NOT DESIGNATED FOR PUBLICATION

No. 125,180

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

EDMOND LEE WININGER,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Cherokee District Court; OLIVER KENT LYNCH, judge. Opinion filed July 28, 2023. Affirmed.

Stacey L. Schlimmer, of Schlimmer Law, LLC, of Overland Park, for appellant.

Steven J. Obermeier, assistant solicitor general, and *Kris W. Kobach*, attorney general, for appellee.

Before WARNER, P.J., COBLE and PICKERING, JJ.

COBLE, J.: Following Edmond Lee Wininger's conviction of one count of aggravated indecent liberties with a child and one count of indecent liberties with a child, a panel of this court affirmed his conviction on appeal. *State v. Wininger*, No. 114,431, 2017 WL 1033986, at *1 (Kan. App. 2017) (unpublished opinion). Wininger then filed a K.S.A. 60-1507 motion, claiming both his trial and appellate counsel were ineffective. After a nonevidentiary hearing, the district court summarily denied all Wininger's claims without granting an evidentiary hearing. Wininger now appeals.

After reviewing the claims Wininger raises on appeal, we find the district court did not err in summarily denying his K.S.A. 60-1507 motion. Wininger's claims are largely conclusory or unsupported by the record or any evidentiary basis. In all claims, Wininger either fails to establish that his trial and appellate counsel's performances fell below an objectively reasonable standard or does not show that he was prejudiced by counsel's actions under the *Strickland* analysis. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). So, he fails to meet his burden to demonstrate that he was entitled to an evidentiary hearing, and we affirm the district court's summary denial of Wininger's K.S.A. 60-1507 motion.

FACTUAL AND PROCEDURAL BACKGROUND

In 2011, the State charged Wininger with one count of aggravated indecent liberties with a child under 14 years of age, in violation of K.S.A. 2010 Supp. 21-3504(a)(3)(A), an alternative count of indecent liberties with a child between the of age of 14 and 16, in violation of K.S.A. 21-3503(a)(1), and a second count count of indecent liberties with a child, in violation of K.S.A. 21-3503(a)(1). Specifically, the State alleged that Wininger engaged in inappropriate contact with a minor victim on multiple occasions in his home in late 2010 and early 2011.

The district court held a jury trial in March 2015. The victim testified that she used to go to Wininger's house when she was 13- and 14-years old, and she turned 14 on Christmas Eve 2010. She said that while she was at Wininger's house, she would give Wininger kisses on the cheeks for using the internet or his cellphone for social media. She told the jury that Wininger eventually asked for longer kisses on the mouth, including open mouth kisses, and at times forced his lips on hers. The victim also testified that on one occasion, shortly before or after her 14th birthday, Wininger forcibly touched her breasts and her groin area while she was sleeping on the couch. Her sister

also testified that she saw Wininger kissing her sister on the bed once and had to push him off her.

Wininger testified on his own behalf and admitted to getting kisses from the victim and touching parts of her body. He denied forcibly kissing her in his bedroom and testified that he was asleep when she started kissing him. He denied the allegations that he touched the victim on the couch. He testified that he had provided statements to law enforcement admitting that he had kissed and touched the victim, but that his earlier oral and written statements to law enforcement were made under duress. Evidence at trial showed that, when law enforcement officers interviewed Wininger, he admitted to an open mouth kiss as well as to touching the victim on the breasts and on the buttocks.

Wininger also presented two character witnesses on his behalf: T.L. and B.T. T.L. testified that her daughter was once married to Wininger's son, and T.L. lives about two blocks from Wininger. She testified that Wininger routinely came to her house on Fridays to see if the grandchildren at T.L.'s house wanted to stay at his house. T.L. testified that the victim had been in her home, and she had the chance to observe Wininger with the victim. She did not ever witness any dissension or uneasiness between the two. She also testified that Wininger and multiple children, including the victim, had spent Christmas Eve 2010 at her home and she noticed nothing amiss, and the victim did not say anything about the allegations at that time.

B.T. testified that she is T.L.'s granddaughter, and although she is not related to the victim, some of her relatives are related to the victim. B.T. said that as a teenager, before she became employed, she spent most weekends at Wininger's home, along with the victim and other children. Although she was similar in age to the victim, B.T. testified that Wininger did not act inappropriately with her, and she never saw him act inappropriately with any of the other children who visited his home. B.T. also testified that both she and the victim were at T.L.'s house on Christmas Eve 2010. She recalled

that the victim later left with Wininger, but B.T. did not witness anything inappropriate occurring.

During jury deliberations, the jury presented a question to the court about the charges, asking whether they had to "make a decision and vote and sign Count 1 [and] Count 1 alternative (same vote) as count 1 alternative reads the same as count 2." The district court, after conferencing with counsel and receiving no objections, answered by stating that the jury "must indicate a verdict on each count—both count 1 [and] count 1 alternative, as well as count 2. Refer to your instructions if necessary." The jury then found Wininger guilty on all three counts.

Wininger moved the court for a judgment of not guilty notwithstanding the verdict of the jury or in the alternative for a new trial. The district court denied Wininger's motion. The district court dismissed alternative Count 1 and sentenced him on only Counts 1 and 2, establishing Count 2 as the base sentence and imposing a 34–month prison sentence for the indecent liberties with a child conviction. The district court also sentenced Wininger to a mandatory 25-years minimum prison term and lifetime postrelease supervision for Count 1, running consecutive to Count 2.

On direct appeal, a panel of this court affirmed Wininger's conviction. *Wininger*, 2017 WL 1033986, at *1. The Kansas Supreme Court denied Wininger's petition for review. 307 Kan. 994 (2017).

Following our Supreme Court's denial of his petition for review, Wininger timely filed a K.S.A. 60-1507 motion. In his motion, he asserted five claims of ineffective assistance against his trial counsel and three claims against his appellate counsel. After conducting a nonevidentiary hearing on the motion, the district court granted the State's motion to summarily dismiss the K.S.A. 60-1507 motion, finding that the case files and records conclusively showed Wininger was not entitled to relief. The district court did not

articulate specific reasons but adopted in its decision the arguments and authorities set forth in the State's motion to dismiss and supporting memorandum.

Wininger timely appeals.

DID THE DISTRICT COURT ERR IN SUMMARILY DENYING WININGER'S K.S.A. 60-1507 MOTION?

Wininger raises a single issue on appeal—his claim that the district court erred by summarily dismissing his K.S.A. 60-1507 motion without an evidentiary hearing. Wininger argues that he presented sufficient evidence to meet his burden of establishing the need for an evidentiary hearing on his claims of ineffective assistance of counsel.

When the district court decides a K.S.A. 60-1507 motion following a preliminary or nonevidentiary hearing, the appellate court evaluates whether the district court's factual findings are supported by substantial competent evidence and whether those findings are sufficient to support its conclusions of law. *Robertson v. State*, 288 Kan. 217, 225, 201 P.3d 691 (2009). We then review the district court's ultimate legal conclusions using a de novo standard. 288 Kan. at 225.

As the movant, Wininger bears the burden of establishing entitlement to an evidentiary hearing. To meet this burden, a movant's contentions must be more than conclusory, and either the movant must set forth an evidentiary basis to support those contentions or the basis must be evident from the record. *Thuko v. State*, 310 Kan. 74, 80, 444 P.3d 927 (2019). If this showing is made, the court must hold an evidentiary hearing unless the motion is a second or successive motion seeking similar relief. *Sola-Morales v. State*, 300 Kan. 875, 881, 335 P.3d 1162 (2014). In other words, the district court must hold an evidentiary hearing on a K.S.A. 60-1507 motion, unless the motion, files, and

records of the case conclusively show the movant is not entitled to relief. K.S.A. 2022 Supp. 60-1507(b); Supreme Court Rule 183(f) and (j) (2023 Kan. S. Ct. R. at 243-44).

Wininger's ineffective assistance of counsel claims

Comprising Wininger's single issue on appeal are five claims of ineffective assistance of counsel. He alleges that his trial counsel was ineffective for four reasons: (1) failing to investigate or call an expert witness; (2) failing to call three key witnesses to testify for the defense; (3) failing to sufficiently cross-examine two State witnesses; and (4) failing to sufficiently advise him during sentencing. He also claims that his appellate counsel was ineffective for (5) failing to raise on appeal an issue regarding the jury instructions.

Wininger abandons three of the ineffective assistance of counsel claims originally asserted in his K.S.A. 60-1507 motion, including his claim that his trial counsel predetermined that Wininger would be convicted, and that his appellate counsel failed to raise issues regarding both the sufficiency of the evidence and the suppression of Wininger's statements. Issues not adequately briefed are deemed waived or abandoned, and we do not consider the abandoned arguments. *State v. Gallegos*, 313 Kan. 262, 277, 485 P.3d 622 (2021).

Legal principles applicable to ineffective assistance claims

Before examining Wininger's surviving five claims, we must first summarize the applicable legal standard. We analyze claims of ineffective assistance of counsel under the well-established two-prong test outlined in *Strickland* and adopted by our Supreme Court in *Chamberlain v. State*, 236 Kan. 650, 656-57, 694 P.2d 468 (1985). *Khalil-Alsalaami v. State*, 313 Kan. 472, 485, 486 P.3d 1216 (2021). To prevail on a claim of ineffective assistance of trial counsel, a criminal defendant must establish (1) that the

performance of defense counsel was deficient under the totality of the circumstances, and (2) that the deficient performance prejudiced the defendant. *Sola-Morales*, 300 Kan. at 882 (citing *Strickland*, 466 U.S. at 687).

To demonstrate deficient performance under the first prong, "'the defendant must show that counsel's representation fell below an objective standard of reasonableness.'" *Khalil-Alsalaami*, 313 Kan. at 485 (quoting *Strickland*, 466 U.S. at 688). Judicial scrutiny of counsel's performance in a claim of ineffective assistance of counsel is highly deferential and requires consideration of all the evidence before the judge or jury. *State v. Sprague*, 303 Kan. 418, 426, 362 P.3d 828 (2015). A fair assessment of counsel's performance requires that every effort be made to eliminate the distorting effects of hindsight, reconstruct the circumstances surrounding the challenged conduct, and evaluate the conduct from counsel's perspective at the time. *Khalil-Alsalaami*, 313 Kan. 485-86 (citing *Strickland*, 466 U.S. at 689). A court considering a claim of ineffective assistance of counsel must strongly presume that defense counsel's conduct fell within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, counsel's action "'might be considered sound trial strategy.'" *Khalil-Alsalaami*, 313 Kan. at 486 (quoting *Strickland*, 466 U.S. at 689). "An attorney's strategic decisions are essentially not challengeable if the attorney made an informed decision based on a thorough investigation of the facts and the applicable law." *Wilson v. State*, 51 Kan. App. 2d 1, 14, 340 P.3d 1213 (2014).

The second prong of the *Strickland* analysis requires the defendant to establish that defense counsel's deficient performance was prejudicial. """To show prejudice, the defendant must show a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."'" *Sprague*, 303 Kan. at 426. "'A court hearing an ineffectiveness claim must consider the totality of the evidence

before the judge or jury.'" *Khalil-Alsalaami*, 313 Kan. at 486 (quoting *Edgar v. State*, 294 Kan. 828, 838, 283 P.3d 152 [2012]).

Applying these standards, we address each of Wininger's ineffective assistance of counsel claims in turn.

1. *Claim of ineffectiveness for trial counsel's alleged failure to investigate or call an expert witness*

Wininger first claims that his trial counsel was ineffective for failing to thoroughly investigate and call an expert witness for trial. In his K.S.A. 60-1507 motion, he argued that the introduction of an expert witness report or a testimony by the expert witness could have shifted the weight of the victim's credibility. On appeal, Wininger claims that an evidentiary hearing was warranted because it is impossible to determine why his trial counsel failed to call the expert as a witness solely from the record. Wininger also claims that he was prejudiced by his trial counsel's perceived deficient performance.

During the underlying criminal case, defense counsel moved the court for an order allowing him to hire a forensic psychologist and, in his motion, expressed the intent to hire Dr. Robert Barnett as an expert witness. The district court granted Wininger's motion and ordered defense counsel to seek the services of Dr. Barnett to review documents and the video recording of the victim's forensic interview. Counsel also listed Dr. Barnett as a potential expert witness in the pretrial questionnaire. Yet trial counsel did not call Dr. Barnett during trial to provide an expert opinion on forensic interviewing techniques of a minor or cross-examine the interviewing techniques used by the State's witnesses.

The State argued that trial counsel's long-established career as an attorney is a testament that his performance did not fall below the objective standard of reasonableness. The State also asserts that defense counsel was not required to present

Dr. Barnett as an expert witness because the State did not introduce forensic interview techniques during trial or even discuss the Sheriff's interview with the victim.

Generally, "'[i]t is within the province of a lawyer to decide what witnesses to call, whether and how to conduct cross-examination, and other strategic and tactical decisions.' [Citation omitted.]" *Sola-Morales*, 300 Kan. at 887. If counsel makes a strategic decision after making a thorough investigation of the law and the facts relevant to the realistically available options, then counsel's decision is virtually unchallengeable. *State v. Butler*, 307 Kan. 831, 854, 416 P.3d 116 (2018).

When considering whether trial counsel's strategic decision not to retain expert services was deficient, a panel of this court found that defense counsel's failure to present or even search for an expert witness constituted ineffective assistance of counsel. *Mullins v. State*, 30 Kan. App. 2d 711, 718, 46 P.3d 1222 (2002). Mullins was convicted of child sexual abuse, and this court held that the importance of using expert witnesses in such cases was well-known at the time of the trial. 30 Kan. App. 2d at 717. In *Mullins*, the defendant was convicted primarily on the victim's testimony. A panel of this court found that Mullins was prejudiced by his trial counsel's deficient performance because an expert witness may have presented strong evidence to undermine the allegations and the testimony of the victim. 30 Kan. App. 2d at 717-18.

On the other hand, panels of this court have found that counsel's failure to call an expert witness did not amount to ineffective assistance when the defendant's confession corroborated the victim statement, and the victim was available for cross-examination during trial. *State v. Lewis*, 33 Kan. App. 2d 634, 648, 111 P. 3d 636 (2003); *Loyo v. State*, No. 119,016, 2019 WL 1969606, at *4 (Kan. App. 2019) (unpublished opinion). And failing to call an expert on interviewing techniques does not constitute ineffective assistance of counsel when the defendant admitted at trial to touching the victim.

Westerman v. State, No. 94,627, 2006 WL 2440003, at *4 (Kan. App. 2006) (unpublished opinion).

Wininger cites *Mullins* to support his argument that trial counsel's performance was deficient by failing to retain an expert witness, but the facts in *Mullins* are distinguishable. Unlike counsel in *Mullins*, here defense counsel did investigate and consult with an expert witness. Wininger even stated in his K.S.A. 60-1507 motion that Dr. Barnett was consulted and defense counsel received Dr. Barnett's expert opinion regarding the forensic interview techniques employed by the sheriff's office.

Wininger's reliance on *Mullins* also fails because, in that case, no other witnesses were presented during trial and the conviction was "'primarily based upon the testimony of [the victim].'" 30 Kan. App. 2d at 712. This case bears more similarities to the *Lewis*, *Loyo*, or *Westerman* cases, where the jury's decisions were not solely based on the victim's testimony. Here, it was not only the victim who testified at trial. Her sister also testified to corroborate the victim's testimony. Moreover, Wininger himself testified and admitted to kissing the victim more than once and admitted he touched her buttocks. His own testimony corroborated portions of the victim's testimony, including his earlier statements to law enforcement. Along with the trial testimony by law enforcement officers and the victim's sister, the jury had multiple sources on which to base its decision and did not have to rely solely on the testimony of the victim.

Here, Wininger presents no evidence in support of his argument and does not address on appeal any authority other than *Mullins* that is relevant to ineffective assistance of counsel claims for failing to retain an expert witness. He simply argues that his trial counsel was ineffective because it is unknown from the record why he did not call Dr. Barnett as witness. Wininger also indicates his trial counsel may have failed to complete a thorough investigation of the expert. But he provides no evidentiary basis to support this argument.

Contrary to Wininger's contentions, the record demonstrates that trial counsel sought court permission to retain Dr. Barnett and served the expert's credentials on the prosecution. The record also shows that trial counsel intended to utilize the expert's services to review the forensic interview of the victim by law enforcement and opine about the interview techniques employed. Trial counsel's motion indicated that Dr. Barnett would "*possibly* even testify," so his trial testimony was not certain. (Emphasis added.)

But then, at trial, the prosecution did not call any witness to testify about the victim's forensic interview. And the State did not introduce the interview during the jury trial. Because the victim's interview was not presented, defense counsel had nothing for Dr. Barnett to rebut during trial. In fact, it would not have been in Wininger's interest for his own counsel to introduce the victim's forensic interview to allow the jury yet another opportunity to hear damaging statements from the victim.

Wininger bears the burden of showing his trial counsel's deficient performance, and if there are blanks in the records—such as a concrete reason for trial counsel not to use his expert—"appellate courts do not fill them in by making assumptions favoring the party claiming error in the district court.'" *Morgan v. State*, No. 109,099, 2014 WL 5609935, at *8 (quoting *Harman v. State*, No. 108,478, 2013 WL 3792407, at *1 [Kan. App. 2013] [unpublished opinion]). And, as the appellate court, we must strongly presume that counsel's conduct fell within the broad range of reasonable professional assistance. *State v. Kelly*, 298 Kan. 965, 970, 318 P.3d 987 (2014); *Phillips v. State*, 282 Kan. 154, 159-60, 144 P.3d 48 (2006).

Given the testimony of not just the victim, but her sister and Wininger's own admissions both before and during trial, together with the forensic interview having not been introduced at trial, Wininger fails to sufficiently show that trial counsel's performance fell below the objective standard of reasonableness. He bears the burden to

make more than a conclusory contention that the expert should have been introduced at trial—he must set forth an evidentiary background for his contention, but he failed to do so.

So, Wininger failed to show that his counsel's failure to call Dr. Barnett as an expert witness during trial was deficient and that it fell below an objective standard of reasonableness. If the defendant fails to prove the first prong of the *Strickland* test, there is no need to progress to the second prong of the test showing prejudice. *State v. Betancourt*, 301 Kan. 282, 308, 342 P. 3d 916 (2015.) But even if we were to assume that Wininger managed to show his trial counsel's deficient performance, his argument also fails on the prejudice prong.

Wininger presented only conclusory statements on appeal claiming that if his counsel's performance was found to be ineffective, then there is a reasonable probability that the result of his trial would have been different. He presents no evidentiary support to show that the perceived deficiency would likely undermine the confidence of the outcome of the case, nor does he specify how he was prejudiced by trial counsel's deficient performance. Absent sufficient allegations of prejudice, Wininger's claim fails.

As the movant, Wininger bears the burden to establish the grounds for relief by a preponderance of the evidence. See Supreme Court Rule 183(g). Again, to meet this burden, Wininger's contentions must be more than conclusory, and he must either set forth an evidentiary basis to support those contentions or the basis must be evident from the record. See *Thuko*, 310 Kan. at 80. Wininger did not present a sufficient claim in his K.S.A. 60-1507 motion to convince the district court by the reponderance of the evidence that he was entitled to relief and that an evidentiary hearing was necessary.

Once more, given the testimony of Wininger himself, the victim, her sister, and law enforcement, the jury had multiple sources of evidence on which to base its verdict.

Another panel of this court, in Wininger's direct appeal, stated: "Wininger admitted that he had kissed [the victim] in a 'romantic' manner and that he touched her with his hand 'roaming' up and down her body. Furthermore, [the victim] and her sister testified at trial regarding Wininger's interactions with [the victim]." *Wininger*, 2017 WL 1033986, at *2. The victim testified and was subject to cross-examination, and the jury was able to assess her credibility. Given the strength of the evidence, Wininger fails to convince us that there was a reasonable probability the result of his trial would have been different had the expert been called to testify.

For the above reasons, the district court's summary denial was not erroneous, and the court correctly found that the motion, files, and records of the case conclusively showed that Wininger was not entitled to relief based on his claim that his trial counsel was ineffective for failing to call the expert witness at trial.

2. *Claim of ineffectiveness for trial counsel's failure to call three key witnesses to testify for the defense*

Wininger next argues that his trial counsel provided ineffective assistance because he failed to subpoena three key witnesses for trial. On appeal, he claims that his girlfriend, Y.C., and his sister, T.F., would have been able to refute some dates stated by the victim and could have testified about "family dynamics and the motive behind" the victim's accusations. He also asserts that the Kansas Department for Children and Families (DCF) investigator, Melissa Martin, would have testified that the victim told Martin that she had never been molested.

Wininger provided only a one-paragraph argument and cites *McHenry v. State*, 39 Kan. App. 2d 117, 177 P.3d 981 (2008), in support of his argument. He notes that the appellate court in *McHenry* found when there is no physical evidence and the trial turns solely on the credibility of witnesses, defense counsel's failure to investigate the

prosecution witnesses is ineffective. There, this court found that a counsel's performance fell below the objective standard of reasonableness under a series of deficiencies, including counsel's failure to investigate the prosecution witnesses, failure to contact any witnesses suggested by the defendant, and failure to investigate prior abuse allegations of the victim in a different county. 39 Kan. App. 2d at 123. A panel of this court agreed with the district court's finding of ineffective assistance of McHenry's defense counsel.

But Wininger makes no attempt to apply *McHenry* to this case aside from stating that this trial also turned on the credibility of the accuser. And the remainder of his arguments are conclusory. Wininger argues that the "testimony of witnesses who were present at the time of the alleged misconduct . . . would have been significant." But Wininger fails to show how his girlfriend's and sister's testimony would have been different than the two character witnesses that defense counsel presented at trial. Although Wininger indicates his girlfriend's and sister's testimony would have refuted dates provided by the victim, both T.L. and B.T. testified to their observations of Wininger and the victim during 2010 and 2011, including their recollections of Christmas Eve 2010. Both character witnesses testified that the interactions between Wininger and the victim did not appear inappropriate or tense. So, defense counsel did provide testimony, through two separate witnesses, who observed the victim and Wininger during the relevant time period. Trial counsel is not ineffective simply for failing to call a witness whose testimony would have been cumulative. *Lewis*, 33 Kan. App. 2d at 649 (citing *United States v. Miller*, 643 F.2d 713, 714 [10th. Cir.1981]).

Wininger also alleges that DCF investigator Martin should have been called to testify because Martin had taken a previous report from the victim, in which she indicated she had never been molested. Although this report was used for impeachment during the preliminary hearing, defense counsel did not call Martin as a witness for trial. But Wininger fails to acknowledge that Martin's report was, in fact, used by defense counsel at trial. While cross-examining the victim, defense counsel was able to draw out the

victim's confession she told Martin that she had never been molested. Wininger has not shown how calling Martin personally to testify about this same information would have changed the outcome of the trial. And again, calling Martin as a separate witness would have been cumulative to the victim's admission of her conversation with Martin, and failure to call a cumulative witness does not constitute ineffectiveness. See *Lewis*, 33 Kan. App. 2d at 649.

Wininger fails to adequately show how trial counsel's failure to call the three witnesses fell below the objective standard of reasonableness because all of the information Wininger claims should have been presented was already introduced via other avenues at trial. He also fails to explain how he was prejudiced by not having the three witnesses testify during trial. Wininger presents mere conclusory statements speculating that the three witnesses' testimony was necessary and does not outline what prejudicial effect resulted from counsel's alleged deficiency.

Mere speculation that a witness' testimony could have possibly changed the outcome of the jury verdict is not sufficient to satisfy the prejudice prong of the *Strickland* test. See *Mullins*, 30 Kan. App. 2d at 718-19; see also *Morgan*, 2014 WL 5609935, at *8 (applying second *Strickland* prong and holding this court cannot base judgment on speculation). As stated above, this court does not fill in the blanks of the record by making assumptions in favor of the moving party. *Morgan*, 2014 WL 5609935, at *8.

For the preceding reasons, Wininger failed to present a sufficient claim in his K.S.A. 60-1507 motion to convince the district court by the preponderance of the evidence that he was entitled to relief and that an evidentiary hearing was necessary. As a result, the district court correctly found that the motion, files, and records of the case conclusively showed that Wininger was not entitled to relief based on his ineffective assistance of counsel claim regarding the failure to call three witnesses.

3. *Claim of ineffectiveness for trial counsel's alleged failure to sufficiently cross-examine two State witnesses*

Wininger's third claim of his trial counsel's ineffectiveness is based upon his counsel's failure to cross-examine two State witnesses: Doug Wydick, Chief Investigator with the Cherokee County Sheriff's Office; and David Brede, Special Agent with the Kansas Bureau of Investigation. At trial, Chief Investigator Wydick testified about his interviews with Wininger, and that during the second interview conducted with Special Agent Brede, Wininger admitted to an open-mouth kiss with the victim, as well as stating he touched the victim's breasts and buttocks. The State also used Chief Investigator Wydick to introduce Wininger's signed statement into evidence—a statement in which Wininger admits to an open-mouth kiss with the victim and "feeling her body" and "put[ting] [his] hands in places [he] should not have]." Special Agent Brede also testified regarding his recorded interview with Wininger.

But Wininger's argument on appeal focuses on Chief Investigator Wydick and Special Agent Brede's interview with the victim, not with Wininger. He argues that during Chief Investigator Wydick and Special Agent Brede's interview with the victim, she consistently stated she was 14 years old when the events occurred, and neither officer sufficiently investigated the case by interviewing other family members about inconsistencies in the victim's stories. His one-sentence argument on appeal simply states: "Without an evidentiary hearing there is no way to determine why these witnesses were not cross-examined on the crucial information they could provide the jury."

Here, Chief Investigator Wydick and Special Agent Brede testified only regarding their interviews with Wininger. Any cross-examination of the officers regarding the victim's interview would have been outside the scope of the direct examination. See *State v. Lowery*, 308 Kan. 1183, 1234, 427 P.3d 865 (2018) ("'Questions asked on cross-examination must be responsive to testimony given on direct examination, or material

and relevant thereto . . . .'") (quoting *State v. Hobson*, 234 Kan. 133, 151, 671 P.2d 1365 [1983]).

And again, Wininger presents only conclusory statements on appeal, asserting that his counsel's performance was deficient without providing supporting evidence or offering any authority for his claim. Additionally, Wininger makes no claim that he was prejudiced by his counsel's actions. Absent any allegations of prejudice, Wininger's claims must fail.

Wininger bears the burden to establish the grounds for relief by a preponderance of the evidence. See Supreme Court Rule 183(g). Given his conclusory statements and failure to allege prejudice, Wininger failed to meet his burden to show that he was entitled to relief and that an evidentiary hearing was necessary on his ineffective assistance of counsel claim regarding his trial counsel's failure to cross-examine the State's witnesses.

4. *Claim of ineffectiveness for trial counsel's alleged failure to sufficiently advise during sentencing*

Wininger next claims that his trial counsel was ineffective by failing to advise him adequately during sentencing. He alleges his trial counsel did not suggest to him to seek a treatment program evaluation before sentencing. In his K.S.A. 60-1507 motion, he argued that counsel did not advise him to get an evaluation or do anything to help the district court find substantial and compelling reasons to depart, and that the departure motion his counsel did file was actually a detriment to Wininger.

The departure motion filed by his trial counsel lists numerous mitigating circumstances on which Wininger asked the district court to depart from the Kansas Sentencing Guidelines. Trial counsel noted Wininger's lack of prior criminal history, his

age, his longtime gainful employment, the terminal illness of Wininger's father, that Wininger had accepted responsibility for his actions, his extensive family and friends who would support him during rehabilitation, and that there are "many treatment programs for sexual offenders in the local area in which [Wininger could] enroll upon his release and to which [he could] be ordered to attend."

On our review, this claim of ineffective assistance of counsel is also conclusory and absent evidentiary support. Again, Wininger's argument consists of just one sentence: "There is no way to determine why trial counsel did not inform his client to get a treatment program evaluation prior to sentencing." He does not explain why the filed motion was somehow detrimental, or why the mention of possible treatment programs in the motion was insufficient.

Moreover, Wininger's claim fails on the merits. The district court articulated at sentencing that even if the reasons Wininger's counsel offered for the requested departure were supported by evidence, those reasons—which would include the treatment programs—would still not be substantial and compelling enough to grant a departure. After stating its conclusion, the district judge explained his reasoning for denying Wininger's departure motion:

> "I intend to agree with the State that it is appalling to try to characterize the victim as having no major effects from this. There is absolutely no evidence of that. And what little the court does know about the victim it was totally opposite to that. Also despite [trial counsel's] representations of the defendant has accepted responsibility for his acts we have not heard that from the defendant. In the only statements he's made on the matter were at his presentence investigation where he denied responsibility for it. And in his confession where he admitted the acts but took no responsibility; likewise in his testimony where he again failed to take responsibility for his actions. So the departure motion is denied."

The district court's denial of the departure motion and its exclusion of the treatment programs suggests the court did not consider potential treatment programs, or Wininger's evaluation for such programs—as a significant factor in its decision. The district court's reasoning supports the State's argument that Wininger's claim should fail under the prejudice prong of the *Strickland* test. Without sufficient allegations of prejudice, Wininger's argument fails. Our Supreme Court has held that when either the first or second prong of the *Strickland* test is satisfied, the court need not analyze the other prong. *Betancourt*, 301 Kan. at 308; *Edgar*, 294 Kan. at 843.

Most significantly, even if a treatment program evaluation had been obtained, the district court could not have granted a departure sentence in Wininger's case due to his crime of conviction. Reviewing the statutes in effect at the time of the crime (see *State v. Rice*, 308 Kan. 1510, 1512, 430 P.3d 430 [2018]), we look to K.S.A. 2010 Supp. 21-4719(a). This statute provides that a "sentencing judge *shall not* impose a downward dispositional departure sentence for any crime of extreme sexual violence, as defined in K.S.A. 21-4716, and amendments thereto." (Emphasis added.) K.S.A. 2010 Supp. 21-4719(a). Looking to the definition, under K.S.A. 21-4716(c)(2)(F)(i)(b) and (c), a "'[c]rime of extreme sexual violence'" involves three felonies, including "a crime involving . . . lewd fondling and touching with any child who is 14 or more years of age but less than 16 years of age and with whom a relationship has been established or promoted for the primary purpose of victimization" and "a crime involving an act of . . . lewd fondling or touching with any child who is less than 14 years of age." The jury convicted Wininger of both indecent liberties with a child between the years of 14 and 16 and aggravated indecent liberties with a child under the age of 14. So, pursuant to the sentencing statutes, even if his trial counsel had encouraged Wininger to seek a treatment program evaluation, it would have been a futile effort, because the outcome of the proceeding would not have changed. Thus, Wininger fails to show that he was prejudiced by trial counsel's perceived deficiency.

Wininger provided a conclusory claim that his trial counsel erred and did not assert any prejudice as a result of counsel's actions. Moreover, we find no prejudice, even on a review of the merits of his claim. So, Wininger did not present a sufficient claim to convince the district court by the preponderance of the evidence that trial counsel's failure to advise him to get a treatment program evaluation entitled him to relief and that an evidentiary hearing was necessary.

5. *Claim of ineffectiveness for appellate counsel's alleged failure to raise issues*

Wininger's final claim relates to the alleged ineffective assistance of his appellate counsel. Although his K.S.A. 60-1507 motion alleged three distinct claims of ineffective assistance of appellate counsel, he presents only one on appeal—failing to raise "the jury instruction for alternative Count 1." His other two claims related to his appellate counsel are then waived. *Gallegos*, 313 Kan. at 277.

The State's first amended information charged Wininger with the following crimes: Count 1—aggravated indecent liberties with a child under 14 years of age, in violation of K.S.A. 2010 Supp. 21-3504(a)(3)(A); Alternative Count 1—indecent liberties with a child between 14 and 16 years of age, in violation of K.S.A. 21-3503(a)(1); and Count 2—indecent liberties with a child, in violation of K.S.A. 21-3503(a)(1). During jury deliberations, the jury presented a question to the court about the charges, asking whether they had to "make a decision and vote and sign Count 1 [and] Count 1 alternative (same vote) as count 1 alternative reads the same as count 2." The district court, after conferencing with counsel and receiving no objections, answered by stating that the jury "must indicate a verdict on each count—both count 1 [and] count 1 alternative, as well as count 2. Refer to your instructions if necessary." The jury then found Wininger guilty on all three counts. However, the district court dismissed alternative Count 1 and sentenced him on only Counts 1 and 2.

Wininger argues the prosecutor confused the jury by asking them to consider each count, including the alternative counts, and although defense counsel and the prosecutor tried to explain the alternative charges in closing arguments, the jury was still confused because they submitted the question during deliberations. He maintains that, based on the evidence, and the State's theory, there was no possible way both Count 1 and alternative Count 1 both could be correct, as it is legally impossible. He contends the jury was not informed that Count 1 and alternative Count 1 involved an "either or" decision, and neither the jury instructions nor the district court's answer to the jury's question offered any help for the jurors' confusion.

Although trial counsel raised the issue of confusion regarding the alternative count to the district court and filed a motion for judgment of not guilty, notwithstanding the jury's verdict, the trial court denied the motion and trial counsel's motion for reconsideration. The issue was preserved for direct appeal, yet appellate counsel did not raise the alternative count issue on direct appeal. Wininger argues this failure prejudiced him because the district court's error caused him to be sentenced to a mandatory 25-year sentence on Count 1, rather than the lesser sentence he might have received on the alternative count.

As to Wininger's claims of his appellate counsel's deficient performance, we note that the failure of appellate counsel to raise an issue on appeal is not, per se, ineffective assistance of counsel. *Miller v. State*, 298 Kan. 921, 932, 318 P.3d 155 (2014). An appellate attorney need not include every possible issue on appeal. Rather, this court has long held that "'[e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.'" *Baker v. State*, 243 Kan. 1, 10, 755 P.2d 493 (1988) (quoting *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 [1983]). This means that appellate counsel exercising reasonable professional judgment should only raise issues which have merit and should not set forth on appeal

issues that are weak, without merit, or could result in nothing more than harmless error. 243 Kan. at 10. But we need not determine whether appellate counsel was deficient, because we can reject Wininger's claim solely on the prejudice prong of the *Strickland* analysis.

We must also address the issue of what precise argument Wininger preserved for appeal. Wininger's claims regarding his appellate counsel's actions related to the alternative count are somewhat unclear. His K.S.A. 60-1507 motion focuses more on the charging document and the prosecutor's closing argument regarding the alternative count and includes only the following statements regarding jury instructions and the trial court's response to the jury question: "The jury was confused by the alternative count as the jury presented a question to the Court regarding the alternative count. The Court's response that referred the jury instructions to the jury could not have helped to clarify the issue." But then, in Wininger's appellate brief, the only authority cited in his argument focuses solely on the trial court's response to the jury's question.

On appeal, we generally only address issues that have been preserved—that is, presented in Wininger's K.S.A. 60-1507 motion. See *State v. Godfrey*, 301 Kan. 1041, 1043, 350 P.3d 1068 (2015) (issues may not be raised for the first time on appeal and will not be considered for the first time on appeal unless the defendant demonstrates that an exception to the usual preservation rule should be applied). It is not clear that Wininger's original motion specified an issue with the jury instructions themselves or the trial court's response to the jury's question during deliberations, and he argues no exceptions to this preservation rule.

But even if we assume Wininger preserved the issue of appellate counsel's challenge to the jury instructions and the trial court's response to the jury's question, Wininger's claims fail on the merits. Failing to meet one prong of the *Strickland* test is enough to dismiss an ineffective assistance of counsel claim, and Wininger's claim fails

on the analysis of prejudice. See *Betancourt*, 301 Kan. at 308; *Edgar*, 294 Kan. at 843 (both finding that when either the first or second prong of the *Strickland* test is satisfied, the court need not analyze the other prong). He asserts that the district court erred by applying the alternative count incorrectly and by instructing the jury on alternative Count 1 and confusing the jury, causing it to find Wininger guilty on all three charges. He claims he was prejudiced by his appellate counsel's failure to raise the issues regarding the alternative count on appeal, because he was sentenced to a longer prison term.

To prevail on his claim of prejudice, Wininger must show that if the alternative count and related jury instruction issue were raised on direct appeal, his appeal would have succeeded. Yet he simply claims that if the issues were raised, the jury instruction could have been found erroneous and his sentence would have been shorter. Wininger's argument is conclusory, and he presents no argument as to how the outcome of his appeal would have changed but for appellate counsel's deficiency.

In fact, his contention is not legally sound. If a defendant is charged with alternative counts, the jury is "free to enter a verdict on each of the alternatives", which is how the district court advised the jury here. *State v. Ruiz-Cisneros*, No. 97,167, 2008 WL 2369802, at *3 (Kan. App. 2008) (unpublished opinion) (citing *State v. Winters*, 276 Kan. 34, 41-43, 72 P.3d 564 [2003]). But because the jury found Wininger guilty on both alternatives (Count 1 and alternative Count 1), the court may accept only the verdict on the greater charge. 2008 WL 2369802, at *3.

Wininger ignores this legal reality. But the facts are clear that the jury ultimately found Wininger guilty of all three counts, including the alternative as it was free to do. Then, the district court properly accepted only the verdict on the greater charge: Count 1 of aggravated indecent liberties with a child. This conviction required the 25-year mandatory prison sentence. The district court did not convict or sentence Wininger on the alternative count.

Because Wininger fails to address the proper handling of alternative counts and does not explain how the jury would have found him not guilty on Count 1 and only found him guilty on the alternative Count 1, his argument of prejudice lacks merit. Additionally, during closing arguments, the State tied specific acts to each charged crime, including the alternative counts. And the evidence produced at trial supported a finding that multiple acts were committed by Wininger prior to the victim's 14th birthday, each of which could constitute the crime outlined in Count 1, as well as acts after her birthday, which would support either the alternative Count 1 or Count 2.

The district court's decision to sentence Wininger on Count 1, rather than the alternative Count 1, was supported by substantial competent evidence. See *Robertson*, 288 Kan. at 225 (outlining the appellate court's standard for review of the district court's factual findings and legal decision). And its decision to sentence him on Count 1—the greater charge—is supported by law as noted. Wininger bears the burden to show otherwise, and not only are his arguments conclusory, but he sets forth no evidentiary or legal basis to support his claim that his appellate counsel was ineffective for failing to raise the alternative count and related jury instruction issue on appeal.

Conclusion

Wininger sets forth on appeal five distinct claims of ineffective assistance of trial and appellate counsel under K.S.A. 60-1507. Reviewing each claim independently, we find that Wininger fails to successfully meet his burden to show that either his trial or appellate counsel were ineffective in any of his claims.

For the preceding reasons, the district court correctly found that the motion, files, and records of the case conclusively showed that Wininger was not entitled to relief based on his claims of ineffective assistance of counsel. The district court did not err by summarily denying Wininger's K.S.A. 60-1507 motion.

Affirmed.

* * *

PICKERING, J., concurring: I agree with the majority opinion's judgment that the district court did not err when it summarily denied Edmond Lee Wininger's K.S.A. 60-1507 motion without an evidentiary hearing. I fully join the majority's analysis of issues one through four. I do not, however, join in the majority's analysis of the merits of issue five.

From my review of the record, issue five is not properly before us. The issue Wininger now raises—namely, appellate counsel's failure to challenge the district court's response to the jury's question—was never asserted in his K.S.A. 60-1507 motion. As such, the district court was never able to consider this issue. It would have been helpful if Wininger had explained why we may consider this issue. See Supreme Court Rule 6.02(a)(5) (2023 Kan. Sup. Ct. R. at 36) (Along with citing the appropriate standard of review, each issue must begin with "a pinpoint reference to the location in the record on appeal where the issue was raised and ruled on. If the issue was not raised below, there must be an explanation why the issue is properly before the court."). But this was not done. Given that Wininger has not shown he is entitled to consideration of that claim, I concur in the result only.