NOT DESIGNATED FOR PUBLICATION

No. 125,444

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

WILLIAM DOTSON,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Dickinson District Court; RYAN W. ROSAUER, judge. Opinion filed September 8, 2023. Affirmed.

Joseph A. Desch, of Law Office of Joseph A. Desch, of Topeka, for appellant.

Daryl E. Hawkins, assistant county attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before SCHROEDER, P.J., MALONE, J., and MARY E. CHRISTOPHER, S.J.

PER CURIAM: William Dotson appeals the district court's denial of his K.S.A. 60-1507 motion alleging that his trial counsel, Julie McKenna, was ineffective for failing to use an appropriate expert to bolster his defense to the charge of aggravated indecent liberties with a child. After holding an evidentiary hearing, the district court denied Dotson any relief, finding McKenna did not provide deficient performance, and, even if she did, that deficiency did not undermine confidence in the jury's verdict. Because the district court's findings are supported by substantial competent evidence, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 2014, a jury convicted Dotson of one count of aggravated indecent liberties with a child, an off-grid, person felony. The conviction was based on Dotson's fondling of his relative, C.R., while they were sharing a bed during an October 2012 overnight visit.

At trial, Dotson did not challenge C.R.'s account of the events, but focused his defense on arguing that his actions were unintentional. Dotson presented testimony from Jeremy Crosby, Ph.D., his treating psychologist and an expert in posttraumatic stress disorder (PTSD). Crosby testified that Dotson suffers from PTSD and depression resulting from his military service in Vietnam, and he explained that it was very common for Dotson to have bad dreams and periodic, involuntarily limb movement with no awareness of his actions.

In rebuttal, the State presented testimony from William Logan, M.D., a psychiatrist, who confirmed Dotson's PTSD with a persistent depressant disorder diagnosis, but clarified that while Dotson commonly had nightmares involving striking out at someone, he had never previously sexually fondled anyone in his sleep. Logan testified that he had not heard of any cases involving PTSD sufferers acting out sexually while sleeping. The State also presented evidence about Dotson's 1995 child sex crime conviction, including testimony from the victim. The jury found Dotson guilty as charged, and he appealed his sentence twice, which ultimately was affirmed in part and vacated in part. See *State v. Dotson*, No. 117,434, 2018 WL 671507 (Kan. App. 2018) (unpublished opinion).

On July 24, 2019, Dotson filed a timely K.S.A. 60-1507 motion prepared by legal counsel. In his motion, Dotson raised three claims: (1) His counsel was ineffective for failing to adequately advise him during plea negotiations; (2) his counsel was ineffective

for failing to obtain necessary experts to support his defense at trial; and (3) cumulative error. The district court found that Dotson's motion warranted an evidentiary hearing.

At the hearing, Dotson testified himself and called other witnesses including McKenna and Crosby. For her part, McKenna testified about her extensive experience in representing criminal defendants and presenting mental disease or defect defenses. She recounted that the theory of defense in Dotson's case was always that he suffered from PTSD-induced involuntary movements while sleeping, but she never considered having Dotson evaluated for additional mental health or neurological issues. McKenna recounted that she crafted this defense theory after speaking with Crosby, with whom she consulted several times before trial. McKenna noted that Crosby had never mentioned the prospect of parasomnia as a cause of Dotson's actions. McKenna also pointed out that at trail, Dr. Logan had explicitly ruled out parasomnia as a causal factor of Dotson's actions.

Crosby, who served as Dotson's lone expert at trial, expressed his dissatisfaction with McKenna's presentation of his testimony on PTSD and recounted Dotson's many ailments, including periodic limb movement, which causes a person to move in relation to events during dreams. He testified that McKenna did not allow him to fully explain Dotson's disorders and their effect on his actions. He also suggested that an additional forensic examination of Dotson would have added perspective to his testimony.

Finally, Dotson presented the testimony of Michael Cramer Bornemann, M.D., an expert on a sleep disorder called parasomnia. Dr. Bornemann testified that the most likely explanation for Dotson's behavior was a form of parasomnia called sexsomnia, which causes a person to unintentionally exhibit sexual behaviors while sleeping. Dr. Bornemann conceded that no research suggested any connection between PTSD and sexual behavior, and it was possible that Dotson's actions were intentional and not the result of sexomnia.

On June 17, 2022, the district court denied Dotson's motion with a 12-page memorandum decision containing detailed findings of fact and conclusions of law. As for his plea-based argument, the district court found Dotson's testimony that McKenna had failed to advise him about the State's offer for probation incredible. It noted McKenna's experience as a trial attorney and Dotson's shaky memory about specific events as support for its conclusion. And the court explained that Crosby corroborated McKenna's recollection that Dotson was unwilling to consider any plea offers from the State. Turning to Dotson's claim that McKenna provided deficient performance because she failed to muster additional experts to support his defense, the district court explained that Dotson's claim presented a high risk of applying hindsight to critique McKenna's performance. The district court explained that although it may have been better for McKenna to prepare Crosby more thoroughly for trial and to obtain additional experts to bolster Dotson's defense, the necessary information was still presented to the jury.

The district court continued by finding that even if McKenna's failure to call any other experts constituted deficient performance, that deficiency was not serious enough to prejudice Dotson. The district court reasoned that while additional experts may have tightened Dotson's defense, their testimony would have been similar to Crosby's and would not have created a reasonable probability of a different outcome. It reasoned that in the face of C.R.'s credible testimony, coupled with Dotson's prior victim's recollections of his similar behavior, the jury was unlikely to be swayed by another expert. Finally, the district court found that Dotson's cumulative error argument was meritless because he did not establish any errors to accumulate. Dotson timely appealed.

ANALYSIS

Dotson argues the district court erred in denying his K.S.A. 60-1507 motion. He contends that McKenna "was ineffective in investigating, preparing and presenting expert testimony in support of the defense" and argues the decision cannot be excused as a

strategic decision. Although Dotson asserts that McKenna did not adequately prepare Crosby to testify at the trial, he focuses his appeal on McKenna's failure to procure an additional expert witness on sleep disorders and parasomnia to bolster his theory of defense. Dotson argues that such an expert would have provided the jury with a more complete context to evaluate his allegedly involuntary actions. Dotson does not renew his claims that McKenna was ineffective for failing to adequately advise him during plea negotiations and cumulative error. An issue not briefed is waived or abandoned. *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021).

The State responds that McKenna was not ineffective and the district court correctly denied habeas corpus relief. The State asserts that substantial evidence supports the district court's findings. The State contends that the decision not to present an expert on sleep disorders was within his lawyer's strategic purview, and that even if such an expert had been obtained, the outcome of the trial would have been the same.

An appellate court's standard of review over the denial of a K.S.A. 60-1507 motion depends on how the district court handled the motion. *State v. Adams*, 311 Kan. 569, 578, 465 P.3d 176 (2020). When, as here, the district court conducts a full evidentiary hearing, this court reviews the court's findings of fact to determine whether they are supported by substantial competent evidence and are sufficient to support its conclusions of law. Appellate review of the district court's ultimate conclusions of law is de novo. *Balbirnie v. State*, 311 Kan. 893, 897-98, 468 P.3d 334 (2020).

Ineffective assistance of counsel claims are analyzed under a well-established two-part test:

> "Courts consider whether a reversible denial of the right occurred by applying a two-prong test stated by the United States Supreme Court in Strickland [v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. A convicted defendant must

first establish deficient performance by 'show[ing] that counsel's representation fell below an objective standard of reasonableness.' Then the defendant must show that the deficient performance prejudiced the defense. [Citations omitted.]" *Balbirnie*, 311 Kan. at 897.

The performance prong

As the Kansas Supreme Court has repeatedly noted, when examining an attorney's performance in a claim of ineffective assistance of counsel, appellate courts are highly deferential and presume that counsel's conduct fell within the broad range of reasonable professional assistance. Any fair assessment of an attorney's performance must eliminate the distorting effects of hindsight, focusing instead on reconstructing the circumstances of counsel's challenged conduct and evaluating that conduct from counsel's perspective at the time. See, e.g., *Edgar v. State*, 294 Kan. 828, 838, 283 P.3d 152 (2012).

"'The decisions on what witnesses to call . . . and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his or her client.' . . . '"Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."' [Citations omitted.]" *State v. Johnson*, 304 Kan. 924, 951, 376 P.3d 70 (2016). "[T]his court generally does not second-guess strategic decisions of counsel." *Breedlove v. State*, 310 Kan. 56, 65, 445 P.3d 1101 (2019). That said, """[m]ere invocation of the word 'strategy' does not insulate the performance of a criminal defendant's lawyer from constitutional criticism," especially "'when counsel lacks the information to make an informed decision due to inadequacies of his or her investigation."'" *Edgar*, 294 Kan. at 839.

Dotson contends that McKenna provided deficient representation because she failed to consult and utilize another expert to testify about Dotson's alleged sleep disorders—specifically sexsomnia—the alleged causal explanation of his actions. While he concedes that McKenna's chosen strategy "most likely falls within strategic decisions" he maintains that she only "took a cursory review of the [S]tate's case [and] embarked on

a narrow path." That is, he argues that McKenna failed to exercise reasonable professional judgment by not thoroughly examining all potential avenues to explain his actions beyond those provided by his treating psychologist, Crosby.

McKenna had represented hundreds of criminal defendants, including individuals accused of committing sex offenses against children, and had presented several mental disease/defect defenses. McKenna explained that her decision to select an expert in cases involving mental-health issues depends on the advice of the defendant's treating physician. She testified that, in some cases, an outside forensic evaluator is necessary to help flesh out a successful defense, but in Dotson's case she focused on Crosby's treatment and analysis, which focused predominately on PTSD as the causal explanation for his actions. Based on her reliance on Crosby's clinical assessment, she did not consider having Dotson evaluated for any other mental disorders. She noted that Crosby never mentioned the prospect of parasomnia as a cause of Dotson's actions.

While Dotson now argues that McKenna essentially lacked the necessary information to make an informed decision about whether another expert was necessary, the record bears out that she consulted Crosby in deciding to rely on PTSD as the crux of his defense. That Dotson's defense could have been more robust had an additional independent expert been employed, does not render McKenna's representation deficient under the circumstances.

Dr. Bornemann testified how he would have evaluated and explained Dotson's behavior under the lens of parasomnia, highlighting his expertise in the area of sleep disturbances. Although Crosby's testimony was not as specialized as Dr. Bornemann's, McKenna ensured that the jury was presented with the necessary evidence to support Dotson's sleep disturbance-based defense. The district court squarely addressed this dilemma, noting that while "[t]here is probably always something more to be done when getting ready for trial," McKenna identified the pertinent issues to present Dotson's

defense, consulted Crosby, and offered his testimony about the effect of Dotson's medical issues on the State's allegations.

McKenna effectively investigated, prepared, and presented testimony in Dotson's defense that he acted without the requisite criminal intent. McKenna based her trial strategy on the advice and recommendations of Dotson's treating psychologist, Crosby. While it may have been better to use additional expert opinions to flesh out Dotson's defense, the essential explanation—that Dotson's actions were the involuntary result of mental conditions—was presented to the jury. McKenna was not required to consult or present testimony from any other experts on potential sleep disturbances. When evaluating McKenna's performance without indulging in the benefits of hindsight, it cannot be said that her representation of Dotson was deficient. Although we could end our analysis here, we will also examine the district court's findings on the second prong of the ineffective assistance of counsel analysis—prejudice.

The prejudice prong

To prevail on his K.S.A. 60-1507 motion, Dotson needed to establish prejudice by showing that, considering the totality of the evidence before the jury, there is a reasonable probability that, but for his counsel's deficient performance, the result of the trial would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. See *Edgar*, 294 Kan. at 838. In other words, Dotson needed to show a reasonable probability that the jury would have acquitted him had McKenna vetted additional experts and deployed a more extensive defense at trial.

In evaluating whether Dotson was prejudiced by McKenna's representation, the district court observed that the State's case against Dotson was particularly strong. The State presented not only the testimony of C.R., but also that of Dotson's prior victim, T.C., whom he sexually assaulted in 1995 when she was a minor. On its own, C.R.'s

testimony was highly credible and was corroborated by the State's other witnesses. She spoke to her grandmother and then to investigators directly after Dotson touched her, and her story did not waiver. Dotson himself conceded that he had no reason to believe that she was making up her account of the incident. And as the district court noted in denying the K.S.A. 60-1507 motion, Dotson's wife testified at the hearing that in almost three decades of marriage, Dotson's PTSD had never caused Dotson to involuntarily touch her in his sleep the way Dotson claimed to involuntarily touch C.R.

Dotson relies heavily on his assumption that if the jury had been presented with additional expert testimony about sexsomnia, such as that provided by Dr. Bornemann at the evidentiary hearing, it would have found him not guilty. But even if McKenna had presented additional expert testimony about the likelihood of a parasomnia being the root cause of Dotson's actions, the jury would still have heard the competing analysis of the State's expert, Dr. Logan, who concluded that Dotson's behavior was not caused by any mental disease or defect. Dr. Logan testified that even if Dotson did suffer from a sleep disorder such as parasomnia, there was no documentation of him ever engaging in any fondling or groping of another person while sleeping.

Given the weight of the State's evidence, the particularly damning nature of the testimony of Dotson's two victims, and the fact that the jury was presented with contradictory explanations of Dotson's actions by experts, it cannot be said that McKenna's decision not to present another expert on sleep disorders would have changed the outcome of the trial. Substantial competent evidence supports the district court's finding that even if McKenna's performance were deficient, Dotson failed to establish prejudice to receive relief on his claim of ineffective assistance of counsel.

Affirmed.