NOT DESIGNATED FOR PUBLICATION

No. 124,885

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

MARQUEL D. DEAN,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; JEFFREY SYRIOS, judge. Opinion filed May 12, 2023. Affirmed.

Wendie C. Miller and *David L. Miller*, of The Law Office of David L. Miller, LLC, of Wichita, for appellant.

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

Before SCHROEDER, P.J., WARNER and CLINE, JJ.

PER CURIAM: Marquel D. Dean appeals the summary denial of his K.S.A. 60-1507 motion. Since we agree that Dean's alleged trial errors were or should have been raised in his direct appeal, and he has established no prejudice from his allegations of appellate error, we affirm the district court's decision.

FACTS

A jury convicted Dean of first-degree murder, four counts of aggravated battery, and criminal possession of a firearm. These convictions stemmed from a retaliatory gang shooting at a late-night party in July 2013. Dean, a member of the Crips, shot and killed a member of the Bloods shortly after arriving at the party. He also injured four bystanders in the shooting. *State v. Dean*, 310 Kan. 848, 859, 450 P.3d 819 (2019). Several party guests identified Dean as the shooter.

After unsuccessfully appealing his convictions, Dean moved for relief under K.S.A 60-1507, alleging 16 trial and appellate errors. The district court summarily denied Dean's motion in a 19-page opinion, extensively examining each claim and explaining in detail why the claims were insufficient or waived. Dean now reasserts seven of his grounds for relief on appeal.

ANALYSIS

A district court has three options to resolve a K.S.A. 60-1507 motion: (1) determine that the motion, files, and case records conclusively show the prisoner is entitled to no relief and deny the motion summarily; (2) determine from the motion, files, and records that a potentially substantial issue exists, in which case a preliminary hearing may be held after appointment of counsel; or (3) determine from the motion, files, records, or preliminary hearing that there is a substantial issue requiring an evidentiary hearing. *Beauclair v. State*, 308 Kan. 284, 293, 419 P.3d 1180 (2018).

To avoid summary denial of the motion, a movant has the burden to prove his or her K.S.A. 60-1507 motion warrants an evidentiary hearing. The movant must make more than conclusory contentions and must state an evidentiary basis in support of the claims, or an evidentiary basis must appear in the record. *Edgar v. State*, 294 Kan. 828,

836, 283 P.3d 152 (2012). We review the district court's disposal of Dean's motion under a de novo standard. See *Beauclair*, 308 Kan. at 293.

Dean's claims based on alleged trial errors

Most of Dean's claims are based on alleged trial errors. These claims include his allegations that (1) his constitutional rights were violated by the State's knowing failure to correct a witness' false testimony that the witness was not testifying pursuant to a plea agreement, and his trial counsel was ineffective for failing to properly address the issue; (2) the district court erred in, and his trial counsel was ineffective for, allowing that same witness to testify about that witness' relationship with the victim and the fact that the victim had a young child; (3) the district court erred in permitting three witnesses to express their opinions about Dean's guilt; (4) his trial counsel was ineffective in failing to obtain expert witnesses and investigators to rebut the testimony of the State's witnesses; (5) his trial counsel was ineffective for failing to challenge prosecutorial misconduct in the State's closing arguments; and (6) his trial counsel's errors, viewed cumulatively, are sufficiently prejudicial to qualify as ineffective assistance of counsel under the cumulative error doctrine.

Kansas Supreme Court Rule 183(c)(3) (2023 Kan. S. Ct. R. at 243) generally prohibits a K.S.A. 60-1507 motion from being used "as a substitute for direct appeal involving mere trial errors or as a substitute for a second appeal." But the rule provides an exception, allowing a movant to raise trial errors affecting constitutional rights even though that error could have been raised in a direct appeal if "exceptional circumstances excuse the failure to appeal." Rule 183(c)(3) (2023 Kan. S. Ct. R. at 243). It is the movant's burden to establish such circumstances exist. See *Moncla v. State*, 285 Kan. 826, 831, 176 P.3d 954 (2008) (citing Kansas Supreme Court Rule 183[c][3]).

Steele's alleged improper testimony about his plea deal

Dean first challenges the district court's denial of his K.S.A. 60-1507 motion as to his claim that his constitutional rights were violated by the State's knowing failure to correct false testimony by one of its witnesses—Charles Steele.

Steele was awaiting sentencing on unrelated federal charges when he testified in Dean's trial. Steele testified that he pleaded guilty in the federal case against him but was not given a plea bargain in exchange for testifying in Dean's case. Instead, he stated that he merely hoped to use his testimony as a basis for a reduction in his sentence and had no guarantee that his sentence would be reduced.

Roughly three weeks after the trial, the federal prosecutors in Steele's case contacted the prosecutors in Dean's case and shared a letter Steele sent the federal prosecutors some six months earlier. The letter discusses Steele's desire to cooperate with the government, among other matters. The e-mail containing the letter states that the federal prosecutor "couldn't remember if [he] had sent [the State prosecutor] this letter." The e-mail then states: "Rest assured, nothing was acted upon concerning the letter, and the government has not offered [Steele] anything beyond what we have already talked about, namely a proposed reduction in his federal sentence should he cooperate in [Dean's] case."

The response e-mail from the State prosecutor reflects that the State prosecutor and federal prosecutor spoke over the phone following the State prosecutor's receipt of the e-mail and letter. It summarizes this discussion, noting that during this phone call, the federal prosecutor told the State that Steele's plea deal included the term that Steele was to provide truthful testimony in Dean's case and in exchange the federal government would "consider his assistance and recommend a reduced sentence" to the federal court at the time of Steele's sentencing. The federal prosecutor also reiterated that the government

only promised to recommend a reduced sentence if Steele testified truthfully in Dean's case, and there was no guarantee the sentencing court would follow the government's recommendation.

Dean moved for a new trial on the eve of his sentencing based on this "newly discovered evidence," claiming the State withheld details about Steele's plea deal with the federal government until after trial. The district court denied the motion after finding that regardless of whether Steele had a plea bargain with the federal government, he admitted he was testifying in exchange for a benefit. It also pointed out that he "was fully impeached on that issue," as Dean's trial counsel "cross-examined Steele about the benefit he could receive for testifying and attacked his credibility during closing argument." *Dean*, 310 Kan. at 858-59. Thus, the district court found evidence of Steele's alleged plea deal was neither newly discovered nor material.

Dean addressed this issue—and other alleged trial errors—in his direct appeal. But our Supreme Court agreed with the district court's finding, noting "more detail about Steele's plea deal would not 'be likely to produce a different result upon retrial.'" 310 Kan. 859 (citing *State v. Rojas-Marceleno*, 295 Kan. 525, 540, 285 P.3d 361 [2012]).

Dean has essentially repackaged this claim in his current K.S.A. 60-1507 motion. He now argues the State's alleged failure to correct Steele's false testimony violated his constitutional right of due process under the Fourteenth Amendment to the United States Constitution. He contends that had the jury known about Steele's plea deal, it would have impacted the jury's view of Steele's credibility and affected the verdict. Dean also claims his trial counsel was ineffective in addressing this issue by not requesting additional discovery about Steele's plea deal and not challenging Steele's testimony as perjurious. Dean argues if his counsel had requested additional discovery regarding the plea deal and cross-examined Steele more thoroughly, the jury would have found him innocent. Alternatively, he argues if his counsel had supported his motion for a new trial with more

evidence or challenged Steele's testimony as perjury rather than claiming the alleged plea agreement was newly discovered evidence, he would have been granted a new trial.

Because Dean already raised this issue in his direct appeal, we agree with the State that consideration of this claim is barred by res judicata and Supreme Court Rule 183(c)(3). Once a defendant seeks direct appeal of his or her conviction or sentence, the judgment of the reviewing court is res judicata as to all issues raised and any issues that could have been raised are considered waived. *Drach v. Bruce*, 281 Kan. 1058, 1079, 136 P.3d 390 (2006). Constitutional grounds for reversal asserted for the first time on appeal are no exception to that rule. See *State v. Pearce*, 314 Kan. 475, 484, 500 P.3d 528 (2021); *Kaiser v. State*, No. 101,712, 2010 WL 3731180, at *2 (Kan. App. 2010) (unpublished opinion).

And even if we did not find Dean had waived the new arguments he offers on this point by failing to raise them in his direct appeal, we find the essence of his claim has already been decided. Dean challenged the State's handling of Steele's testimony in his direct appeal, and our Supreme Court found more information about Steele's alleged plea deal would not likely have changed the verdict. *Dean*, 310 Kan. at 859.

Based on this procedural history, we find the district court properly dismissed Dean's claims on this issue.

Improper testimony from Steele about the victim

Dean next argues the district court erred by allowing Steele to testify about his relationship with the victim and mention that the victim left behind a daughter. Dean alleges this testimony was elicited by the prosecutor, was irrelevant, and only served to inflame the passions of the jury. He also argues his trial counsel was ineffective for

failing to object to the admission of this testimony and that this allows for consideration of his claim despite the lack of an objection.

In addressing Dean's K.S.A. 60-1507 motion, the district court characterized this claim as an allegation of trial error. It determined that consideration of the claim was barred since Dean should have raised it in his direct appeal. As for Dean's passing comment that his trial counsel was ineffective for failing to object to this testimony, the district court found Dean failed to establish how his counsel was ineffective or that Dean suffered any prejudice from the admission of this testimony.

We find no error in the district court's decision on this issue.

To begin, we find Dean's claim involves alleged trial errors and that he waived any right to challenge these errors by failing to raise this claim in his direct appeal or argue exceptional circumstances allowing us to address it now. See Kansas Supreme Court Rule 183(c)(3); *Moncla*, 285 Kan. at 831.

Nonetheless, were we to find that Dean did not waive this claim, it would still be unpersuasive. Even assuming the contemporaneous objection rule would not stand as an additional bar to the consideration of this claim, there is no reasonable probability that the challenged testimony affected the outcome of the trial.

Error in the admission of evidence that does not implicate a defendant's constitutional rights is harmless if there is no reasonable probability the error affected the trial's outcome considering the entire record. The burden of proving harmlessness is on the party benefiting from the error. *State v. Chapman*, 306 Kan. 266, 276, 392 P.3d 1285 (2017).

Dean argues that the State elicited irrelevant testimony from Steele intending to inflame the passions of the jury. Dean points to Steele's testimony that he reached out to assist the prosecution because "[Dean] killed my partner. My partner didn't deserve it." He also points to Steele's statements that Steele knew the victim for over 10 years and considered him a close friend and that the victim had a young daughter who now had to grow up without him. Dean did not object to the admission of this testimony at trial.

In support of his claim, Dean cites several cases for the proposition that a prosecutor's intentional elicitation of irrelevant testimony about the victim's surviving friends and children to inflame the passions of the jury constitutes reversible error. *State v. Donesay*, 265 Kan. 60, 82, 959 P.2d 862 (1998); *People v. Bernette*, 30 Ill. 2d 359, 372-73, 197 N.E.2d 436 (1964). But we agree with the State that the facts here are distinguishable from *Donesay* and *Bernette*.

Donesay and *Bernette* involved irrelevant information elicited by the prosecution solely to inflame the passions of the jury. In both cases, the prosecution elicited testimony from the victim's spouse about the victim's surviving children or the victim's relationship with the spouse, family, and friends. In *Donesay*, the prosecution had the victim's spouse, who was a non-fact witness, provide extensive testimony about their relationship, the victim's personality, and the victim's relationships with friends and family. In *Bernette*, the prosecutor intentionally elicited testimony about the victim's surviving children and remarked on the injustice of taking away his opportunity to be a father in closing arguments. The admission of this testimony was reversible error in both cases because it was patently irrelevant and deliberately presented for the obvious purpose of inflaming the jury against the defendant, and thus implicated the defendant's right to a fair and impartial trial. *Donesay*, 265 Kan. at 88; *Bernette*, 30 Ill. 2d at 372-73.

Here, in contrast, Steele was a fact witness describing the background of his involvement in the events underlying the case—i.e., how he knew the victim—and his

reasons for assisting the prosecution. His statements were brief and incidental, could be relevant given the questions over his credibility, and were not further used by the prosecution. Finally, Steele's testimony about the victim's daughter was not elicited by the prosecution but came in response to extended questioning from *defense* counsel about Steele's motivations for testifying.

Given the way the statements at issue were elicited and the other evidence establishing Dean's guilt, there is no reasonable probability that this brief testimony affected the outcome of the trial. Thus, any error that occurred here was harmless.

Alleged improper opinion testimony

Dean next argues the district court erred in allowing Steele and two other witnesses "to express their opinions as to his guilt." The district court denied this claim because it found it to contain allegations of trial error which Dean should have raised in his direct appeal. Since Dean identified no exceptional circumstances which would allow the district court to consider his claim, the court found he was barred from presenting it in his K.S.A. 60-1507 motion.

On appeal, Dean asserts for the first time that his trial and appellate counsel were ineffective for failing to challenge this testimony, either at trial or on direct appeal, and that this constitutes exceptional circumstances justifying the consideration of his claim. But he offers no substantive argument on this point, nor does he argue any exception which would allow us to consider this claim for the first time on appeal.

Generally, appellate courts do not consider issues raised for the first time on appeal, although exceptions to this rule exist. *State v. Hilyard*, 316 Kan. 326, 343, 515 P.3d 267 (2022). This includes claims of ineffective assistance of counsel raised for the first time on appeal. *Trotter v. State*, 288 Kan. 112, 127, 200 P.3d 1236 (2009).

Kansas Supreme Court Rule 6.02(a)(5) (2023 Kan. S. Ct. R. at 36) requires an appellant raising an issue for the first time on appeal to affirmatively invoke and argue an exception to the general rule that such claims may not be raised for the first time on appeal. Failure to satisfy Rule 6.02(a)(5) in this respect amounts to an abandonment of the claim. *State v. Godfrey*, 301 Kan. 1041, 1043-44, 350 P.3d 1068 (2015).

Because Dean does not identify an exception or make any argument about why we should consider his newly asserted allegations of ineffective assistance of counsel, we find his argument unpreserved and abandoned.

We thus affirm the district court's dismissal of Dean's claim on this issue, as Dean has failed to show that exceptional circumstances excuse his failure to raise these trial errors in his direct appeal.

Whether Dean's trial counsel provided ineffective assistance of counsel by failing to obtain investigators or expert witnesses

Dean next claims his trial counsel was ineffective for failing to obtain expert witnesses or investigators to rebut the State's experts. His entire statement on this issue in his K.S.A. 60-1507 motion consisted of two sentences:

> "For every expert witness the [S]tate had, the petitioner, was entitled to one also . . . , regardless of whether he could afford to hire one or not. Petitioner's co-petitioner was afforded an expert witness by the [S]tate when he couldn't afford to pay for one despite having a paid attorney."

The district court dismissed this claim as "conclusory [and] vague," finding Dean failed to meet his burden to support his argument with factual or legal support.

On appeal, Dean greatly expands his argument by now asserting he should have been afforded an eyewitness expert, an investigator to conduct a cellular phone analysis to rebut testimony from a special agent called by the State who testified about cellular analysis he conducted to determine the location of the parties and other evidence, an investigator to examine firearms and shell casings, and an expert to challenge testimony from a law enforcement officer who was declared an expert witness in the area of gang intelligence. But Dean made none of these arguments before the district court and makes no argument to us as to why we can consider them now.

Since Dean has failed to preserve his arguments on appeal or identify an exception to the preservation rule that would allow our consideration of them now, we find them waived and abandoned. See *Godfrey*, 301 Kan. at 1043-44.

Dean's conclusory claim, as presented to the district court, is unpersuasive. The test for ineffective assistance of counsel "does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense." *Harrington v. Richter*, 562 U.S. 86, 111, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

Prosecutorial error

Dean also argued in his K.S.A. 60-1507 motion that the prosecutor committed reversible misconduct during closing arguments by misstating the evidence. The district court determined this allegation was another claim of trial error which Dean should have raised in his direct appeal.

On appeal, Dean again expands on his argument about why the prosecutor's statements were allegedly improper but does not address the district court's determination that this was a trial error or that he waived his argument by failing to address it in his

direct appeal. Instead, he claims the court should have liberally construed Dean's pro se motion and appointed counsel who could have amended Dean's K.S.A. 60-1507 motion to also allege his trial counsel was ineffective for failing to challenge the statements and that his appellate counsel was ineffective for failing to raise the issue on appeal.

We find Dean waived this claim as well. His assertion about the prosecutor's statements in closing is an allegation of trial error that should have been raised in his direct appeal, and he argues no exceptional circumstances which justify our consideration of this error now. See Kansas Supreme Court Rule 183(c)(3). We do not find his argument on appeal to be a reasonable construction of his K.S.A. 60-1507 motion, nor do we find that the district court erred in not appointing Dean counsel. We find his allegations on this issue are vague and conclusory and did not obligate the court to appoint counsel to investigate them further. As the district court correctly found, Dean waived his right to challenge the prosecutor's statements by failing to raise these trial errors in his direct appeal.

Cumulative error

Rounding out his claims of trial error, Dean argues that even if he has failed to show that he was prejudiced by any of his trial counsel's errors when viewed individually, the accumulation of these errors created a reasonable probability of changing the outcome of the trial. But since we have found Dean waived all but one of his claims of trial error, there are no errors to accumulate. *State v. Foster*, 290 Kan. 696, 726, 233 P.3d 265 (2010) ("A single error does not constitute cumulative error."). We cannot consider Dean's unpreserved claims of error since "[t]o do otherwise would allow a criminal defendant to resurrect lost errors—those waived, invited, or simply never raised in the district court—in the guise of cumulative error." *State v. Knight*, No. 105,092, 2012 WL 2325849, at *7 (Kan. App. 2012) (unpublished opinion). As a result, Dean's claim of cumulative error fails as well.

Dean's claims based on alleged appellate error

Along with his claims of trial error, Dean brings claims based on two alleged errors in his appeal.

The partial verdict form

During jury deliberations in Dean's case, the foreperson of the jury—Juror 7—alerted the district court to the fact that he had been taking notes outside of court summarizing the proceedings and asked for permission to share the notes with the other jurors. Since the district court had prohibited the jurors from taking notes during the trial, it ordered Juror 7 dismissed and replaced him with an alternate. As Juror 7 was escorted from the courtroom, he handed the court assistant a verdict form. This form had marks in two of the spaces, seemingly reflecting the jury had concluded that Dean was guilty of first-degree murder and criminal possession of a weapon by a felon by the time Juror 7 was dismissed. Before sending the reconstituted jury back to deliberate, the district court instructed the jury that it was to begin deliberations anew.

Based on these circumstances, Dean moved for a mistrial, which the district court overruled. It found there was no substantial prejudice, as there was no indication from polling the other jurors that they were tainted by Juror 7's conduct and the jury was instructed to begin deliberations anew.

On direct appeal, Dean argued that the district court erred in denying his motion for a mistrial. The Kansas Supreme Court rejected this claim, finding that Dean failed to furnish a record establishing prejudicial error because he did not include the partial verdict form in the record on appeal. *Dean*, 310 Kan. at 853.

Dean mainly argues that he received ineffective assistance of appellate counsel based on his counsel's failure to include the partial verdict form in the record on appeal, as this was necessary to support his claim that the district court erred in denying his motion for a mistrial. He argues that had the partial verdict form been included in the appellate record, the Kansas Supreme Court would have found prejudicial error and granted him a new trial.

The State argues that, even if appellate counsel's failure was objectively unreasonable, Dean fails to establish that the outcome of his appeal would have been different absent counsel's deficient performance.

For a criminal defendant to succeed in asserting that he or she was denied effective assistance of appellate counsel, it must be shown that (1) counsel's performance was objectively unreasonable and (2) but for counsel's deficient performance, the appeal would have succeeded. *Holmes v. State*, 292 Kan. 271, 274, 252 P.3d 573 (2011).

The Kansas Supreme Court has suggested that appellate counsel's failure by ignorant mistake to provide a record on appeal sufficient to support the claims included on appeal can constitute objectively unreasonable conduct. See *Holmes*, 292 Kan. at 280-83.

As the State notes, however, it is unnecessary to address whether appellate counsel's failure to include the partial verdict form was objectively unreasonable, since Dean has failed to establish prejudice.

When an alternate juror is substituted after deliberations have begun, the district court must instruct the jury to begin deliberations anew. *State v. Haislip*, 237 Kan. 461, 469, 701 P.2d 909 (1985). Generally, appellate courts presume that juries follow a district

court's instructions, and a defendant must come forward with some evidence to overcome the presumption. *State v. Kleypas*, 305 Kan. 224, 279, 382 P.3d 373 (2016).

As the Kansas Supreme Court noted in refusing to consider Dean's claim on direct appeal, he claimed that the partial verdict form incurably tainted the jury such that it could not start over with a clean slate. To succeed in his current appeal, Dean therefore must show that there is a reasonable probability that the court would have found in his favor and ordered a new trial, had the form been included in the record on appeal.

In arguing prejudice, however, Dean does not discuss the information in the form or explain how the partial verdict form incurably tainted the jury, beyond suggesting that Juror 7 exerted a special influence over the other jurors as the foreperson and pointing to the fact that jurors were quick with readbacks in support. He has thus failed to explain why the Supreme Court would have reached a different result had the form been included.

More support for the contention that the Kansas Supreme Court would have found against Dean even if the partial verdict form were in the record in his direct appeal comes from how long it took the new jury to return a verdict. As the State points out, the reconstituted jury deliberated for nearly seven hours before returning a verdict, suggesting that the jury took the district court's instruction to start deliberations anew to heart. Given this, and the presumption that juries follow the instructions they are given, it does not appear likely the Kansas Supreme Court would have found in Dean's favor, even if the form were in the record on appeal.

Steele's plea deal

Dean also claims that his appellate counsel provided ineffective assistance by failing to include Steele's plea deal in the record on appeal. He argues that had the plea

deal been included in the record on appeal, he would have been granted a new trial. He provides no support for this contention beyond stating that had this evidence been added to the record the result of the appeal would have been different.

Dean did not raise this claim before the district court and does not argue that an exception to the general rule against considering claims raised for the first time on appeal applies here. Therefore, we find that the district court did not err in summarily denying Dean's K.S.A. 60-1507 motion as to these claims.

CONCLUSION

Because the motion, files, and records of the case conclusively establish that Dean is not entitled to relief on any of his claims of error, we find the district court did not err in summarily denying Dean's K.S.A. 60-1507 motion.

Affirmed.