224 P.3d 564 (2010). One's act of reaching toward their hip, as Willingham did, does not elicit intense emotional excitement that in turn prompts a violent reaction.

Kansas courts have also emphasized the requirement that the quarrel at issue must be sudden and unforeseeable. *State v. Lowry*, 317 Kan. 89, 95, 524 P.3d 416 (2023). The *Lowry* court went on to hold that it is foreseeable that a participant in a quarrel will take steps to defend themselves and their decision to do so does not constitute sufficient provocation for their opponent to respond in a violent and deadly manner. 524 P.3d at 422. Here, it was certainly foreseeable that Willingham would take steps to protect himself when several unknown individuals, a portion of whom were remarkably agitated, descended on his doorstep during the early morning hours, demanded to see Max and for Willingham to stop selling heroin to him. Willingham's attempt to counter what he perceived as a threat by Thille and his comrades does not rise to the standard for the provocation required to warrant the instruction. Reviewing the evidence in the light most favorable to Thille, as the standard requires of us, we are not persuaded the instruction was factually appropriate under this theory. See *State v. Bentley*, 317 Kan. 222, 243, 526 P.3d 1060 (2023).

2. *Imperfect self-defense*

Thille's imperfect self-defense claim fails for similar reasons. Voluntary manslaughter based on this theory contemplates an intentional killing committed while laboring under an unreasonable but honest belief that the circumstances justify deadly force to defend against an aggressor's imminent use of unlawful force. *State v. Salary*, 301 Kan. 586, Syl. ¶ 5, 343 P.3d 1165 (2015). But the record before us bears out that Thille was the initial aggressor. He went to Willingham's house, uninvited, in the middle of the night, flanked by several others, got face to face with Willingham at his front door, and angrily ordered him to retrieve Max from inside the residence. As Willingham reached for his hip, Thille shoved him and then struck him in the face.

We are aware that certain exceptions exist for initial aggressors under very particularized circumstances. K.S.A. 2022 Supp. 21-5226 instructs that the self-defense justification is not available to one who:

> "(c) otherwise initially provokes the use of any force against such person or another, unless:
> "(1) Such person has reasonable grounds to believe that such person is in imminent danger of death or great bodily harm, and has exhausted every reasonable means to escape such danger other than the use of deadly force; or
> "(2) in good faith, such person withdraws from physical contact with the assailant and indicates clearly to the assailant that such person desires to withdraw and terminate the use of such force, but the assailant continues or resumes the use of such force."

But Thille cannot invoke these exceptions. Any claim that he believed he faced imminent danger rings hollow given that he claimed he did not know Willingham had a gun when he reached for his hip. Even so, to the extent he did possess such an awareness, there is no indication from the record that Thille also "exhausted every reasonable means to escape such danger" before resorting to the use of deadly force. Further, there is no evidence which establishes that Thille withdrew from physical contact with Willingham,

yet Willingham persisted. Because Thille was the initial aggressor the facts of his case did not support issuance of a voluntary manslaughter instruction under the theory of imperfect self-defense. See *Salary*, 301 Kan. at 597-98 (concluding defendant was not entitled to instruction on self-defense where defendant was initial aggressor).

Thille has failed to meet his burden of showing that a voluntary manslaughter instruction was factually appropriate. Thus, we are unable to conclude that any error occurred when the court declined to issue the requested instruction.

The absence of an instruction for involuntary manslaughter did not result in clear error as there is no real possibility the jury would have rendered a different verdict if afforded the opportunity to consider that offense.

Thille next claims, for the first time on appeal, that the district court erred when it failed to instruct the jury on involuntary manslaughter. The State responds that the instruction was not factually appropriate, so no error occurred.

Because Thille neither requested nor objected to the district court's failure to give the challenged instruction, our review of the issue is guided by whether the absence of the instruction amounts to clear error. K.S.A. 2022 Supp. 22-3414(3) ("No party may assign as error the giving or failure to give an instruction, including a lesser included crime instruction, unless the party objects thereto before the jury retires to consider its verdict . . . unless the instruction or the failure to give an instruction is clearly erroneous.").

We turn once again to the three-part test set out in the previous jury instruction issue:

> "'(1) determining whether the appellate court can or should review the issue, i.e., whether there is a lack of appellate jurisdiction or a failure to preserve the issue for appeal; (2) considering the merits of the claim to determine whether error occurred below; and (3)

assessing whether the error requires reversal, i.e., whether the error can be deemed harmless.'" *Holley*, 313 Kan. at 253.

Under the first step, Thille's failure to raise this issue at trial does not necessarily deprive this court of jurisdiction to consider the merits of his claim. See K.S.A. 2022 Supp. 22-3414(3); *State v. Waggoner*, 297 Kan. 94, 97, 298 P.3d 333 (2013) ("failure to object to an instruction does not prevent appellate review"). Rather, that preservation piece affects our reversibility inquiry under the third step of the analysis. When a party fails to request an instruction or object to its absence, we will only reverse if the instructional path taken by the district court was clearly erroneous, meaning, we must be "'firmly convinced that the jury would have reached a different verdict had the instruction error not occurred.'" *State v. Patterson*, 311 Kan. 59, 68, 455 P.3d 792 (2020).

The second step requires that we assess whether the instruction at issue was legally and factually appropriate. The district court instructed the jury on premeditated first-degree murder and because involuntary manslaughter is a lesser degree of that offense, such an instruction was legally appropriate. *Gentry*, 310 Kan. at 721.

We turn now to whether the instruction was factually appropriate. An instruction on a lesser included crime is factually appropriate if there is "'sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, that would have supported the instruction.'" *State v. Becker*, 311 Kan. 176, 183, 459 P.3d 173 (2020) (quoting *State v. Chavez*, 310 Kan. 421, 430, 447 P.3d 364 (2019). The district court instructed the jury that to find Thille guilty of reckless second-degree murder, it must find that he acted recklessly and, in a manner manifesting an extreme indifference to the value of human life. Thus, when the jury convicted him of that offense, it necessarily found that the State proved beyond a reasonable doubt that Thille acted recklessly and within the heightened degree of recklessness. K.S.A. 2022 Supp. 21-5405(a)(1) tells us that one classification of involuntary manslaughter is the reckless killing of a human being. A

person's conduct is considered reckless when he or she "consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." K.S.A. 2022 Supp. 21-5202(j).

In an effort to shoehorn his case into those parameters, Thille argues he consciously disregarded a substantial and unjustifiable risk that Willingham was armed and would defend himself if Thille tried to enter the house to search for Max, and a reasonable person would not have opted for the course of action he pursued. He further contends that the instruction was appropriate because the evidence supporting recklessness was the same whether it is used to provide the foundation for reckless second-degree murder or involuntary manslaughter.

Our Supreme Court addressed a strikingly similar argument in *State v. James*, 309 Kan. 1280, 1300, 443 P.3d 1063 (2019), and found that when the facts of a particular case support the issuance of a reckless second-degree murder instruction it does not necessarily follow that there is also support for a reckless involuntary manslaughter instruction because of the difference in the degree of recklessness associated with the two crimes. Instead, the Court undertook an analysis of the evidence to determine the propriety of an involuntary manslaughter instruction even though it had already found a second-degree murder instruction factually appropriate. 309 Kan. at 1300.

The *James* court concluded that the second-degree murder instruction was factually appropriate because there was testimony and physical evidence which tended to support a finding that James did not intend to kill the victim. 309 Kan. at 1299-1300. It similarly found that the instruction for involuntary manslaughter was factually appropriate. In so finding, it observed that "If jurors accepted that James acted recklessly, the evidence did not foreclose culpability at either end of the spectrum for the results of his reckless acts." 309 Kan. 1301. Rather, it opened the door to a variety of possibilities,

and it was the jury's responsibility alone, following consideration of the full breadth of the evidence, to determine where James' conduct fell within the range of recklessness. 309 Kan. at 1301.

Even so, the *James* court ultimately deemed the instructional errors harmless because the jury returned a guilty verdict for first-degree murder, indicating that they determined he acted intentionally and with premeditation. Thus, it eliminated the possibility that the jury viewed the killing as the consequence of reckless conduct. 309 Kan. at 1302.

We believe the same holds true here. The sufficiency of the evidence to support Thille's conviction has not been challenged on appeal. So, it is settled that his actions during those early morning hours are properly characterized as reckless. At one level, it is certainly subject to the interpretation that his conduct demonstrated a heightened degree of recklessness. But given the various perspectives offered by those present and the nuances in their accounts with respect to the number, identities, and locations of those present, Willingham's conduct, the nature of the encounter immediately preceding the fatal shots, and the physical evidence that may or may not corroborate those versions of events, we find the record does contain sufficient evidence to support Thille's assertion that an instruction for involuntary manslaughter was factually appropriate.

But just because we find it is conceivable that a rational jury *could* have found Thille guilty of the lesser crime, that does not necessarily mean that we believe it *would* have convicted him of that offense. *State v. Cooper*, 303 Kan. 764, 772, 366 P.3d 232 (2016). The responsibility to see that this is accomplished lies at Thille's feet by virtue of the clearly erroneous standard. See *State v. Martinez*, 317 Kan. 151, 162, 527 P.3d 531 (2023) ("Under the clear-error standard, the defendant has the burden to firmly convince us that the jury would have reached a different verdict if the instructional error had not occurred."). While he highlights those facts that allude to the general existence of

recklessness, given the jury's verdict there really is not a question that reckless conduct occurred. The deficiency is that Thille fails to use those factors in a way which precisely illustrates how that evidence firmly gives rise to the conclusion that the jury would have found his conduct merely amounted to simple recklessness had the district court not deprived them of the opportunity to do so. The district court instructed the jury that the State had the burden to prove beyond a reasonable doubt that Thille's conduct manifested an extreme indifference to the value of human life, and the jury concluded from the evidence that the State fulfilled its burden. Thille has not met his burden to decisively establish that would not have been the case had the composition of their instructions been different. As a result, we reject the notion that the district court committed clear error when it failed to provide the jury with an instruction for involuntary manslaughter.

The district court properly exercised its discretion when it denied Thille's motion for new trial.

Finally, Thille contends that the district court erred in denying his request for a new trial due to what he perceived was ineffective assistance rendered by his attorney. As support he argues that counsel neglected to adequately inform him of the consequences of requesting a reckless second-degree murder instruction, which in turn led Thille to agree to a guilt-based defense, and that counsel also failed to adequately impeach several of the State's witnesses. The State contends that Thille did not meet his burden to establish ineffective assistance of counsel because he made no showing of any prejudice he suffered as a result of counsel's alleged deficiencies.

An appellate court reviews a district court's denial of a motion for new trial for an abuse of discretion. *State v. Butler*, 307 Kan. 831, 852, 416 P.3d 116 (2018). Judicial discretion is abused if the decision is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. *State v. Gonzalez-Sandoval*, 309 Kan. 113, 126-27, 431 P.3d 850 (2018). The party asserting the district court abused its

discretion bears the burden of showing such abuse occurred. *State v. Thomas*, 307 Kan. 733, 739, 415 P.3d 430 (2018).

The Sixth Amendment to the United States Constitution guarantees criminal defendants the effective assistance of an attorney. See U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To prevail on his claim of ineffective assistance of counsel, Thille had the burden to establish the existence of two factors: (1) his counsel's performance fell below an objective standard of reasonableness under the totality of the circumstances, and (2) he suffered prejudice as a result. *State v. Johnson*, 307 Kan. 436, 447, 410 P.3d 913 (2018). To establish prejudice, the defendant must show with reasonable probability that the deficient performance affected the outcome of the proceedings, based on the totality of the evidence. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Khalil-Alsalaami v. State*, 313 Kan. 472, 486, 486 P.3d 1216 (2021).

We are under no obligation to consider both prongs of the test if Thille fails to make an adequate showing as to one. *Edgar v. State*, 294 Kan. 828, 843, 283 P.3d 152 (2012). Judicial scrutiny of counsel's performance in a claim of ineffective assistance of counsel must be highly deferential and we must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional service. *Butler*, 307 Kan. at 852-53. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Khalil-Alsalaami*, 313 Kan. at 486.

1. *Counsel did not adopt a guilt-based defense.*

Thille first argues that trial counsel's representation fell below an objective standard of reasonableness when he informed Thille that he would serve no more than 10 years in prison if they argued for reckless second-degree murder. Thille speculates that counsel confused the severity level and presumptive sentence of involuntary manslaughter with reckless second-degree murder. Thus, Thille's argument goes, counsel's misstatement concerning the potential consequences of a reckless second-degree murder conviction was the functional equivalent of pursing a guilt-based defense without Thille's consent. Thille now claims he would not have asked for the lesser-included crime of reckless second-degree murder if counsel had properly made him aware that the offense carried the potential for a 38-year prison term. Rather, he would have opted for an "all or nothing" strategy because he felt the State lacked sufficient evidence to sustain a conviction for first-degree murder.

Our Supreme Court has held that a defense attorney's pursuit of a guilt-based defense against their client's wishes violates a defendant's fundamental right to enter a plea of not guilty and deprives the defendant of effective assistance of counsel in a way that is per se prejudicial. *State v. Carter*, 270 Kan. 426, Syl. ¶ 4, 14 P.3d 1138 (2000). But Thille fails to successfully establish that counsel pursued a guilt-based defense in his case. *Carter* nicely illustrates a situation where an impermissible guilt-based defense was truly at issue. In that case, defense counsel made several remarks to the jury that Carter was not completely innocent, but while he may have engaged in criminal conduct he did not act with premeditation. 270 Kan. at 431-33. But in Thille's case, his attorney consistently maintained throughout the trial that Thille was wholly innocent. Requesting a lesser-included instruction does not amount to a guilt-based defense where counsel argues that the defendant is innocent of all offenses. See *State v. Sloan*, No. 89,218, 2004 WL 2160671, at *5 (Kan. App. 2004) (unpublished opinion). As an additional point, as fleshed out in addressing Thille's earlier issues, the lesser included offense of reckless

second-degree murder was both legally and factually appropriate and, therefore, the district court was statutorily required to issue the instruction. K.S.A. 2022 Supp. 22-3414(3) ("In cases where there is some evidence which would reasonably justify a conviction of some lesser included crime as provided in subsection (b) of K.S.A. 2022 Supp. 21-5109, and amendments thereto, the judge shall instruct the jury as to the crime charged and any such lesser included crime."). Thus, the "all or nothing" based defense Thille claims he would have otherwise pursued was not available to him.

Because Thille has failed to show how his counsel pursued a guilt-based defense, he is not entitled to a finding of prejudice per se. Under the two-prong *Strickland* analysis, he must also establish that counsel's complained of conduct resulted in prejudice to him. But he has not favored us with any argument that addresses and analyzes that component of the test. His failure to argue that step amounts to a waiver of the same. See *State v. Tague*, 296 Kan. 993, 1001-02, 298 P.3d 273 (2013) (The failure to brief or assert an argument before an appellate court waives or abandons the claim.) The absence of that component means Thille likewise failed to satisfy his burden to demonstrate counsel provided deficient representation.

2. *The State's witnesses were sufficiently impeached.*

Thille next argues that counsel's performance fell below what is considered reasonable because he neglected to impeach the credibility of Max, Haas, Sitton, and Bingham through the introduction of evidence establishing their prior convictions for crimes of dishonesty. He claims a defendant is necessarily denied effective assistance of counsel when his or her lawyer fails to discover and capitalize upon prior criminal records to impeach the credibility of the State's key witnesses, and for support directs our attention to *Wilkins v. State*, 286 Kan. 971, 987, 190 P.3d 957 (2008) (citing *Sanders v. Ratelle*, 21 F.3d 1446, 1456-61 [9th Cir. 1994]; *People v. Nickson*, 120 Mich. Ct. App. 681, 684-87, 327 N.W.2d 333 [1982]). But *Wilkins* acknowledges that Kansas does not

follow this bright-line rule and continues to filter claims of this nature through the dual pronged *Strickland* analysis. See 286 Kan. at 987. Our thorough review of the record failed to uncover any PSIs or other evidence introduced at the evidentiary hearing which serve to substantiate Thille's claim that such prior convictions even exist. It is "'the well-established rule that an appellant has the burden to designate a record sufficient to establish the claimed error. Without an adequate record, an appellant's claim of alleged error fails.'[Citations omitted.]" *State v. Vonachen*, 312 Kan. 451, 460-61, 476 P.3d 774 (2020). Here, the record is insufficient to persuade us that Thille is entitled to the relief he seeks.

Because Thille has failed to carry his burden to demonstrate that he suffered deficient representation at the hands of his trial counsel, he has equally failed to establish that the district court abused its discretion in rejecting his claim that he was entitled to a new trial as a result of counsel's subpar performance. Accordingly, we uphold the district court's denial of Thille's motion for new trial.

CONCLUSION

Mika Thille brought this case to us because he believed purported deficiencies in the jury instructions, and the district court's allegedly erroneous denial of his motion for new trial based on the ineffective assistance of his trial counsel, undermined the validity of his conviction. Following a thorough review of the record and legal analyses governing the claims raised, we decline to find that the new trial Thille seeks is warranted. The voluntary manslaughter instruction he requested was properly excluded by the district court as it was not factually appropriate under the circumstances presented by Thille's case. The absence of an involuntary manslaughter instruction, an issue that Thille's brings to us anew, did not give rise to clear error. While legally and factually appropriate, there is no real possibility the outcome of Thille's case would have been different had the jury received that instruction. Finally, we uphold the district court's

denial of Thille's motion for new trial because he failed to satisfy his burden under the *Strickland* analysis to establish that his trial counsel provided substandard representation and he suffered prejudice as a result.

Affirmed.