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CASE NUMBER: 2017-CR-001012

IN THE DISTRICT COURT OF DOUGLAS COUNTY, KANSAS

STATE OF KANSAS,	)	
Plaintiff,	)	CASE NO. 2017 CR 1012
vs.	)	
ALBERT WILSON	)	
Defendant.	)	

DEFENDANT ALBERT WILSON'S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Defendant Albert Wilson ("Mr. Wilson") respectfully submits the following *Proposed Findings of Fact and Conclusions of Law* with respect to his claim for ineffective assistance of counsel at trial. This pleading incorporates the evidence adduced at the *Van Cleave* hearing held by this Court on November 2, 2020 and November 3, 2020.

PROPOSED FINDINGS OF FACT

I. Procedural Background

A. The Incident

1. In September 2016, Albert Wilson was a full-time student at the University of Kansas. *State v. Wilson*, Case No. 17-CR-1012, Transcript of Proceedings for Jury Trial ("Trial Tr.") at 613:14-16. Late on September 10, 2016, Mr. Wilson went to an establishment called the Jayhawk Cafe, colloquially known as the Hawk. *Id*. at 782:1-17. Mr. Wilson went to the Hawk with his friend, Trey Williams. *Id*. at 782:23-24.

2. While in line to enter the dancefloor, also known as the "Boom Boom Room," Mr. Wilson and Mr. Williams met two females—Ms. Doe and her cousin, Tatum Gibbar. *Id*. at 636:8-10; 782:25-783:7. Inside the Boom Boom Room, Mr. Wilson and Ms. Doe started kissing. *Id*. at 786:15-19.

3. Mr. Wilson and Ms. Doe left the Hawk and walked to Mr. Wilson's home. *Id*. at 793:3-5. Mr. Wilson's home was approximately five minutes from the bar. *Id*. at 794:24-795:1.

4. Mr. Wilson and Ms. Doe offer different accounts regarding what transpired at Mr. Wilson's home. Mr. Wilson stated that they kissed on the bed and that he touched Ms. Doe's chest area. *Id*. at 797:24-798:7. However, Mr. Wilson testified that no sexual intercourse occurred. *Id*. at 803:11-13. Ms. Doe stated that she was sexually assaulted by Mr. Wilson. *Id*. at 384:9-14.

5. Approximately five minutes after arriving at Mr. Wilson's house, Mr. Wilson and Ms. Doe walked back toward the Hawk. *Id*. at 803:1-10.

6. Ms. Doe went to the hospital for a sexual assault examination on the morning of September 11, 2016. *Id*. at 396:21-397:7. Mr. Wilson's DNA was only found on her chest, where he had admitted to kissing her. *Id*. at 739:9-13. The rape kit found no pubic hair or other bodily secretions. *Id*.

B. The Trial

7. Mr. Wilson was charged with two counts. The jury convicted Mr. Wilson on a first charge of rape by force of fear, while a second charge of sexual assault resulted in a hung jury. All of the jurors were white, while Mr. Wilson is African American. *State v. Wilson*, Case No. 2017-CR-1012, Transcript of Proceedings for Van Cleave Hearing ("Hr'g Tr.") at 286:3-6.

8. On April 3, 2019, this Court sentenced Mr. Wilson to 147 months in prison to be followed by lifetime post-release supervision. Mr. Wilson must also register as a sexual offender. Mr. Wilson is currently an inmate at the Hutchinson Correctional Facility, with an earliest possible release date of May 1, 2029.

C. The Appeal and Remand

9. Mr. Wilson filed a direct appeal in appellate case number 121217. The Court of Appeals remanded this case to the district court "for the limited purpose of allowing it to determine whether [Mr. Wilson] was denied his statutory right to the effective assistance of counsel, consistent with the Kansas Supreme Court's ruling in *State v. Van Cleave*. . . ." *State v. Wilson*, Case No. 121217 (Kan. Ct. App. Feb. 6, 2020). The Court of Appeals "ask[ed] the district court and the parties to expedite this remand as much as possible." *Id*.

II. Key Actors

A. Mr. Wilson's Trial Counsel

10. Forrest Lowry ("Mr. Lowry") was Mr. Wilson's sole defense counsel. Hr'g Tr. at 23:10; 245:11-13. Mr. Lowry started practicing law 33 years ago, and now operates as a "self-employed attorney." *Id*. at 23:11-13. Since 2005, approximately 98% of Mr. Lowry's practice has comprised criminal defense work. *Id.* at 231:13-232:8. Mr. Lowry estimates that he has participated in approximately 150 federal cases and over 700 state cases throughout his career, including "dozens" of sexual assault cases. *Id*. at 232:16-233:18.

11. Mr. Lowry was appointed to Mr. Wilson's case in the fall of 2017. *Id*. at 245:1-5. Mr. Lowry was paid $75 per hour by the Board of Indigent Defense Services for his work defending Mr. Wilson. This rate represents approximately half the amount that Mr. Lowry receives for private work. *Id*. at 24:4-6. Mr. Lowry is no longer on the appointment list. *Id*. at 23:14-16.

12. Mr. Lowry described his "theory of defense" for Mr. Wilson as follows:

> My theory was that this was a case of consent and that it was a case of buyer's remorse from a young woman whose family pressured her into pressing charges in this case.

Id. at 246:18-23. In other words, Mr. Lowry's "***theory of the defense was that of credibility***," which focused on false reporting by Ms. Doe. *Id*. at 270:23-271:1 (emphasis added); *see id*. at 60:17-18 (agreeing that "credibility [was] an important part of this trial.").

13. Toward at end, Mr. Lowry sought to demonstrate inconsistencies between Ms. Doe's verbal self-report and other evidence. *Id*. at 243:11-244:1 (describing his plan to show "how her testimony might be inconsistent with the lay of the land or the other facts of the case."). These

inconsistencies were central to Mr. Lowry's defense strategy. *Id*. at 247:2-17 ("[W]hat I saw were core inconsistencies between what actually happened and what Jane Doe said").

B. Psychological Experts

i. Dr. John Spiridigliozzi

14. The State retained Dr. Spiridigliozzi to perform a psychodiagnostic evaluation of the complaining witness, Ms. Doe, in this case. *Id*. at 38:23-39:4. Dr. Spiridigliozzi testified that he served as a "forensic psychologist." Trial Tr. at 742:7-8. However, the Kansas licensing board does not recognize the field of forensic psychology. Hr'g Tr. at 305:1-11. Dr. Spiridigliozzi is also not certified by the American Board of Professional Psychology. *Id*. at 182:20-21.

15. Dr. Spiridigliozzi's evaluation of Ms. Doe took place between March 17-19, 2018, a year and a half after the subject incident. *Id*. at 179:19-22; *see also id*. at 370:14-16. Dr. Spiridigliozzi relied upon Ms. Doe's self-reporting of symptoms in rendering his diagnosis. *Id*. at 109:21-24.

16. Dr. Spiridigliozzi noted that Ms. Doe reported a range of symptoms attributed to the effects of the alleged sexual assault. These include "depress[ion] after the alleged sexual assault," as well as "anxiety and panic." Def. Ex. 1 (Spiridigliozzi Report) at 4. Ms. Doe reported having "one to two panic attacks per week, which has improved from two to three panic attacks per day after her experience in September 2016." *Id*. Ms. Doe also reported trying to avoid activities and people, less interest in social events, and general interference with her "satisfaction with life." *Id*. at 7.[1] Ms. Doe claimed that all of these symptoms emerged for the first time soon

[1] This mirrored Ms. Doe's testimony at trial. Trial Tr. at 408:13-17. Likewise, Dr. Spiridigliozzi reiterated this account at trial: "She lost her friends. At school she would hide because she couldn't stand being around larger groups of people." *Id*. at 755:17-21.

after the night in question. *Id*. at 7 ("Ms. [Doe] said that prior to September 16, 2016 she had never experienced any of the psychological symptoms identified in the current evaluation.").

17. Dr. Spiridigliozzi noted that the reported symptoms meet the diagnostic criteria for "Major Depressive Disorder, Generalized Anxiety Disorder, and Panic Disorder." *Id*. at 6. At the close of the psychological evaluation, Dr. Spiridigliozzi diagnosed Ms. Doe with post-traumatic stress disorder. Hr'g Tr. at 187:9-12.

18. Dr. Spiridigliozzi's findings are memorialized in a report dated May 10, 2018, and entitled "Confidential Psychodiagnostic Evaluation Summary Report." Def. Ex. 1 (redacted); Def. Ex. 2 (unredacted).

ii. Dr. Gerald Gentry

19. Defendant retained Dr. Gerald Gentry to review Dr. Spiridigliozzi's May 10, 2018 report and his subsequent testimony given on January 9, 2019. Def. Ex. 18 (Gentry Report) at 1.

20. Dr. Gentry has specific experience evaluating the diagnoses of other psychologists. He served a four-year term on the Kansas Behavioral Sciences Regulatory Board, where he investigated complaints lodged against mental health professionals. *Id*. Dr. Gentry spent six years on the Board of Directors for the Association of State and Provisional Psychology Boards, where he led international initiatives related to psychology regulation. *Id*. He also worked for 15 years at Osawatomie State Hospital, including 13 years as Chief Psychologist, where he reviewed the psychological evaluation reports of his staff. *Id*.

21. Dr. Gentry has published several papers on the psychological effects of sexual assault. Hr'g Tr. at 357:16-22. Psychologists having more experience with particular types of victims, such as sexual assault survivors, are "more sensitive to what you commonly see in terms

of a reaction." *Id*. at 357:23-358:2. This specialized experience is important given the "wide range of the way[s] that people react to trauma." *Id*. at 358:3-7.

22. Dr. Gentry related his "concerns about Dr. Spiridigliozzi's report and testimony" in a report dated April 4, 2020. *Id*. He noted, *inter alia*, various missing information, inconsistencies, and testing abnormalities evidenced by the Spiridigliozzi Report. Def. Ex. 18 at 1-2.

iii. Dr. Christy Blanchard

23. Dr. Christy Blanchard is a licensed psychologist. Hr'g Tr. at 289:11-12. The State retained Dr. Christy Blanchard to rebut the findings set forth in Dr. Gentry's April 4, 2020 report. State Ex. 2 (Blanchard Report) at 1.

24. Dr. Blanchard has limited experience with victims of sexual assault. She has never testified in court "as an expert regarding victims of sexual assault," nor the trauma resulting therefrom. Hr'g Tr. at 299:12-15. Dr. Blanchard has also never been "certified as an expert . . . to "render testimony regarding the mental state of the victims of sexual assault." *Id*. at 299:16-22. Nor has she been certified as an expert to discuss the diagnoses for sexual assault victims. *Id*. Likewise, Dr. Blanchard has never published or conducted training related to the victims of sexual assault. *Id*. at 299:1-6.

25. Dr. Blanchard's experience with "victims of sexual assault" is limited to evaluating defendants "who have suffered sexual trauma" for the purpose of competency. *Id*. at 380:22-381:7. Yet Dr. Blanchard admits that diagnostic assessments are different from competency to stand trial evaluations. *Id*. at 307:5-8; *see also id*. at 381:2-7 (agreeing that her prior work differs from the "purpose of the evaluation presented to [this] Court").

26. Dr. Blanchard did not review any of the source materials that Dr. Spiridigliozzi considered in rendering his opinion. Hr'g Tr. at 300:19-23. In particular, she "never reviewed any evidence whatsoever from the evening in question." *Id*. at 363:2-5.

III. Sexual Assault Allegations Are Vulnerable To False-Reporting

27. Sexual assault allegations have been deemed by the psychological community as "easy to fabricate because of the private nature of the experiences." *Id*. at 172:10-14. False reporting may occur for a number of reasons, including parents "coaching a child," revenge, or hate. *Id*. at 173:20-174:3. Another reason is to gain attention. *Id*. at 171:18-23.

28. The clinical term for dishonest reporting by an evaluee is "malingering." *Id*. at 353:11-16. It occurs when an evaluee "present[s] with symptoms that are not there and they are trying to feign a disorder." *Id*. at 140:24-141:2.

29. A patient's self-report is very important in the diagnosis of PTSD. *Id*. at 171:24-172:5. As such, examiners look to "supporting information" to better "gauge and measure" the patient's self-report. *Id*. When there are inconsistencies between an evaluee's self-report and objective facts, the discrepancy "gets you closer to the truth." *Id*. at 144:6-8. Ms. Doe's self-report was particularly important in this case because Dr. Spiridigliozzi was not provided with key collateral information. *Id*. at 110:2-7.

IV. Trial Counsel Failed to Review Critical Exculpatory Evidence In His Possession

30. The discovery produced by the State included approximately 2,000 pages of text messages and hundreds of photographs that were collected from Ms. Doe's phone. *Id*. at 143:2-7; Def. Exs. 4-6, 9-10. Mr. Lowry admits that he picked up this evidence from the State as part of routine discovery. *Id*. at 263:6-20. However, Mr. Lowry didn't bother to review it. *Id*. at 269:23-270:3 (conceding that "this was evidence that [he] had in [his] possession, but did not review").

31. Many of these texts and photographs contradict Ms. Doe's report to Dr. Spiridigliozzi, as well as her direct testimony at trial. *Id*. at 69:21-25, 271:2-5.

32. Mr. Lowry confirmed that his failure to leverage this evidence was not the result of litigation strategy. He simply was not aware that it existed—because he never reviewed the entire case file. Hr'g Tr. at 269:23-270:3 (confirming that "this was evidence that [he] had in [his] possession, but did not review"). Mr. Lowry admitted that the data from Ms. Doe's phone "further corroborate[s] [his] client's innocence." *Id*. at 264:6-9.

33. Mr. Lowry testified that he "would have utilized" this evidence if he knew about it. *Id*. at 270:4-7. Specifically, Mr. Lowry would have changed his defense strategy:

> I can tell you that if I had seen the text messages that I was shown by Mr. Whalen yesterday, I definitely would have used them at trial along with the photographs that I was shown.

Id. at 263:6-20; *see also id*. at 269:23-270:7 (confirming that "if [he] had had that information, [he] would have utilized that"). This conforms to Mr. Lowry's general approach to cross-examination in this case, which was to install a "sense of inconsistency" regarding Ms. Doe. *Id.* at 260:5-10.

34. Mr. Lowry expressly admitted that his failure to review this evidence "hurt his ability to defend Mr. Wilson." *Id*. at 275:4-9. He conceded that the subject texts and photographs "could have had an impact on the outcome of the case." *Id*. at 275:4-9. With over 33 years of experience, Mr. Lowry agreed that he "should have known to review all of the discovery that [he] received." *Id*. at 274:22-275:1.

A. The Text Messages Contradict Ms. Doe's Reported Alcohol Use

i. Ms. Doe Reported Virtually No Prior Drinking Experience

35. Ms. Doe reported to Dr. Spiridigliozzi that "she had never consumed hard liquor prior to that evening, [while] the most alcohol she had consumed in the past was ***one beer***." Def. Ex. 1 at 3 (emphasis added); Hr'g Tr. at 140:1-3 (confirming Ms. Doe's report "that the most she had had at one time was one beer"); *id*. at 141:3-7 (confirming Ms. Doe's report that "she had not drank hard liquor in the past").

36. Ms. Doe reiterated this story at trial. When asked about her prior use of hard liquor, Ms. Doe responded: "I'd only really had beer like, once or twice sort of thing." Trial Tr. at 355:11-13. The State even contributed to this picture of inexperience. *Id* at 313:20-22 ("[Ms. Doe] will tell you that she had never had hard liquor before; she'd only had beer occasionally.').

37. Ms. Doe's friend, Ms. Byers, also reported to Dr. Spiridigliozzi that "Ms. Doe is "not a big partier," and " she had never seen [Ms. Doe] inebriated." Def. Ex. 1 at 9.

ii. Ms. Doe's Text Messages Indicate That She Was An Experienced Drinker

38. Text messages on Ms. Doe's phone are inconsistent with her claim to have been an inexperienced drinker.

39. On April 17, 2016, Ms. Doe sent a text message to a gentleman in which she referenced a "fight" between them. Ms. Doe noted that the gentleman "beat" her because she was "***a drunk 17yr old girl***." Def. Ex. 9 at 527 (emphasis added).

40. On April 18, 2016, Ms. Doe sent a text message to the same gentleman, and suggested that "I was rly mean to u saturdary." *Id*. at 531. The gentleman responded, "it's cool" because "***U were drunk***." *Id*. (emphasis added).

41. On August 13, 2016, Ms. Doe sent a text message to a friend and stated, "[I]f u want to pre game ***I have whiskey***. . . ." Def. Ex. 10 at 481 (emphasis added). The friend responded, "***Should I bring my wine***?" *Id*. (emphasis added).

42. On August 21, 2016, Ms. Doe sent a text message to a gentleman, in which she described a video. Ms. Doe noted, ***I was so drunk in that video***." Def. Ex. 6 (emphasis added).

iii. Mr. Lowry Failure's to Utilize The Text Messages Was Material

43. Mr. Lowry acknowledged that the foregoing text messages described Ms. Doe as "being drunk and buying alcohol." Hr'g Tr. at 274:18-21. As such, Mr. Lowry admitted that they would be beneficial to attacking Ms. Doe's credibility. *Id*. at 69:21-25; *see also id*. at 72:5-9 (agreeing that "these are the kinds of things that may have been helpful in attacking her credibility"). However, Mr. Lowry never showed the text messages to Dr. Spiridigliozzi or any other witness at trial. *Id*. at 142:24-143:1.

44. Dr. Spiridigliozzi testified that it would be "important" to know whether Ms. Doe was "being honest with [him] when she told [him] that" she had consumed at most "one beer." Hr'g Tr. at 140:1-8. In his own words, "if she had a dependency on alcohol, ***that could make a world of difference***." *Id*. at 140:9-11 (emphasis added).

45. If Ms. Doe self-reported that she had very limited experience with alcohol, and this turns out to be false, "it demonstrates that she is being untruthful." *Id*. at 144:20-145:1; *see also id*. at 351:24-352:3 (finding "important" any "evidence that [Ms. Doe] was not honest … regarding how much alcohol she had consumed in the past"). Such lying about alcohol consumption may, then, be indicative of malingering. *Id*. at 140:15-18.

46. Upon being shown the texts, Dr. Spiridigliozzi agreed that they contain "references to [Ms. Doe] being inebriated." *Id*. at 211:18-20. He further admitted that the text messages show

an "inconsistency with the verbal self-report." *Id*. at 144:2-5. According to Dr. Spiridigliozzi, had he known about the text messages, he would have "challenge[d]" those inconsistencies. *Id*. Dr. Spiridigliozzi even drew the credibility of Ms. Doe's friend into question, admitting that Ms. Byers "may not have known all of the behaviors of Ms. Doe." *Id*. at 211:14-17.

47. Dr. Spiridigliozzi further explained that, if Ms. Doe had more experience with alcohol than she reported, she might have had more tolerance. This could suggest that Ms. Doe was not as intoxicated as she claimed on the night of the alleged assault. *Id*. at 140:12-14 ("[T]hen she could consume larger amounts of alcohol with lesser effects.").

48. Lowry did not secure any of these admissions. This was not a strategic decision; Mr. Lowry never reviewed the discovery provided by the State and did not know they existed. *Id*. at 269:23-270:3.

B. The Text Messages Contradict Ms. Doe's Reported Mental Health

i. Ms. Doe Reported No Prior Mental Health Issues

49. Ms. Doe reported to Dr. Spiridigliozzi that she "struggles with symptoms of anxiety, depression, and panic, which she attributed to the impact on her from the alleged sexual assault." Def. Ex. 1 at 7. However, everybody that Dr. Spiridigliozzi interviewed, including Ms. Doe and her mother, indicated that these symptoms appeared for the first time ***after*** the alleged assault:

> Ms. [Doe] said that prior to September 16, 2016 ***she had never experienced any of the psychological symptoms identified in the current evaluation***. The foregoing statement was corroborated by the record, her mother, high school counselor, and a close friend. . . .

Id. (emphasis added); *see also id*. at 274:2-6 (agreeing that this information "came from his interviews with Ms. Doe and her mother").

50. Ms. Doe mirrored this testimony at trial. She testified, "I'm just anxious, and I feel like I got really depressed. You know, it's hard to go through every day and panic attacks." Trial Tr. at 408:9-17. When asked whether she had "any of these issues before September 11th," she answered: "No." *Id*. at 410:12-14.

51. On that basis, Dr. Spiridigliozzi noted in his report that Ms. Doe "had a rapid onset of the symptoms . . . ." Def. Ex. 1 at 7. He then repeated this finding at trial: "[N]one of these symptoms that she had presented every existed before September 2016. It was a rapid onset. All of a sudden something had happened to her where she – she had all of these symptoms." Trial Tr. at 754:25-755:9.

52. Spiridigliozzi was not provided any treatment records from the doctor(s) that prescribed PROZAC to Ms. Doe. Hr'g Tr. at 156:22-157:3. He asked Ms. Doe and her mother to provide any prior treatment records, but they never did so. *Id*. at 145:23-146:14.

ii. Ms. Doe's Text Messages Indicate Her Prior Use of PROZAC

53. Text messages on Ms. Doe's phone are inconsistent with her claim to have experienced rapid onset symptoms.

54. On August 2, 2016, Ms. Doe's mother sent a text message to Ms. Doe which referenced the latter's "Prozac refill." Def. Ex. 5 at 1016 ("[D]o you call in your Prozac refill or I can"). In response, Ms. Doe indicated that she forgot to pick up her Prozac refill. *Id*.

55. On August 7, 2016, Ms. Doe sent a text message to her mother, which asked "***Where is my Prozac***"? *Id*. at 1018 (emphasis added). Ms. Doe's mother stated that the "Prozac is on top of your book case." *Id*.

56. On August 9, 2016, Ms. Doe sent a text message to her mother, which complained that "***I haven't been able to take my Prozac***" because the bottle left by her mother "is prednisone."

Id. at 1020 (emphasis added). Ms. Doe explained, "I said that u could put it on the bookshelf while I was cleaning & I watched u put it there ***but the pills u put r not Prozac***." *Id*. (emphasis added).

iii. Mr. Lowry's Failure to Utilize The Text Messages Was Material

57. Dr. Spiridigliozzi was not aware that Ms. Doe had been taking PROZAC prior to the alleged sexual assault. Hr'g Tr. at 148:12-17. That is because Ms. Doe and her mother told him that "whatever medication she was taking" started "***after*** the situation happened." *Id*. at 151:7-13 (emphasis added); *id*. at 147:9-14.

58. Upon reviewing the texts on Ms. Doe's phone, Dr. Spiridigliozzi explained that PROZAC is used to treat all of the symptoms reported by Ms. Doe, including "major depressive systems, generalized anxiety, and panic." Hr'g Tr. at 151:23-25; *see also id. at* 206:7-8; 348:18-349:6 (Dr. Blanchard confirming same). As such, the text messages draw into question whether Ms. Doe's symptoms were rapid onset, as she reported. *Id*. at 146:20-147:8; *see also id*. at 347:6-10 ("goes to whether or not . . . the symptoms that she is currently experiencing or at the time of the evaluation may or may not be related to previous symptoms."). For this reason, the existence of preexisting symptoms was "critically important" to Ms. Doe's evaluation. *Id*. at 347:11-15; *see also id*. at 349:24-350:2.

59. In addition, a history of depression may also render a person more prone to the symptoms of PTSD. *Id*. at 384:20-24 ("I would argue that having a history of depression or having a history of anxiety may make an individual more prone to the effects of trauma."). Thus, if Ms. Doe experienced "depression earlier and had been prescribed Prozac," then "she may have been more prone to PTSD." *Id*. at 389:12-16.

60. Mr. Lowry was not aware that Ms. Doe had been "taking any kind of antidepressants or psychological mood drugs." *Id*. at 36:20-24. He admitted that the text messages

"about prior medications was in the phone in [his] possession as part of [his] discovery." *Id*. at 86:16-19; *see also id*. at 69:5-11. However, he never reviewed them. *Id*. at 269:23-270:3. As such, he never questioned Dr. Spiridigliozzi or any other witness about the use of PROZAC to treat preexisting symptoms.

61. Mr. Lowry admitted that it would have been "significant" if he had known about Ms. Doe's "prior issues with depression and anxiety before the incident with Mr. Wilson." *Id*. at 66:25-67:11. He could have "used [the evidence] effectively at trial" because it "***would go towards the credibility of Ms. Doe***." *Id*. at 68:19-24 (emphasis added); *see also id*. at 272:14-21 (explaining that he "would have used" the texts "with her mom" discussing PROZAC). Mr. Lowry testified that he would have asked both Ms. Doe and Dr. Spiridigliozzi about these text messages "in cross-examination." *Id*. at 273:18-23.

C. The Text Messages Suggest That Ms. Doe's Perception Could Have Been Altered

62. Alcohol consumption can impact someone taking a selective serotonin reuptake inhibitor (SSRI), such as PROZAC. *Id*. at 350:13-20. When alcohol is combined with such medications, it can "increase the effects of both." *Id*. a 157:4-12. This process is called "potentiating." *Id*.

63. Dr. Spiridigliozzi agreed that mixing PROZAC and alcohol could alter a person's perception of an event. *Id*. at 162:4-9; *see also id*. at 160:24-161:2 (confirming that mixing PROZAC and alcohol "can affect one's ability to think clearly"). Altered perception, in turn, "could lead to false reporting of events." *Id*. at 351:7-17.

64. The manufacturer of PROZAC, Eli Lillie, even warns against combining the medication with alcohol. The medication guide states that "PROZAC can cause sleepiness or may

affect your ability to make decisions, think clearly, or react quickly," and advises: "Do not drink alcohol while using PROZAC." Def. Ex. 16 at 6.

65. The text messages in Ms. Doe's phone indicate that she may have been consuming alcohol during a time period in which she also took PROZAC. Def. Exs. 5-10. Because Dr. Spiridigliozzi was not shown these messages, he never asked Ms. Doe about possible potentiating. Hr'g Tr. at 161:3-6. As such, he had no idea "whether or not Ms. Doe was mixing alcohol and Prozac" on the night in question. *Id*. Dr. Spiridigliozzi acknowledged, however, that this is "important information to know." *Id*. at 162:10-14.

66. Mr. Lowry did not pose any questions to Dr. Spiridigliozzi or any other witness regarding the mixing of alcohol and PROZAC by Ms. Doe, or the possibility that Ms. Doe's perception was altered as a result. *Id*. at 161:7-9.

D. The Photographs Contradict Ms. Doe's Reported Aversion To Crowds

i. Ms. Doe Reported That She Couldn't Stand Being In Large Groups

67. Ms. Doe reported to Dr. Spiridigliozzi that she was losing friends and had difficulty with crowds. Trial Tr. at 755:16-19 ("She lost friends. At school she would hide because she couldn't stand being around larger groups of people."); *see also* Hr'g Tr. at 270:12-15 (confirming that Ms. Doe testified "that she was uncomfortable being in crowds" due to "this sexual assault").

ii. Ms. Doe's Photographs Show Multiple Crowded Gathering After The Alleged Assault

68. Photographs on Ms. Doe's phone indicate that she had been actively socializing in crowds, including various group pictures, shortly after the incident. Hr'g Tr. at 270:8-11.

69. A photograph dated September 18, 2016 shows Ms. Doe posing with a group of twelve other female friends dressed in cocktail attire. Def. Ex. 4A.

70. A photograph dated September 18, 2016 shows Ms. Doe posing with a group of eight other female friends dressed in cocktail attire. Def. Ex 4B.

71. A photograph dated September 18, 2016 shows Ms. Doe hugging two female friends at an outdoor event. Def. Ex. 4C.

72. A photograph dated September 18, 2016 shows Ms. Doe smiling alongside a male friend. Def. Ex. 4D.

73. A photograph dated September 20, 2016 shows Ms. Doe at a crowded indoor event. Def. Ex. 4E.

74. A photograph dated September 28, 2016 shows Ms. Doe attending a dance with friends. Def. Ex. 4J.

75. A photograph dated October 18, 2016 shows Ms. Doe at an outdoor event surrounded by approximately 25 people. Def. Ex. 4O.

76. Photographs dated September 21, 2016, September 24, 2016, September 29, 2016, October 2, 2016, and October 18, 2016 show Ms. Doe smiling alongside various groups of female friends. Def. Exs. 4F-4I, Ex. 4K, Ex. 4L, Ex. 4P, and Ex. 4Q.

iv. Mr. Lowry's Failure to Utilize The Photographs Was Material

77. Mr. Lowry confirmed that these photographs were all dated "shortly after the incident occurred, about a week or two or three," and all depict Ms. Doe socializing in crowds. Hr'g Tr. at 65:15-25. For instance, he noted that one photograph showed Ms. Doe dancing with a group of people six days after the alleged assault. *Id*. at 271:15-17.

78. Mr. Lowry agreed that the photographs "contradict [Ms. Doe's] assertion that she was afraid to be in crowds and afraid to be around people." *Id*. at 271:18-272:5.

79. Mr. Lowry admitted the photographs are "significant evidence that would have been beneficial to Mr. Wilson's case." *Id*. at 66:3-6. This was a case about credibility. *Id*. at 270:23-271:1. Photographs showing her "out in a crowd" could "have affected her credibility." *Id*. at 271:2-5. Mr. Lowry testified that he "would have used these pictures" in this manner—had he made himself aware of them. *Id*. at 271:6-9.

E. The Text Messages Contradict Ms. Doe's Reported Sexual History

80. Ms. Doe reported to Dr. Spiridigliozzi that she had one sexual encounter prior to the alleged assault. *Id*. at 163:3-7; 352:19-353:1; Def. Ex. 1 at 4 ("Ms. [Doe] reported that she had engaged in sexual intercourse once prior to September 11, 2016.").

81. Text messages from Ms. Doe's phone reference multiple prior sexual encounters.

82. Evidence indicating that Ms. Doe "was not being truthful" in connection with "her sexual history" would be "important to [Dr. Spiridigliozzi's] forensic assessment." Hr'g Tr. at 353:2-6. It would be "another indication of dishonesty." *Id*. at 353:7-10.

83. Prior sexual history is also relevant to identify the "after effects" of a sexual encounter, including whether a person felt "used." Def. Ex. 18 at 1. A past sexual encounter may offer "context that would better explain the symptoms that the examinee is currently experiencing." Hr'g Tr. at 312:15-24 (Dr. Blanchard). As such, Dr. Spiridigliozzi admitted sexual history "could play a role in [his] assessment had [he] had that information." *Id*. at 170:10-14.

84. Mr. Lowry never showed Dr. Spiridigliozzi any of the texts discussing Ms. Doe's prior sexual encounters. *Id.* at 170:22-24. As such, Dr. Spiridigliozzi had no idea whether the symptoms that Ms. Doe suffered were in reaction to her prior sexual experiences. *Id*. at 169:10-15. In particular, he had "no idea whether or not prior sexual experiences caused her to be

depressed." *Id*. at 169:16-19. He also had "no idea whether" any "prior sexual experience with someone of another race" affected Ms. Doe's perception. *Id*. at 170:6-9.

V. Mr. Lowry Failed To Request All Relevant Discovery From The State

A. Mr. Lowry Never Requested The Unredacted Spiridigliozzi Report

85. During Mr. Wilson's criminal case, the State produced a redacted version of Dr. Spiridigliozzi's report to Mr. Lowry. Hr'g Tr. at 45:15-18. Dr. Spiridigliozzi never redacted his report in any way. *Id*. at 135:7-136:20. The redactions were added unilaterally by the prosecutor, Ms. McGowan. *Id*. at 45:19-23.

86. Mr. Lowry never received the unredacted version of Dr. Spiridigliozzi's report. *Id*. at 46:23-47:7, 86:25-87:2. Nor did he recall ever asking for the unredacted report. *Id*. at 50:9-12, 53:25-54:2. Nothing in his case file or timesheets suggests that Mr. Lowry ever requested it from the State. *Id*. at 255:6-9. 53:25-54:2

B. The Redacted Content Revealed Significant Inconsistencies

87. The redacted content contains exculpatory evidence about Ms. Doe's background. In particular, it indicates that Ms. Doe received treatment for mental health issues prior to September 10, 2016.

88. The redacted content states that Ms. Doe received individual and family counseling, and currently takes PROZAC:

> Ms. [Doe] reported that she received individual and family counseling, and she currently takes Prozac.

Def. Ex. 2 at 5.

89. The redacted content also states that Ms. Doe had previously been prescribed Xanax and Zoloft:

> In the past she was prescribed Xanax and Zoloft. She denied receiving any other mode of mental health treatment.

Id.at 5.

90. The redacted content further reveals that Ms. Doe's mother knew about her daughter's prior use of PROZAC:

> [Ms. Doe's mother] knew that [Ms. Doe] was - previously prescribed Prozac.

Id. at 8.

91. The redacted content further reveals that Ms. Doe saw a mental health professional in middle school:

> [Ms. Doe's mother] also mentioned that Ms. [Doe] saw a counselor for a few sessions when she was in middle school.

Id.

C. Mr. Lowry Admitted That He Should Have Requested The Unredacted Report

92. Mr. Lowry conceded that the redacted content was not confidential and described the redactions as "really self-serving." *Id*. at 47:13-19. There is no "reason why the State would have it redacted." *Id*. at 47:20-23.

93. Mr. Lowry knew that he had the right to all evidence relied upon or generated by an expert. *Id*. at 275:10-14. His decision whether to request an unredacted copy of a document "depend[ed] on if the document is important." *Id*. at 237:3-8. Mr. Lowry admits that he "should have requested an unredacted copy" of Dr. Spiridigliozzi's report. *Id*.

94. Mr. Lowry's failure to request the unredacted report was not a strategic decision. By Mr. Lowry's own admission, it was an error. *Id*. at 237:9-11 (stating that the report is "something I would request").

D. Mr. Lowry Admitted That His Failure Was Material

95. Had Mr. Lowry been provided with the unredacted report, he would have used it during Mr. Wilson's trial. According to Mr. Lowry, it would have been useful in "cross-examining [Ms. Doe] about her alleged PTSD that supposedly occurred as a result of the events of September 10th of 2016." *Id*. at 51:21-52:1; *see also id*. at 53:7-13 ("I would have been able to cross-examine her on preexisting conditions.").

96. If Mr. Lowry had requested the unredacted report, he may also have retained an expert to rebut Dr. Spiridigliozzi. *Id*. at 254:15-21 ("[I]f I had actually had a copy of that unredacted report, I think I would have gotten an expert"); *see also id*. at 275:24-276:5 (describing "a couple of lines that probably would have encouraged me to get an expert of my own").

VI. Trial Counsel Allowed Dr. Spiridigliozzi to Testify That He Confirmed Ms. Doe's Story

A. Dr. Spiridigliozzi Testified That He Confirmed Ms. Doe's Version of Events

97. Dr. Spiridigliozzi thought this his job was to "determine whether or not what the person you were evaluating is reporting to you is true." *Id*. at 109:15-20. He believed that his role was different from a "therapeutic evaluation where generally psychologists just accept what the client tells them." *Id*. at 136:25-137:5.

98. Dr. Spiridigliozzi believed this investigative function was a primary difference between a clinical psychologist and a forensic psychologist:

> In clinical psychology, or if you're doing a therapeutic evaluation or assessment, there are a number of distinctions. Typically, what a therapeutic evaluator does is they generally accept what the client tells them whereas, on the other hand, a forensic psychologist verifies. They investigate what the person is telling them.

Trial Tr. at 744:9-15.

99. Based on that view of his role, Dr. Spiridigliozzi testified at trial that he confirmed the accuracy of Ms. Doe's entire self-report. He testified:

> Q: When you said earlier that one of the things that is necessary for forensic psychodiagnostic evaluation is to be able to confirm because what you are doing is getting all of this from the alleged victim; correct?
> A: Well, yes.
>
> Q: Okay. Then were you able to do that here?
> A: Yes. ***Everything here has more than one source that I have reported***.

Id. at 763:22-764:5 (emphasis added); *see also* Hr'g Tr. at 110:14-17 (Dr. Spiridigliozzi agreed that he testified "to the jury in the Albert Wilson trial that everything Ms. [Doe] reported to [him] ***had been confirmed***.") (emphasis added).

B. Dr. Spiridigliozzi Presented Key Aspects of Ms. Doe's Self-Report As Fact

100. Dr. Spiridigliozzi told the jury that Ms. Doe had been raped—not allegedly raped:

> ***After the rape***, she said that he had removed or pulled down her undergarments, and she was lying with her legs off of the bed with her back on the bed when she was penetrated by the gentleman's penis.

Trial Tr. at 750:19-22 (emphasis added).

101. Dr. Spiridigliozzi also told the jury what Ms. Doe experienced during the rape:

> ***And then he finished rather quickly, and at that point she was doing – she was dissociating***, which means that she was – it was depersonalization, which is a component of that where she felt as if she was even out of her body at that time. She was staring at a wall.

Id. at 750:25-751:5 (emphasis added).

102. Dr. Spiridigliozzi told the jury what Ms. Doe did following the rape:

> And then when he was finished, she quickly rearranged her clothing, rushed downstairs. She found her phone and left kind of rather quickly, even though she did not know where she was located.

Id. at 751:6-9.

103. Dr. Spiridigliozzi told the jury what Ms. Doe felt following the rape:

> And she just knew that she wanted to get away, even though she didn't know where she was going.

Id. at 751:15-19.

C. Mr. Lowry's Failure to Object Was Not Strategic

104. Mr. Lowry knew that Dr. Spiridigliozzi should have been "limited in his testimony to basically symptoms what his exam was, and the conclusion that he could draw about those symptoms." Hr'g Tr. at 77:7-12. Mr. Lowry also knew that Dr. Spiridigliozzi should not be allowed to "confirm everything that . . . was told to him" because "[t]hat would have gone to the ultimate question before the jury." *Id*. at 77:17-23; *see also id*. at 42:6-11 (confirming that a psychological expert cannot "say much more than what their diagnosis is and why.").

105. He also knew that the Court issued an order on this very topic, under which Dr. Spiridigliozzi would not be allowed to "testify that [Ms.] Doe was raped, which was an invasion of the province of the jury." *Id*. at 42:24-43:7. It was also ordered that Dr. Spiridigliozzi "would not say rape," but rather "would say alleged" rape. *Id*. at 43:8-10.

106. Dr. Blanchard agreed that a psychologist is not "qualified to determine if someone is telling the truth." *Id*. at 335:8-10. She explained that any testimony beyond "relating what [Ms. Doe's] self report was would be inappropriate. . . ." *Id*. at 340:11-15.

107. Yet Mr. Lowry did not lodge a single objection to Dr. Spiridigliozzi's report or testimony. *Id*. at 41:7-9; *see also id*. at 81:9-12. Nor did Mr. Lowry file any pretrial motions seeking to limit Dr. Spiridigliozzi's testimony. *Id*.

108. Mr. Lowry offered no reason for failing to object to Dr. Spiridigliozzi's testimony that Ms. Doe's self-report have been verified. He simply responded, "At the time, I don't think I did. ***Two years later, sounds like it was***." *Id*. at 280:7-19 (emphasis added).

109. Likewise, with respect to Dr. Spiridigliozzi's use of the term "rape," Mr. Lowry said, "***I guess I just missed it***." *Id*. at 79:2-15 (emphasis added).

VII. Trial Counsel Allowed Dr. Spiridigliozzi to Testify As To Ms. Doe's Intoxication Level

A. Dr. Spiridigliozzi Testified That Ms. Doe Was Physically Impaired

110. At trial, Dr. Spiridigliozzi testified that Ms. Doe experienced various physical impairments due to alcohol consumption. For instance, he testified that she was indifferent to pain: "[W]hen you're this intoxicated, your body is even indifferent to pain." Trial Tr. at 752:8-9.

111. Dr. Spiridigliozzi testified that Ms. Doe had motor control problems:

> She had difficulty moving around. . . . She mentioned in -- when she was in the room, that was one of the main things what -- that she just couldn't muster the muscle control and the balance to even get up and get off of the bed.

Id. at 752:9-18.

112. Dr. Spiridigliozzi testified that Ms. Doe was unresponsive to external stimuli:

> She was what I would describe as being unresponsive to her environmental stimuli, things in the environment that were happening. She was just unable to respond, she was so intoxicated.

Id. at 752:10-14.

113. Dr. Spiridigliozzi testified that Ms. Doe was nauseous: "There was nausea. There was -- her head was spinning." *Id*. at 752:14-15.

B. Dr. Spiridigliozzi Testified Regarding Ms. Doe's Blood Alcohol Level

114. Dr. Spiridigliozzi went so far as to testify as to his belief that, at the time of the incident, Ms. Doe had a blood alcohol level of 0.25:

> People that are that intoxicated are probably at what would be the .25 blood alcohol content level, so that's quite inebriated. That's like three times over the Kansas limit of legal driving.

Id. at 752:23-753:1.

115. Dr. Spiridigliozzi based his approximation of Ms. Doe's blood alcohol level on what he believed to be "typical drinking patterns and what is common for people with that level of alcohol in their system." *Id*. at 753:11-13. Mr. Lowry never asked Dr. Spiridigliozzi to disclose the reference materials he considered to determine either metric. Hr'g Tr. at 134:4-15.

116. He testified that people can lose consciousness or die at such levels of intoxication:

> And even at some points people lose consciousness when they have that high of a level alcohol. Then it gets pretty serious after you've consumed more than that. You can actually die from alcohol poisoning.

Id. at 753:2-6.

117. Dr. Spiridigliozzi also showed the jury a chart "with the symptoms that [Ms. Doe] had described of drunkenness," which was not admitted into evidence. Hr'g Tr. at 107:2-4.

118. There was no diagnostic reason to discuss Ms. Doe's level of intoxication. *Id*. at 188:16-18 (intoxication is not a "diagnostic criteria for PTSD"); *id*. at 329:15-18 (blood alcohol content is not a "diagnostic criteria for PTSD").

119. Dr. Spiridigliozzi is not a medical doctor. *Id*. at 127:10-11. He has never testified as an expert on the effects of alcohol on the human body. *Id*. at 128:9-12. He certainly has never provided testimony regarding blood alcohol levels. *Id*. at 128:16-18.

120. Dr. Blanchard testified that Dr. Spiridigliozzi's "testimony regarding blood alcohol and intoxication" was "improper." *Id*. at 373:3-9; *see also id*. at 338:2-7 (describing that testimony as "inappropriate"). According to Dr. Blanchard, this is not "something a forensic examiner is qualified in [her] experience to discuss." *Id*. at 328:19-22.

C. Dr. Spiridigliozzi Did Not Consider Ms. Doe's Physical Characteristics

121. The impact of alcohol on a person is affected by his or her height and weight. *Id*. at 108:2-9 (Dr. Spiridigliozzi admitting that "weight has a pretty important impact on the effects of alcohol."); *see also id*. at 340:16-20.

122. The impact of alcohol on a person is also affected by the amount of food consumed, and in relation to when the person ate to when he or she consumed alcohol. *Id*. at 107:19-108:14; *id*. at 340:16-341:1. The amount of water that a person drinks also impacts the effect of alcohol. *Id*. at 134:16-22.

123. Dr. Spiridigliozzi "did not factor any of those things" into his evaluation because he "didn't have that information." *Id*. at 134:23-25. He never asked Ms. Doe what she ate for dinner, or when she consumed it. *Id*. at 108:23-109:1. He didn't even note Ms. Doe's "height, weight, or anything else about her physical appearance" in his report, as is customary in the field. Def. Ex. 18 at 1; *see also* Hr'g Tr. at 105:19-23. Instead, Dr. Spiridigliozzi "just accept[ed] what [Ms. Doe] told [him] about her alcohol consumption that night." *Id*. at 137:6-11.

D. Mr. Lowry Failed To Object To Dr. Spiridigliozzi's Speculation

124. Mr. Lowry didn't know whether Dr. Spiridigliozzi was even qualified to even make these statements. *Id*. at 83:21-22 ("I don't think so. He probably was."). Yet he did not object to Dr. Spiridigliozzi's testimony as exceeding the proper scope of expert opinion. When asked whether he thought this testimony was objectionable, Mr. Lowry simply responded: "I didn't feel like it was." *Id*. at 83:19-20.

VIII. Trial Counsel Allowed Dr. Spiridigliozzi to Testify Regarding Ms. Doe's Intelligence

125. Dr. Spiridigliozzi reported that Ms. Doe's "intellectual functioning was estimated to fall within the superior range." *Id*. at 174:14-175:1.

126. Dr. Spiridigliozzi did not give Ms. Doe any intellectual functioning tests. *Id*. at 174:8-10. He made this finding based on the fact that Ms. Doe had "been in gifted programs" and was a "national merit scholar." *Id*. at 175:6-19.

127. There is no empirical reason for Dr. Spiridigliozzi to characterize Ms. Doe's intelligence. Intelligence is not a diagnostic criteria for PTSD. *Id* at 329:19-21. Dr. Spiridigliozzi could not identify any studies suggesting that superior intelligence is correlated to a person's likelihood to truthfully self-report. *Id*. at 176:2-16.

128. Mr. Lowry did not object to Dr. Spiridigliozzi's testimony as to Ms. Doe's intelligence level.

IX. Trial Counsel Failed To Cross-Examine Dr. Spiridigliozzi Regarding Missing Or Unreviewed Data

129. Dr. Spiridigliozzi asked the State for all the records relevant to his evaluation, but did not receive them. *Id*. at 113:19-21 ("I asked for all the records and didn't receive them apparently."). Dr. Spiridigliozzi confirmed that he was "not given the full universe of relevant information for [his] assessment." *Id*. at 153:20-23.

130. The State's failure to provide "all of the relevant information . . . can lead to an inaccurate assessment." *Id*. at 388:24-389:3. For any record not provided to Dr. Spiridigliozzi, he would have "no way of knowing whether or not those were relevant to [his] assessment. . . ." *Id*. at 110:2-7. Dr. Spiridigliozzi also failed to review all of the material with which he was provided.

A. Dr. Spiridigliozzi Was Not Provided With Relevant Video Footage

131. In his report, Dr. Spiridigliozzi provided a list of materials that he purportedly considered in forming his opinion. Def. Ex. 1 at 11. This includes a "video from the Hawk" and a "video from Bullwinkle's and the Wheel." *Id*. Dr. Spiridigliozzi revealed, however, that he did not actually review these videos—because the State never provided them to him. In fact, Dr.

Spiridigliozzi did not review any surveillance videos in this case. Hr'g Tr. at 112:12-23. He was only provided still photos of Ms. Doe or Mr. Wilson on the evening in question. *Id*.

132. Video would be important in analyzing the effect of alcohol on Ms. Doe. *Id*. at 112:17-21. Dr. Spiridigliozzi testified that video footage might have helped him "determine whether the condition [Ms. Doe] described . . . was consistent with what [he was] seeing in the video." *Id*. at 115:10-14. He thought it was important to compare Ms. Doe's reported condition to the surveillance video. *Id*. at 112:17-21.

133. For instance, Ms. Doe reported that she was "kind of unsteady on her gait, and at one point, [Mr. Wilson] picked her up and carried her part of the way." *Id*. at 120:23-121:5.

134. Upon viewing video footage, Dr. Spiridigliozzi admitted that it did not depict someone that was "even close to that condition." *Id*. at 129:13-25; *see also id*. at 339:16-21 (testifying that it "would be important to review" surveillance video depicting Ms. Doe on the night in question). In the video shown, Ms. Doe never stumbled, "appears steady on her feet," and was not "carried" by Mr. Wilson. *Id*. at 124:5-8. According to Dr. Spiridigliozzi, Ms. Doe and Mr. Wilson were also "walking at a rather brisk pace," and there was "no indication to [him] that Ms. Doe was disoriented." *Id*. at 124:9-14, 131:21-24. On this basis, Dr. Spiridigliozzi conceded that the surveillance video is not "consistent with [Ms. Doe's] self-report to me." *Id*. at 125:2-4.

135. Mr. Lowry failed to ask any questions to Dr. Spiridigliozzi concerning the surveillance videos. *Id*. at 115:15-20; 126:24-127:3.

B. <u>Dr. Spiridigliozzi Was Not Provided With Collateral Contacts</u>

136. Dr. Spiridigliozzi asked to speak with "anyone that could help [him] verify what [Ms. Doe] was telling [him]." *Id*. at 113:22-114:2. However, the only people that Dr.

Spiridigliozzi interviewed were Ms. Doe's mother, her school counselor, and a friend. *Id*. at 113:6-12. This friend, Ms. Katie Byers, was not present on the night in question. *Id*. at 111:10-14.

137. Dr. Spiridigliozzi did not interview anyone aside from Ms. Doe that was actually present on the night of the incident. *Id*. For instance, he did not speak to either of the gentlemen that drove Ms. Doe to The Hawk that evening; he merely reviewed their police statements. *Id*. at 111:20-112:11. Likewise, he did not speak to Ms. Doe's cousin (Ms. Tatum Gibbar) or Mr. Wilson's friend (Trey Williams), both of whom were present at the Hawk. *Id*. at 111:10-14.

138. When asked why he did not speak with direct witnesses, Dr. Spiridigliozzi's stated: "I asked for collateral contacts and I was not provided those." *Id*. at 112:24-113:5. Specifically, he asked Ms. Doe and her mother for additional contacts. *Id*. at 113:15-18. In particular, he requested to speak with multiple professionals, including Ms. Doe's teachers and principal. *Id*. at 211:21-25. He even put in writing that "I want collateral contacts and what the expectations are." *Id*. at 212:1-5. In actuality, Dr. Spiridigliozzi confirmed only "as much as [he] could." *Id*. at 110:23-25.

139. Dr. Blanchard acknowledged that the ability to "speak to collateral contacts that were with Ms. Doe and witnessed her state that evening" would be "important." *Id*. at 339:22-340:1. She testified that it would be "very difficult to confirm … her level of intoxication" without these things. *Id*. at 340:6-10.

140. Mr. Lowry failed to ask any questions of Dr. Spiridigliozzi regarding the contacts that formed the basis of his opinion, or Dr. Spiridigliozzi's inability to secure corroboration.

C. Dr. Spiridigliozzi Never Received Ms. Doe's Treatment Records

141. Mental health records showing preexisting conditions are important to any psychological assessment. *Id*. at 342:11-17. Such records demonstrate the subject's "history and

how it may or may not contribute to the current mental state." *Id*. at 344:24-345:7. Examiners should consider any "prior history of depression" or "prior history of anxiety." *Id*. at 384:11-19.

142. Dr. Spiridigliozzi asked Ms. Doe for any prior treatment records regarding her mental health, but never received them. *Id*. at 145:23-146:14 (confirming that he asked for "all the mental health treatment reports").

143. Dr. Blanchard stated that, without Ms. Doe's treatment records, Dr. Spiridigliozzi's "assessment would need to be noted that there were limitations." *Id*. at 348:11-17.

144. Mr. Lowry never questioned Dr. Spiridigliozzi about the lack of treatment records. Nor did Mr. Lowry request Ms. Doe's prior treatment records from the State.

X. Trial Counsel Failed To Cross-Examine Dr. Spiridigliozzi Regarding Testing Irregularities

A. Dr. Spiridigliozzi's Report Calls for Cautious Interpretation

145. Page 5 of Dr. Spiridigliozzi's report states that "there are indications that [Ms. Doe] may have experienced an occasional loss of concentration while taking the measure. Therefore, the results were found to be valid for a cautious interpretation of the data." Def. Ex. 1 at 5.

146. Dr. Spiridigliozzi explained that this disclaimer is based on the Beck F-scale, which measures "how the person approached the test." Hr'g Tr. at 177:12-14. He stated that cautious interpretation may have been required because Ms. Doe "daydream[ed] a bit and had lost her concentration." *Id*. at 177:22-24.

147. Dr. Blanchard explained that cautious interpretation is required when there is "some type of elevation on the validity indice." *Id*. at 325:10-17. Such an elevation may result from "inconsistencies, over-reporting, under-reporting, random responding, missing items, et cetera." *Id*. at 325:10-17.

148. Mr. Lowry did not ask Dr. Spiridigliozzi a single question about how or why his results should be interpreted cautiously. *Id*. at 177:4-9.

B. Dr. Spiridigliozzi Used Outdated Psychological Tests

149. The American Psychological Association ("APA") maintains a code of ethics, which precludes the use of "outdated tests." *Id*. at 372:3-12. It requires psychologists to "base their assessments or recommendations on data" that is "[a]s current as available." *Id*. at 372:13-16. The use of an outdated test is a "violation of the APA ethical guideline." *Id*. at 379:22-25.

150. According to Dr. Blanchard, Dr. Spiridigliozzi would need a "very good reason" to explain the "use [of] outdated manuals and assessment tools." *Id*. at 379:10-15. If a forensic examiner uses an older test, it is "incumbent upon them to explain why that version of the test is more valuable than the newer versions." *Id*. at 331:3-11.

i. The MCMI Assessment

151. Dr. Spiridigliozzi administered the Millon Clinical Multiaxial Inventory-III ("MCMI-III") test to Ms. Doe on March 17-18, 2018. *Id*. at 179:10-22; 370:14-371:11.

152. An updated version of this test, the MCMI-IV, had been released in 2015. *Id*. at 179:23-25, 377:25-378:3; *see also* Def. Ex. 18 at 2 ("The MCMI-IV was published in 2015."). By March 2018, the psychological community had already released research validating the use of MCMI-IV. Hr'g Tr. at 379:2-9.

153. Dr. Spiridigliozzi did not use the updated MCMI-IV test. *Id*. at 204:24-205:2.

ii. The MMPI Assessment

154. Dr. Spiridigliozzi also administered the Minnesota Multiphasic Personality Inventory 2 test (MMPI-2) to Ms. Doe. *Id.* at 180:1-5.

155. At the time of examination, a "new psychometrically-improved version of the MMPI-2 existed." *Id*. at 370:17-23. This "restructured version" was called the MMPR-2-RF and was released in 2008. *Id.* at 331:12-15; Def. Ex. 18 at 2 ("The MMPI-2-RF was developed in 2003, [and] has been available since 2008").

156. The publisher of the MMPI-2 test is Pearson Assessments. Hr'g Tr. at 180:21-24. Pearson's website describes the MMPI-2-RF test as a psychometrically improved version of the MMPI-2. Def. Ex. 17 at 1.

157. Dr. Spiridigliozzi did not use the psychometrically-improved MMPR-2-RF test. Hr'g Tr. at 182:2-3.

iii. The Supplemental Scale

158. Dr. Spiridigliozzi applied a "supplemental scale" to the MMPI-2 test. *Id*. at 371:16-21. The scale that he used was developed in the 1980s to assess Vietnam combat veterans. *Id*. at 371:12-15; *see also* Def. Ex. 18 at 2 (the scale was "developed . . . in 1984 by contrasting the scores of Vietnam combat veterans with a diagnosis of PTSD with those that had been assigned a different diagnosis"). The scale was "not intended to be used on civilians like DOE." Hr'g Tr. at 371:16-19; *see also* Def. Ex. 18 at 2 ("It is not advisable to apply the scores of the MMPI-2 supplemental scale in a situation involving a civilian.").

159. The psychological community recognizes that the DSM-V CAPS-5 scale is the "gold standard for PTSD assessment." Hr'g Tr. at 371:22-372:2; Def. Ex. 18 at 2 (describing CAPS-5 as "the gold standard in PTSD assessment"). CAPS-5 is a "structured interview" that "assesses the presence and severity of symptoms related to post-traumatic stress disorder." Hr'g Tr. at 332:10-19.

160. Dr. Spiridigliozzi did not use the "gold standard" CAPS-5 scale. *Id*. at 373:1-2.

161. Mr. Lowry did not challenge Dr. Spiridigliozzi's use of any psychological test or scale. *Id*. at 182:4-6.

XI. Trial Counsel Failed To Conduct A Reasonable Investigation

162. Mr. Lowry conducted minimal inquiry into the facts underlying this case. It is Mr. Lowry's typical practice to "contact those people" identified by his client as potentially being "helpful to the defense." *Id* at 241:13-17. In this case, Mr. Lowry never "tried to find and talk to people that were there on the evening of this alleged incident." *Id*. at 26:10-14.

163. Mr. Lowry did hire an investigator, Ed Brunt, to locate potential contacts. *Id*. at 24:10-16. Mr. Brunt never issued any reports detailing his findings; he merely talked with Mr. Lowry "a few times." *Id*. at 25:9-11. Mr. Lowry did not recall whether Mr. Brunt "ever found anybody." *Id*. at 25:10-20. Mr. Lowry offered no explanation why he failed to interview anyone at the Hawk that evening. And he never followed up with his investigator to find out why he couldn't find those persons.

164. Mr. Lowry went to the Hawk on one occasion "when they were closed." *Id*. at 28:3-15. However, Mr. Lowry didn't even ask the "person that showed [him] around" whether he "recall[ed] anything from that evening." *Id*.

XII. Trial Counsel Failed to Secure Experts

165. The State presented DNA evidence and testimony to the jury. The State called Mary Swab, who is a forensic scientist in the biology section of the Kansas Bureau of Investigation. Trial Tr. at 719:6-11. Ms. Swab was asked to assess "items of evidence to screen for biological fluids." *Id*. at 722:22-723:2. These items included "a sexual assault kit, a pair of underwear, a skirt, leggings, a shirt, and the known oral swabs of Albert Wilson." *Id*. at 723:3-6. Ms. Swab employed, *inter alia*, an "acid phosphatase test" and "microscopic exam." *Id*. at 724:22-725:1.

166. The State also called Rachel Hunt, another forensic scientist in the biology section of the Kansas Bureau of Investigation. *Id*. at 727:21-25. With respect to the "breast swabs," Ms. Hunt determined that a "partial foreign DNA profile" was "consistent with the known DNA profile of Albert Wilson." *Id*. at 734:24-735:4. She utilized a polymerase chain reaction (PCR) technique to develop DNA profiles. *Id*. at 728:8-12.

167. There was no evidence of any DNA of Mr. Wilson from anywhere other than on her chest. *Id*. at 739:9-13 (confirming a "partial foreign profile" on Ms. Doe's "chest area"). A rape kit also found no pubic hair or any secretions besides some saliva on the upper body.

168. Mr. Lowry did not consult a DNA or other forensic expert to discuss these issues. He did not present any testimony explaining how this biological testing fails to support the elements element for rape. When asked why he failed to retain a DNA expert, Mr. Lowry simply responded, "That evidence was clearly in our favor." Hr'g Tr. at 285:2-6.

XIII. Trial Counsel Failed to Address The Effect of Race on Malingering

169. In assessing malingering, it is important for a psychologist to consider "whether or not the race or ethnicity of the evaluee had any relationship to the race or ethnicity of the alleged attacker." *Id*. at 368:21-369:5.

170. Studies show a "higher incidence of false allegations of sexual assault when the victim is a white woman and the alleged attacker is a black male." *Id*. at 369:14-19. In this case, Ms. Doe is a white female and Mr. Wilson is an African American male. *Id*. at 369:20-25. There is no indication that Dr. Spiridigliozzi considered the effect of racial disparity on the accuracy of Ms. Doe's self-reporting. It would have been appropriate to do so. *Id*. at 369:20-25 (Dr. Blanchard).

171. Mr. Lowry did not cross-examine Dr. Spiridigliozzi regarding the influence of racial bias. The jury that convicted Mr. Wilson was comprised entirely of white persons. *Id*. at 285:25-286:6. Mr. Lowry was not even aware whether there were any minorities in the jury pool. *Id*.

XIV. Trial Counsel Failed to Secure the Dismissal of a Predisposed Juror

172. In a sexual assault case, it is Mr. Lowry's practice to remove jurors having a prior history of sexual assault, or jurors having family members with such history. *Id*. at 76:5-9. Mr. Lowry "want[s] to get rid of those people off the bat." *Id*. at 267:3-4; *see also id*. at 282:13-20 ("My normal practice is not to keep people who have histories of sexual assault or their family on the jury.").

173. Mr. Lowry did not recall any juror seated in the Wilson trial "who had a sexual assault history or whose relative had a sexual assault history." *Id*. at 266:22-267:3. According to Mr. Lowry, that's a person he would want to "dismiss immediately." *Id*. at 282:5-9.

174. During voir dire, Ms. Gowan asked various prospective jurors whether they could "come in here with an open mind and listen to the evidence in this case." Trial Tr. at 49:13-17. Several prospective jurors stated that personal experience would prevent them from remaining impartial. *Id*. at 50:4-52:22 (citing a "family history with molestation," "some past experiences and "personal experience").

175. Ms. Gowan asked whether anyone else needed a "personal private" in chambers. *Id*. at 52:23-53:10. Ms. O responded, "***I have a family member, probably should***." *Id*. at 53:21-22 (emphasis added). Thereafter, a private conversation was held in chambers. *Id*. at 128:15-17.

176. Ms. O indicated that her sister-in-law had been previously sexually assaulted and that certain evidence could trigger feelings of anger. Trial Tr. (Vol. XIII) at 23-17-24, 43:7-13.

However, Ms. O also suggested that she could remain impartial despite this troubling history. *Id*. at 8:13-21.

177. Mr. Lowry did not seek to dismiss Ms. O, and she was ultimately seated on the jury.

PROPOSED CONCLUSIONS OF LAW

I. Legal Standards Governing Ineffective Assistance of Counsel

178. In all criminal prosecutions, the Sixth Amendment of the Constitution requires that the accused not only have the assistance of counsel, but effective assistance of counsel. *See Strickand v. Washington*, 466 U.S. 668, 686, *reh. denied* 467 U.S. 1267 (1984); *State v. Rice*, 261 Kan. 567, 568, Syl. P 12, 932 P.2d 981 (1997) ("The Sixth Amendment right to counsel is the right to the effective assistance of counsel.").

A. The *Strickland* Test

179. When a motion is premised upon a claim of ineffective assistance of counsel, the defendant must satisfy the constitutional standards set forth in *Strickland*. *See Thompson v. State*, 293 Kan. 704, 715, 270 P.3d 1089 (2011).

180. In *Strickland*, the United States Supreme Court articulated a two-pronged test that defendants must satisfy in order to succeed on a claim of ineffective assistance of counsel. First, a defendant must show that counsel's performance was deficient under the totality of the circumstances. Second, a defendant must show "prejudice, *i.e*., that there is a reasonable probability the jury would have reached a different result absent the deficient performance." *Sola-Morales v. State*, 300 Kan. 875, 882-83 (2014); *see Strickland*, 466 U.S. at 687.

181. The first prong of the Strickland test requires a showing that counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687; *Edgar v. State*, 294 Kan. 828, 838 (2012).

182. The second prong requires a showing of prejudice. To show prejudice, the defendant must show "a reasonable probability" that, but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 671.

183. But *Strickland* makes clear that "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id*. at 693. Instead, the reasonable probability standard is a lesser standard—that there is 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." *Id*. at 694. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*. at 687; *see also Baker v. State*, 57 Kan. App. 2d 561, 572 (2019), *review denied* (Sept. 29, 2020) (citing same).

184. Although generally a showing of "prejudice" is required, if trial counsel fails to subject the prosecution's case to "meaningful adversarial testing," prejudice is presumed and need not be demonstrated to satisfy the second prong of *Strickland*. *See U.S. v. Cronic*, 466 U.S. 648, 659 (1984).

185. "The benchmark for judging any claim of ineffectiveness must be whether the attorney's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *State v. Cheatham*, 296 Kan. 417, 418 (2013).

B. Informed Decision-making

186. "Mere 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." *State*

v. Gonzales, 289 Kan. 351, 358 (2009) (internal quotations omitted). "So where counsel lacks the information to make an appropriate decision on these matters due to lack of investigation, any argument of trial strategy is inappropriate." *Thompson*, 293 Kan. at 716 (internal quotations omitted). "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable judgments support the limitations on investigation." *Cheatham*, 296 Kan. at 437 (internal quotations omitted); *see also Fuller v. State*, 303 Kan. 478, 488 (2015).

C. The Cumulative Error Doctrine

187. Kansas case law recognizes the cumulative error doctrine. A defendant can establish prejudice by demonstrating that an accumulation of errors created a reasonable probability of changing the outcome of the trial. *See In re Ontiberos*, 295 Kan. 10, 40–41 (2012). While *Ontiberos* appears to be the only Kansas case specifically applying a cumulative-error analysis to an attorney's errors under *Strickland* and granting relief, that rule is in line with most other courts. *See* Moyer, *To Err Is Human; To Cumulate, Judicious: The Need for U.S. Supreme Court Guidance on Whether Federal Habeas Courts Reviewing State Convictions May Cumulatively Assess Strickland Errors*, 61 Drake L. Rev. 447, 466–67 (2013) (noting that a majority of federal circuits apply cumulative-error analysis in applying the *Strickland* prejudice test).

II. Mr. Wilson's Sixth Amendment Right to Effective Counsel Was Violated When Mr. Lowry Failed To Review Critical Discovery Materials

188. Mr. Lowry's lack of trial preparation precluded him from presenting evidence actually in his possession that directly contradicted Ms. Doe's self-report.

A. Trial counsel rendered deficient performance when he failed to review discovery.

189. The State made discoverable materials available to defense counsel. These materials included electronic files collected from Ms. Doe's phone, *i.e.*, approximately 2,000 pages

of text messages between Ms. Doe and third parties, and hundreds of photographs. Def. Exs. 4-6, 9-10. Mr. Lowry received these materials from the State as part of discovery in Mr. Wilson's criminal case. Hr'g Tr. at 263:6-20. Mr. Lowry admitted, however, that he never reviewed these documents. *Id*. at 269:23-270:3. He did not know that they existed until his examination at the *Van Cleave* hearing. *Id*.

190. In *Rompilla v. Beard*, 545 U.S. 374 (2005), the Supreme Court held that counsel's failure to read the Government's files was ineffective, constituting "cause" under *Strickland*. *Id*. at 389 ("But looking at a file the prosecution says it will use is a sure bet: whatever may be in that file is going to tell defense counsel something about what the prosecution can produce."). In failing to read the over the 2,000 pages of documents taken directly from the alleged victim's personal phone, attorney Lowry's representation of Mr. Wilson was constitutionally deficient.

191. Failure by an attorney to familiarize himself with evidence within their possession has been found to fall below an objective standard of reasonableness. In *Ontiberos*, for instance, respondent's counsel was "unaware that the evidence" in his possession (the discipline record of its expert, Dr. Barnett) "had been mischaracterized" by the State during questioning. *Ontiberos*, 295 at 40. The attorney's "failure to familiarize himself with the evidence and to object when this question was posed to Dr. Barnett" was found to fall "below an objective standard of reasonableness." *Id*. That the attorney "remained silent while the State questioned Dr. Barnett" was deficient performance.

B. Mr. Wilson was prejudiced by counsel's failure to review discovery.

192. The unread discovery materials contradict various aspects of Ms. Doe's reporting to Dr. Spiridigliozzi and her trial testimony. The materials included text messages between Ms. Doe and her mother in which they discuss Ms. Doe's use of PROZAC. *See supra* Section IV.B.ii.

This occurred months before Ms. Doe ever met Albert Wilson. *Id*. The text messages also suggest that Ms. Doe was drinking to excess while taking the medicine. *See supra* Section IV.A.ii. Additionally, the case file included photographs showing Ms. Doe out at parties, despite her claim to have difficulties with crowds following the alleged assault. *See supra* Section IV.D.ii. These materials go to the heart of Ms. Doe's credibility. That is particularly true in a sexual assault case, which sees a notable number of falsely-reported incidents. *See supra* Section III.

193. Mr. Lowry admitted that this was a very close case in which credibility played a critical role. Hr'g Tr. at 60:17-19, 66:7-8. As such, he could have used these materials to challenge the credibility of Ms. Doe. Mr. Lowry expressly stated that he would have used the discovery in this manner—had he known it existed. Hr'g Tr. at 263:6-20 ("I definitely would have used [the text messages] at trial along with the photographs that I was shown").

194. Even more telling, Mr. Lowry admitted that his failure to review the discovery could have impacted the outcome of the trial:

> Q. Ms. Butler talked about your 33 years and your experience; and with all of that experience and rape trials and all of that, should you have known to review all of the discovery that you received?
> A. Yes.
>
> Q. And should you have done so in this case?
> A. Yes.
>
> Q. Do you believe that hurt your ability to defend Mr. Wilson?
> A. I do, yes.
> Q. Do you believe that that could have had an impact on the outcome of the case?
> A. Could have.

Hr'g Tr. at 274:22-275:9.

195. Mr. Lowry further testified that this sentiment was not the result of hindsight. When asked whether he "view[s] the question differently today than you did back then," Mr.

Lowry responded: "Well, no, I view it the same way." *Id*. at 264:3-5. That is because all of the subject evidence was in Mr. Lowry's possession at the time of Mr. Wilson's trial:

> Q. Okay. And part of your testimony, I believe, today was that if you would have had all of this information, such as the information from the redactions and the texts, that you would have consulted an expert or at least hired an expert to counter Dr. Spiridigliozzi's testimony?
> A. My hindsight suggests I probably would have.
>
> Q. Okay. But your hindsight is also based on all this newly discovered evidence to you?
> A. Yes.
>
> Q. So it's fresh today based on new evidence?
> A. Yes.
>
> ***Q. That was in your possession at the time?***
> ***A. Apparently so***.

Id. at 284:10-23 (emphasis added).

196. The text messages also raise the possibility that Ms. Doe's perception had been altered due to the combination of alcohol and antidepressants. Because Dr. Spiridigliozzi was not aware of these documents, he never examined the effects of potentiating. *See supra* Section IV.C.

197. Mr. Lowry could also have used the materials from Ms. Doe's phone to undermine Dr. Spiridigliozzi's forensic evaluation. Evidence that Ms. Doe was not being truthful would have been important to Dr. Spiridigliozzi's examination. Forensic psychologists should pay more attention to malingering when confronted with multiple instances of dishonesty, as the data from Ms. Doe's phone suggests. Hr'g Tr. at 354:21–355:2. It would also have allowed for a proper cross-examination of Dr. Spiridigliozzi instead of the poorly prepared five pages of cross Lowry engaged in.

198. Accordingly, Mr. Lowry's failure to review material evidence in his own case file compromised Mr. Wilson's defense. These documents would have permitted Mr. Lowry to

significantly undermine Ms. Doe's credibility and the underlying basis for Dr. Spiridigliozzi's report.

199. Once Mr. Lowry was made aware that these same documents were in his possession the whole time, he acknowledged that he would have used them and they could have affected the outcome of the trial. There is no act more basic to an attorney representing a client than to review the discovery given to them by the State. That is simply how criminal defense works. This is such a basic matter that there are no Kansas cases, with the exception of *Ontiberos*, where counsel has failed to even review the discovery provided to them by the State. By his own admission, Mr. Lowry's failure hurt his ability to represent his client, Albert Wilson.

200. Mr. Wilson would also direct this court to review *Kimmelman v. Morrison*, 477 U.S. 365 (1986), which demonstrates that a defense attorney's creditable performance at trial does not cure a failure to investigate before trial (where there is no plausible explanation for the failure). *Id*. at 385–86. In that case, the defense attorney failed to request discovery from the State, and he failed to timely request suppression of highly prejudicial evidence that was obtained without a warrant—because he was not aware of the evidence until trial. The United States Supreme Court concluded that the defense attorney's failure to conduct any pretrial discovery was entirely unreasonable and was a pervasive failure to investigate—despite his creditable performance during trial. *Id*.

201. If no competent attorney would have adopted a strategy, it falls below minimum constitutional standards. *See Bledsoe v. State*, 283 Kan. 81, 93–94 (2007); *Mashaney v. State*, 2010 WL 3731341, at *11 (Kan. App. 2010); *Bullock v. Carver*, 297 F.3d 1036, 1046 (10th Cir. 2002). For example, in *Ontiberos*, the defense counsel did not introduce available test results at trial to contradict the State's test results, which indicated that *Ontiberos* fell into a high-risk

category for committing sexual offenses. The court held that the failure to contradict some of the "more damaging evidence presented at trial" was a constitutionally deficient performance because the attorney had either utilized an unreasonable strategy regarding the test results, or had failed to familiarize himself with the evidence in the case. *Ontiberos*, 295 Kan. at 33; *see Wilson v. State*, 51 Kan. App. 2d 1, 14–15 (2014). No competent attorney would have chosen a strategy of ignoring his own discovery.

III. Mr. Wilson's Sixth Amendment Right to Effective Counsel Was Violated When Mr. Lowry Failed To Request Critical Discovery Materials

A. Trial counsel rendered deficient performance when he failed to request discovery.

202. A review of Dr. Spiridigliozzi's report provided to defense counsel shows significant redactions related to Ms. Doe's background and relevant data. The redacted portions contain important, exculpatory disclosures concerning the onset of Ms. Doe's reported conditions. In particular, they reveal that Ms. Doe received individualized and family counseling; that she was previously prescribed Xanax, Zoloft, and PROZAC; and that she saw a counselor in middle school. *See supra* Section V.B; Def. Ex. 2 at 5.

203. Mr. Lowry knew that the State had redacted large portions of the report, but he never received an unredacted copy. Hr'g Tr. at 50:9-12, 54:25-54:4. He has no memory of ever asking for an unredacted copy. Nor do his time sheets suggest otherwise. *Id*. at 47:24-48:12, 255:6-9.

204. Yet Mr. Lowry knew that he was entitled to all the relevant discovery in this case, including the unredacted report. A defendant is always entitled to the disclosure of evidence favorable to his or her case "where the evidence is material." *Brady v. Maryland*, 373 U.S. 83. 87 (1963); *see also State v. Hills*, 264 Kan. 437, 448 (1998) ("It is simply not permissible to admit an

incriminating hearsay statement by the defendant while denying the admission of exculpatory portions of the same hearsay statement through the use of the hearsay rule.").[2]

205. Mr. Lowry admitted that there is no "reason why the State would have it redacted," and described the State's conduct as "really self-serving." Hr'g Tr. at 47:14-23. His failure to request a full version was not a strategic consideration; it was an error. In fact, Mr. Lowry's practice is to request unredacted copies of any "document [that] is important." *Id*. at 237:3-8. There is no question that Dr. Spiridigliozzi's ***full*** report—which details Ms. Doe's version of the events and the reported impact of the subject incident—constitutes such an "important" document. Mr. Lowry expressly testified that he "***should have*** requested an unredacted copy" of Dr. Spiridigliozzi's report. *Id* (emphasis added).

B. Mr. Wilson was prejudiced by counsel's failure to request discovery.

206. The unredacted report would have been highly relevant, especially in evaluating the assessment and the credibility of Ms. Doe. There is no other evidence in this case from which Mr. Lowry could have learned the full scope of Ms. Doe's counseling and prescription history.

207. Mr. Lowry testified that, had he received the unredacted report, he would have implemented several strategic changes. As a threshold matter, he would have used it to cross-examine Ms. Doe about her alleged PTSD. *Id*. at 51:21-52:1. Specifically, he would have challenged Ms. Doe's assertion that her symptoms first appeared ***after*** the incident. *Id*. at 53:7-13 ("I would have been able to cross examine her on preexisting conditions.").

[2] Mr. Lowry's failings were exacerbated by the impropriety of the State's redactions. The suppression by the prosecution of material exculpatory evidence—which goes directly to Ms. Doe's credibility—is an independent *Brady* violation. *Brady*, 373 U.S. at 87 ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").

208. Mr. Lowry also testified that, had he received the unredacted report, he probably would have retained an expert to rebut Dr. Spiridigliozzi's testimony. *Id. at* 254:15-21 ("[I]f I had actually had a copy of that unredacted report, I think I would have gotten an expert"); *see also id*. at 275:24-276:5. In other words, the redacted portions of the report indicate that Dr. Spiridigliozzi's evaluation—and the accuracy of Ms. Doe's self-reporting—were ripe for critique.

209. The recent case of *People v. Butler* is instructive. 184 A.D.3d 704 (N.Y. App. Div. 2d Dep't June 17, 2020). There, the complainant and the defendant each presented sharply divergent accounts of the events that were alleged to have occurred during the summer of 2009. The record showed that a determination of credibility was key to the jury's consideration of this case, as the jury acquitted the defendant of the charge of rape in the first degree but convicted him of the charges alleging sexual abuse in the first degree. The defendant requested copies of the complainant's mental health records. During an in-camera review of those records, the court redacted a notation indicating "[s]exual abuse denied." *Id.* at 705. The court also redacted an unchecked box labeled "[s]exual abuse (lifetime)." *Id.* The appellate court granting a new trial based on these redactions. It found that the "redacted portion of the complainant's mental health records which contains the statement '[s]exual abuse denied' and the portion of the checklist reflecting that '[s]exual abuse (lifetime)' was not checked off could be viewed by the jury as ***exculpatory and materially relevant to the matter***." *Id*. at 706 (emphasis added).

210. Similarly, in this case, Ms. Doe testified that her symptoms started after September 10, 2016, as a direct result of the alleged sexual assault. The redacted portions of Dr. Spiridigliozzi's report suggest that this is not true; her symptoms may have predated any interaction with Mr. Wilson. As in *Butler*, the jury could have viewed this inconsistency as exculpatory.

211. *Kimmelman v. Morrison*, 477 U.S. 365 (1986) also demonstrates that a defense attorney's creditable performance at trial cannot cure a failure to investigate before trial where there is no plausible explanation for the failure. In that case, the defense attorney failed to request discovery from the State, and he therefore failed to timely request suppression of highly prejudicial evidence that was obtained without a warrant—because he was not aware of the evidence until trial. The United States Supreme Court concluded that the defense attorney's failure to conduct any pretrial discovery was entirely unreasonable and was a pervasive failure to investigate despite his creditable performance during the trial. *Id*. at 385–86.

212. The failure to request the unredacted report was unreasonable and the harms from this failure were apparent from Mr. Lowry's admissions and the cross-examination of Dr. Spirdigliozzi at the evidentiary hearing. *See*, *e.g.*, Hr'g Tr. at 149:1-9 (Court: "The cross-examination is really for – not to attack Dr. Spiridigliozzi and his evaluation. The point of the cross-examination is these might have been important things to bring out at the trial if Mr. Lowry had been made aware of these things. So I think it's relevant as far as pointing out any number of areas that may be—where the evaluation could have had some holes poked in it based upon information not provided to Dr. Spiridigliozzi.").

IV. Mr. Wilson's Sixth Amendment Right to Effective Counsel Was Violated When Mr. Lowry Failed To Retain A Rebuttal Expert

A. Trial counsel rendered deficient performance when he failed to retain an expert.

213. Mr. Lowry's performance as trial counsel was constitutionally deficient for neglecting to consult or call a psychological expert to rebut Dr. Spiridigliozzi's testimony. Had counsel conducted an adequate pretrial investigation, he would have been able to present an expert witness to undermine Dr. Spiridigliozzi's credibility as an expert, and the accuracy of the information upon which he based his diagnosis.

214. Mr. Wilson submitted the report of Dr. Gerald Gentry, an expert in the field of psychology, in support of his claim for ineffective assistance of counsel. Dr. Gentry enumerated several "concerns with Dr. Spiridigliozzi's report and testimony," including the following:

- He notes inconsistencies in Ms. Doe's self-reporting to Dr. Spiridigliozzi. For instance, he asks how Ms. Doe was "able to 'rush' downstairs after the alleged assault and leave the house 'quickly,'" when she was unable to walk seconds earlier. *Id*. at 2.

- He noted that Dr. Spiridigliozzi's conjecture concerning Ms. Doe's blood alcohol level and the estimate of her superior intelligence "lack foundation and should therefore be discarded." *Id*.

- He noted that Dr. Spiridigliozzi did not use the most recent versions of the MMPI and MCMI assessments available at the time of examination. Rather, the versions used were several years outdated. *Id*.

- He noted that Dr. Spiridigliozzi applied a scale to one test (MCMI-III) which is not intended for civilians, and was created for Vietnam combat veterans. *Id*. Dr. Spiridigliozzi elected not to use the DMS-5 (CAPS-5) scale, which is the "gold standard in PTSD assessment." *Id.*

Def. Ex. 18 at 1-2. Trial counsel's failure to consult with or call an expert on psychology meant that all of these deficiencies went unaddressed.

215. In *Robinson v. State*, 56 Kan. App. 2d 211 (2018), an arson case, defense attorneys were held ineffective for failing to present sufficient expert testimony to refute claims made by the State's fire investigators. The attorneys waited until two weeks before trial before consulting an expert, who provided basic guidance in connection with the cross-examination of the State's expert. When that assistance proved to be unhelpful, they did not even consider talking to another expert. The court held this was an "insufficient investigation into the use of an arson causation expert" and was "not reasonable" under *Strickland*. *Id.* at 227-28.

216. This case is even more egregious than *Robinson*. Here, Mr. Lowry made no attempt to even consult with an expert for the purposes of guiding his cross-examination. He took no steps to gain a technical understanding of Dr. Spiridigliozzi's findings, or the inconsistencies therein.

217. This case is analogous to *Mullins v. State*, 30 Kan. App. 2d 711 (2002). There, a defendant was charged with child sodomy. There was no evidence of visual signs of sexual abuse and no witnesses to the alleged offenses. The defendant was convicted based on the State's expert (a nurse) and the victim's testimony. The defense failed to call an expert to rebut the testimony of the nurse or the victim. On appeal, the case was remanded for a new trial. The court noted that, "[g]enerally, the decision to call or not call a certain witness is a matter of trial strategy. However, ***defense counsel cannot make such a strategic decision when he or she has not obtained facts upon which that decision could be made***. When trial counsel lacks the information to make an informed decision due to inadequacies of his or her investigation, any argument as to trial strategy is inappropriate." *Id*. at 711 (emphasis added). The court reasoned that counsel's failure to retain an expert, even for pre-trial purposes, rendered an informed decision impossible. *Id*. a 718.

218. The same is true here. Mr. Lowry had no idea whether Dr. Spiridigliozzi's analysis was scientifically sound—because he never discussed it with an expert in the field. Mr. Lowry's lack of understanding is evidenced by his cross-examination, which accounted for less than five pages of transcript. Trial Tr. at 765:17-769:8. Mr. Lowry did not challenge Dr. Spiridigliozzi concerning a single aspect of his assessment; instead, he asked questions about Ms. Doe's SAT scores and college records. *Id*. at 767:23-768:7.

219. Mr. Lowry admitted that his decision not to call a rebuttal expert was not a strategic decision. It was caused by a lack of information. As discussed above, Mr. Lowry failed to request an unredacted copy of Dr. Spiridigliozzi's report, to which he was admittedly entitled. Mr. Lowry conceded that, had he received the unredacted report, he probably would have called a rebuttal expert. *Id*. at 275:24-276:5 (admitting that the unredacted report "probably would have

encouraged me to get an expert of my own."); *id*. at 254:15-21. This is the very definition of an uninformed decision— the lack of information was caused by counsel's own failures.

B. Mr. Wilson was prejudiced by counsel's failure to retain an expert.

220. Again, it must be noted that the prosecution's entire case rested on the credibility of the alleged victim. All other evidence presented by the prosecution was indirect evidence offered to corroborate aspects of the alleged victim's story. Defense counsel's failure to investigate the prosecution's evidence led him to decide not to challenge what was clearly the most significant corroborative evidence—the psychological expert testimony that the mental condition of the alleged victim supported a conclusion that sexual assault had taken place.

221. Counsel's decision not to consult with or call an expert precluded counsel from offering a potentially persuasive affirmative argument that the alleged victim's condition was not indicative of or consistent with forced sexual trauma. Counsel's failure also prevented him from challenging the psychological evidence offered to explain the inconsistencies in Ms. Doe's reporting as the result of something other than a lack of credibility—which would be a common inference to draw from such shortcomings.

222. Because trial counsel failed to present (or even search for) expert testimony, the jury heard only the alleged victim's allegations of sexual assault, as bolstered and repeated as confirmed truth by the improper testimony of Dr. Spiridigliozzi.

223. As noted above, Mr. Lowry admitted that had he had all of the information shown to him at the hearing, he would have hired an expert. As such, this was not a question of hindsight, as the "newly learned information" was all information that had been available or in Mr. Lowry's possession and he was making his evaluation based on this newly discovered (to him) evidence. *See* Hr'g Tr. at 277:1-18.

V. Mr. Wilson's Sixth Amendment Right to Effective Counsel Was Violated When Mr. Lowry Failed To Object To Improper Expert Testimony

A. Trial counsel rendered deficient performance when he failed to object to improper expert testimony.

224. The Court of Appeals of Kansas has noted that proper expert testimony in cases involving sex crimes should be confined to "the common behavioral traits without relating them to the specific victim, that [the expert] did not provide diagnostic testimony beyond her credentials, that [the expert] did not state or imply that [the victim] had been sexually abused, that [the expert] did not opine on whether the victim was truthful or credible, that [the expert] did not suggest in any manner that [the defendant] had any involvement . . . ." *See State v. Gaona*, 41 Kan. App. 2d 1064, 1068-69 (2009).

225. Many Kansas opinions recognize that there exists a line between permissible expert testimony, *i.e.,* testifying about common behaviors and traits of trauma victims, and impermissible expert testimony, *i.e.*, testifying that "the victim, in fact, was abused or was telling the truth." *See Waisner v. State*, 410 P.3d 167 (Kan. Ct. App. 2018); *State v. Jackson*, 239 Kan. 463, 470 (1986) (reversible error to allow expert witnesses to testify that the "child was telling the truth" about the allegations made against the defendant); *State v. Lash*, 237 Kan. 384, 386 (1985) (treating psychiatrist could not be permitted to testify whether the victim was molested by his father). The latter clearly invades "the province of the jury to determine what actually occurred." *Id.; see also State v. McIntosh*, 274 Kan. 939, 956 (2002) ("Expert conclusions or opinions are inadmissible where the normal experiences and qualifications of lay persons serving as jurors permit them to draw proper conclusions from given facts and circumstances.") (*citing State v. Colwell*, 246 Kan. 382, 389 (1990)).

226. As described above, Dr. Spiridigliozzi offered testimony that far exceeded the scope of his diagnostic assessment:

- He believed that it was his job to determine whether Ms. Doe's self-report was "true," and testified that her version of events had been confirmed by "more than one source." *See supra* VI.A (citing Hr'g Tr. at 109:15-20,111:16-19).

- He testified that Ms. Doe had been raped and that Mr. Wilson had finished quickly. *See supra* VI.B

- He testified that Ms. Doe took specific actions after the rape, including rearranging her clothes and rushing downstairs. *See id.*

- He testified that Ms. Doe was "dissociating" and suffering from "depersonalization" during the rape. *See id*. (citing Trial Tr. at 750:25-751:5).

- He testified as to what Ms. Doe was thinking after the rape, *i.e*., that she "knew that she wanted to get away." *See supra* VI.B (citing Trial Tr. at 751:15-19).

- He testified that Ms. Doe had a superior intelligence level. *See supra* VIII.

227. As described above, Dr. Spiridigliozzi offered testimony that far exceeded the scope of his diagnostic assessment.

228. Mr. Lowry did not object to any of these statements. In fact, Mr. Lowry failed to object to a single portion of Dr. Spiridigliozzi's. direct or re-examination. Mr. Lowry offered no reason for failing to object to Dr. Spiridigliozzi's improper testimony. He stated, "At the time, I don't think I did. ***Two years later, sounds like it was***." Hr'g Tr. at 280:7-19 (emphasis added). In the end, Mr. Lowry stated, "***I guess I just missed it***." *Id*. at 79:2-15 (emphasis added). But Mr. Lowry also testified that Dr. Spirdigliozzi's testimony was improper and outside the allowed scope of testimony and violated the district court's order:

> Q. Okay. Now you testified yesterday that it was inappropriate for Dr. Spiridigliozzi to say that he confirmed everything that he was reporting. Do you recall that?
> A. Yes.
>
> Q. And do you believe that his stating that was a form of bolstering the credibility of Ms. Doe?
> A. His stating what?

Q. That he had confirmed -- stating he confirmed everything she had told him?
A. I don't recall him ever saying that. If he did, it would have been against the court orders because we had determined that is exactly what he should not be doing.

Hr'g Tr. at 277:5-18.

229. Dr. Spiridigliozzi further testified as to the state of Ms. Doe's physical condition, *i.e.*, based on her level of intoxication. He testified that:

- Ms. Doe had difficulty moving around. *See supra* VII.A.
- Ms. Doe couldn't muster enough motor control or balance to even get off the bed. *Id*.
- Ms. Doe was unresponsive to external stimuli. *Id*
- Ms. Doe was nauseous. *Id*.
- Ms. Doe's head was spinning. *Id*.
- Ms. Doe's level of intoxication suggested a 0.25 blood alcohol level, which is three times over the legal limit. *See supra* VII.B.
- People can lose consciousness at Ms. Doe's level of intoxication. *Id*.

230. Dr. Spiridigliozzi admitted that there was no diagnostic reason to discuss Ms. Doe's level of intoxication. Hr'g Tr. at 188:16-18 (intoxication is not a "diagnostic criteria for PTSD"); *id*. at 329:15-18 (Dr. Blanchard confirming the same). Dr. Blanchard even conceded that this was "improper." *Id*. at 373:3-9.

231. Mr. Lowry admitted that he wasn't sure whether Dr. Spiridigliozzi was qualified to make these statements. *Id*. at 83:21-22. Yet Mr. Lowry still failed to object to any of this testimony. Mr. Lowry simply said that he "didn't feel like it was" objectionable. *Id*. at 83:19-20.

232. Mr. Lowry's ignorance of the law is not the same thing as strategy. *See*, *e.g.*., *Pineda v. Craven*, 424 F.2d 369, 372 (9th Cir. 1970) ("There is nothing strategic or tactical about ignorance"). Quite simply, Mr. Lowry was unaware whether Dr. Spiridigliozzi was qualified to make these statements. Even if he were, Mr. Lowry failed to appreciate the proper scope of expert testimony in Kansas.

B. Mr. Wilson was prejudiced by counsel's failure to object to improper expert opinion.

233. The foregoing testimony undoubtedly bolstered Ms. Doe's credibility before the jury. Dr. Spiridigliozzi expressly told the jury that he confirmed Ms. Doe's story through multiple sources when, in fact, this was not the case. Nor could he. Dr. Spiridigliozzi never received material information that we requested from the State, including surveillance videos, mental health records, and collateral contacts. *See supra* IV. In his own word, Dr. Spiridigliozzi was "not given the full universe of relevant information for [his] assessment." Hr'g Tr. at 153:20-23.

234. This case is no different from *State v. Bressman*, 236 Kan. 296 (1984). There, a physician who examined the alleged victim following alleged rape "state[d] before the jury her opinion that [the alleged victim] had been raped." *Id*. at 301. The Supreme Court of Kansas found that the physician's testimony "was clearly improper and prejudicial to the right of the defendant to a fair trial." *Id*. at 304. The court noted that "there was a conflict between the testimony of [the alleged victim] and that of the defendant" and "[i]t was up to the jury to resolve that conflict." *Id*. On that basis, the court held that the jury's "decision could have been affected by [the physician's] opinion." *Id.*

235. The same is true here. Dr. Spiridigliozzi supplanted the jury's truth-seeking role by purporting to confirm Ms. Doe's version of events. As in *Bressman*, that testimony could have affected the jury's decision-making.

VI. Mr. Wilson's Sixth Amendment Right to Effective Counsel Was Violated When Mr. Lowry Failed To Conduct An Adequate Investigation

A. Trial counsel rendered deficient performance when he failed to conduct a reasonable investigation.

236. In terms of conducting an investigation, while counsel is "free to make strategy decisions," those "decisions are constrained by the attorney's obligation to conduct the

investigation reasonably necessary for the representation." *In re Hawver*, 300 Kan. 1023, 1050 (2014). "An attorney's decisions regarding the scope of pretrial investigation and preparation ***must be informed***." *Id*. (emphasis added).

237. KRPC 1.1, comment 5 (2013 Kan. Ct. R. Annot. 447) states:

> Competent handling of a particular matter under Kan. R. Prof. Conduct 1.1 includes inquiry into and analysis of the factual and legal elements of a problem, and use of methods and procedures meeting a standard of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

There can be no greater stakes than a criminal case, in which the next 10 years of Mr. Wilson's life hang in the balance.

238. Mr. Lowry's investigative efforts fail to meet the standard of reasonableness. He failed to conduct basic preparatory tasks required by any criminal defense attorney:

- Mr. Lowry did not interview a single witness—certainly not somebody present during the incident. *See supra* XI. However, lawyers have a duty to "investigate what information . . . potential eye-witnesses possess[], even if he later decide[s] not to put them on the stand." *U.S. v. Gray*, 878 F.2d 702, 712 (3d Cir. 1989); *see also Chambers v. Armontrout*, 907 F.2d 825, 828 (8th Cir.) ("The court is at a loss to understand why anyone would have hesitated at least to contact the potential witnesses in this case to determine what testimony they could offer").

- Mr. Lowry failed to review all of the discovery produced by the State, including exculpatory text messages and photographs that contradict Ms. Doe's reported symptoms. *See supra* IV. However, "[c]ounsel's duty to investigate would necessarily have included a review of the discovery materials provided by the State." *Williams v. Washington*, 59 F.3d 673, 680 (7th Cir. 1995).

- Mr. Lowry did not request Dr. Spiridigliozzi's full report, which contained material information about Ms. Doe's potential preexisting symptoms. *See supra* V.

- Mr. Lowry did not consult an expert to better understand the DNA analyses performed by Ms. Hunt. *See supra* XII.

- Mr. Lowry did not consult an expert to better understand the rape kit testing performed by Ms. Swab. *See id*.

- Mr. Lowry did not consult an expert to better understand the psychological assessment tools used by Dr. Spiridigliozzi. *See supra* X.

Strategic choices made "after less than complete investigation" are reasonable "to the extent that reasonable professional judgments support the limitations on investigations." *Strickland*, 466 U.S. at 671. Mr. Lowry offered no legitimate explanation for failing to perform these basic aspects of case preparation. "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any effectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *LaPointe v. State*, 42 Kan.App.2d 522, 541 (2009) (*quoting State v. Hedges*, 269 Kan. 895, 914 (2000)), *rev. denied* 290 Kan. 1094 (2010). With that said, defense counsel cannot make a strategic decision against pursuing a line of investigation when he or she has not yet obtained facts upon which that decision could be made. *Mullins v. State*, 30 Kan. App. 2d 711, 716 (Kan. Ct. App. 2002), *review denied* 274 Kan. 1113 (2002).

B. Mr. Wilson was prejudiced by counsel's failure to conduct a reasonable investigation.

239. Because Mr. Lowry did not perform the work necessary to prepare for this case, practically every decision he made was ill-informed. Had he reviewed all relevant case materials, spoken with persons having relevant knowledge, and understood the scientific principles at issue, Mr. Lowry would have made better decisions—ones which did not impair the defense of Mr. Wilson.

240. For instance, Mr. Lowry may have:

- requested a *Daubert* hearing regarding Dr. Spiridigliozzi's assessment;
- retained a DNA expert to explain the lack of evidence showing intercourse;

- objected to Dr. Spiridigliozzi's attempt to confirm Ms. Doe's version of events;
- questioned Dr. Spiridigliozzi's reliance on older versions of the MMPI and MCMI tests;
- questioned Ms. Doe and Dr. Spiridigliozzi regarding preexisting symptoms and potentiating; and
- objected to Dr. Spiridigliozzi's attempt to quantify Ms. Doe's level of intoxication.

VII. Mr. Lowry So Failed Mr. Wilson That This Case Should Be Considered Under The *Cronic* Analysis

241. The *Cronic* exception applies when a defendant is completely denied the assistance of counsel or denied counsel at a critical stage of a proceeding. *See State v. Galaviz*, 296 Kan. 168, 181 (2012) (*citing U.S. v. Cronic*, 466 U.S. 648, 658-59 (1984)). Under these circumstances, a court may presume the defendant was prejudiced, *i.e.*, he or she is "spare[d] . . . the need of showing probable effect upon the outcome." *Galaviz,* 296 Kan. at 181 (*quoting Mickens v. Taylor*, 535 U.S. 162, 166 (2002); *see State v. Stovall*, 298 Kan. 362, 375 (2013). Mr. Wilson was denied the assistance of counsel from pretrial through trial.

242. Mr. Wilson was denied the assistance of counsel before the matter went to trial as counsel failed to file any pretrial motions. Counsel failed to review the discovery that was given to him by the State. Counsel failed to request exculpatory evidence, the unredacted report of Dr. Spirdigliozzi, which was hidden from him in plain sight by the prosecutor, who, under *Brady*, had a duty to disclose this information and not unilaterally have it redacted.

243. At trial, counsel failed to properly cross-examine Ms. Doe because he hadn't reviewed her phone contents, which, as was shown at the hearing, contained numerous examples of exculpatory evidence that contradicted Ms. Doe's sworn testimony as well as what she had told to Dr. Spirdigliozzi. Because counsel failed to review discovery and failed to consult or hire an expert, his meager, five-page cross-examination of Dr. Spirdigliozzi was ill-informed, deficient and useless to Mr. Wilson's defense. Counsel did not interview one witness, not even Mr. Wilson's friends and roommates. Counsel failed to object to Dr. Spirdigliozzi's improper bolstering of Ms.

Doe's testimony, saying he "confirmed" everything. Counsel wasn't paying attention when the doctor called the incident a rape, and made numerous improper statements that were well outside the proper testimony of such an expert. Counsel didn't even attempt to strike from the jury a woman whose sister-in-law had been raped, and had stated that the evidence at trial might cause her anger.

244. Mr. Wilson faced his accuser and the State's witnesses alone and without anything close to competent counsel.

245. However, even if prejudice were to be considered by the Court, in this case, it is apparent that a different outcome would have been likely. As Mr. Lowry testified:

> Q. (By Mr. Whalen) Do you remember a letter from the jury that happened after the trial?
> A. We received a letter from a juror -- an e-mail. The court, prosecutor and I received an e-mail from -- a fairly lengthy e-mail from one of the jurors indicating that she believed she voted the wrong way and that she should have voted not guilty. As you recall, I am sure, from your reading of the case, the first count, they did hang on and apparently almost hung on the second one. So it was very close."

Hr'g Tr. at 66:13-24.

246. Even without the bona fide assistance of counsel, this was a very close case. There was no overwhelming evidence. It was a credibility case, as Mr. Lowry testified, and attacking inconsistencies was his trial strategy. The evidence at the remand hearing, not at trial, showed that Ms. Doe's credibility was highly suspect. Ms. Doe testified that her PTSD kept her away from crowds and friends. Pictures from six days later, and a week after that, show that wasn't true. Ms. Doe said she had never drank any alcohol except one beer before the night of incident. Texts from her phone showed that wasn't true. Ms. Doe testified that the onset of all of her mental health issues started after the incident. Her texts and the unredacted report of Dr. Spiridigliozzi show that wasn't true.

247. Mr. Dubin showed the Court what an informed cross-examination can accomplish with a State's expert. And Dr. Gentry's report shows what challenges could have been made to Dr. Spirdigliozzi's report and testimony had Mr. Lowry consulted an expert.

248. Mr. Wilson had a right to effective counsel. Instead, Mr. Wilson faced his accuser alone and without important evidence that was unavailable because counsel couldn't be bothered to review all of the discovery he received, or didn't ask for them. Counsel was ill-prepared to confront the State's witnesses for failure to consult with an expert and he let the State's witnesses testify unfettered and without objection to even the most basic violations of the rules of evidence and experts.

249. As this Court is an expert in criminal matters after forty-two years of experience, it is clear that Mr. Wilson suffered an unfair trial due to ineffective assistance of counsel who failed to review discovery, failed to get exculpatory evidence from the State, failed to consult an expert and let the State's witnesses testify unchallenged. For all of these reasons, Mr. Wilson deserves to have at least a fair trial with competent representation.

CONCLUSION

250. Mr. Lowry explained that this was an exceptionally close case that came down to the credibility of Ms. Doe. Hr'g Tr. at 60:17-19, 66:7-8. But for attorney Lowry's constitutionally-deficient performance, there is a reasonable likelihood that the jury would have acquitted Mr. Wilson on the single charge on which he was convicted.

251. WHEREFORE, for the foregoing reasons, Mr. Wilson respectfully requests that this Court adopt the Proposed Findings of Fact and Conclusions of Law set forth herein, and grant him a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Entry was emailed to Kate Butler, Assistant Douglas County District Attorney at Kbutler@douglascountyks.org and emailed to Derek Schmidt, Kansas Attorney General at ksagappealsoffice@ag.ks.gov on the 21st day of December, 2020.

/s/ *Michael P. Whalen*
Michael P. Whalen

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CLERK OF THE DOUGLAS COUNTY DISTRICT COURT
CASE NUMBER: 2017-CR-001012

IN THE DISTRICT COURT OF DOUGLAS COUNTY, KANSAS
Seventh Judicial District

STATE OF KANSAS, Plaintiff, v. ALBERT N. WILSON, Defendant	Case No. 2017-CR-1012 Division 2

STATE'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The State of Kansas, by Kate Duncan Butler, respectfully moves this Court to adopt the following findings of fact and conclusions of law. For the reasons outlined below, Albert N. Wilson is not entitled to a new trial. His counsel properly considered and rejected certain trial strategies, like hiring a psychological expert. The text messages that Wilson highlighted at evidentiary hearing are likely inadmissible at a trial and do not undermine the victim's credibility or mental-health symptoms. They also would not have changed the conclusions drawn by the State's expert witnesses or the jury's decision in this case, defeating his claim of prejudice.

FINDINGS OF FACT

The facts at trial are familiar to this Court. Highly summarized, high-school senior Jane Doe[1] decided to visit her cousin at college. (Jury Trial, Vol. II, 352-54.) They drank and hung out with the cousin's friends at a party before heading to The Hawk, a well-known college bar. (Jury Trial, Vol. II, 354-57.) By the time they reached the bar, Doe felt very

[1] To comply with the order in limine, this document will continue to employ a pseudonym instead of the victim's initials.

intoxicated. (Jury Trial, Vol. II, 356-57.) She actually stopped drinking alcohol shortly after arriving. (Jury Trial, Vol. II, 357-59.)

While in line for a section of the bar called The Boom Boom Room, Doe and her cousin met Wilson and his friend Trey Williams. (Jury Trial, Vol. II , 360-62.) Doe and Wilson walked into The Boom Boom Room together, at which point he led her to a secluded corner away from the crowd. (Jury Trial, Vol. II, 364-66.) Wilson kissed her and, a moment later, put his hand up her skirt and digitally penetrated her without her consent. (Jury Trial, Vol. II, 365-68.)

Wilson asked Doe back to his house, but she refused because she had lost track of her cousin. (Jury Trial, Vol. II, 369-70.) He led her outside, presumably to call her cousin. (Jury Trial, Vol. II, 370-72.) From there, Wilson guided—and, a moment later, carried—Doe down the block to his home. (Jury Trial, Vol. II, 372-75.) Inside, he helped her up the stairs to his room. (Jury Trial, Vol. II, 374-75.)

Doe protested, telling him she had drank too much. (Jury Trial, Vol. II, 375.) Wilson responded by sitting her on the bed, rummaging around the room for a condom, and penetrating her with his penis against her wishes. (Jury Trial, Vol. II, 380-84.) By this point, Doe felt dizzy, disoriented, and unable to move. (Jury Trial, Vol. II, 375, 380-83.) She simply laid still until he stopped raping her. (Jury Trial, Vol. II, 381-83.) She left quickly afterward, but Wilson followed her and pointed her in the direction of The Hawk. (Jury Trial, Vol. II, 385-90.)

Doe called her cousin, and, a short time later, confessed that she had been raped. (Jury Trial, Vol. II, 390-93.) She repeated essentially the same account to everyone she talked to that night and over the next weeks: her cousin's sorority sister, her mother, a

SANE nurse, and police investigators. (Jury Trial, Vol. II, 392-93, 396-98, 400, 496-97, 525-26, 531-34, 561-64; Vol. III, 604-05, 610.)

The assault impacted Doe severely. She suffered from panic attacks, lost weight, struggled to attend school and social functions. (Jury Trial, Vol. II, 408-11, 501-02, 538-41; Vol. III, 754-55, 760-62.) Before trial, the State hired a forensic psychologist to examine Doe. He interviewed her, reviewed many the records associated with the case, and talked to people in her life. (Defendant's Ex. 2.) He ultimately concluded that she suffered from post-traumatic stress disorder. (Jury Trial, Vol. III, 756.) He believed the symptoms had appeared rapidly after the reported assault. (Jury Trial, Vol. III, 755, 763-64.)

Wilson, on the other hand, testified that Doe consented to the contact in The Boom Boom Room. (Jury Trial, Vol. III, 787-88.) Wilson denied penetrating her in his home; instead, he said that they had been kissing and preparing to have sex when Trey called and texted him. (Jury Trial, Vol. III, 799-801.) He terminated the encounter to find his friend, which he thought angered Doe. (Jury Trial, Vol. III, 801-02.) Swabs from Doe's sexual assault examination revealed DNA evidence from Wilson on her chest. (Jury Trial, Vol. III, 734-39.) There were no swabs taken of her thighs, although small marks like bruises were discovered there. (Jury Trial, Vol. II, 566-68, 576-77.)

The jury convicted Wilson of raping Doe in his home. (Jury Trial, Vol. IV, 930.) That said, a juror wrote to the judge before sentencing to express remorse over this outcome. (Motion for New Trial, 3-4.) Wilson included a portion of this e-mail in his motion for new trial. (Motion for New Trial, 3-4.) The district court, however, denied the motion and sentenced Wilson to 147 months' imprisonment. (Sentencing Journal Entry, 2.)

Wilson filed a notice of appeal. A short time later, he filed a motion with the Court

of Appeals to remand the case for a hearing on his counsel's performance. (*Van Cleave* Motion, 1.) He asserted that his court-appointed attorney, Forrest Lowry, had failed to lodge an adequate defense. Specifically, he believed Lowry failed to:

- Adequately challenge the forensic pathologist's conclusions by requesting the unredacted report, hiring a competing expert, moving to exclude his testimony entirely, objecting to certain testimony, and confronting him with evidence from discovery;
- Thoroughly cross-examine the State's witnesses on Doe's behavior after the assault with the same evidence from discovery;
- Investigate witnesses to testify for Wilson, like Trey and his roommates; and
- Hire a DNA expert to better explain why the results from the SANE test refuted Doe's account. (*Van Cleave* Motion, 1-10.)

While the State argued that Wilson had not pled facts that supported remand, the Court of Appeals sent the case back for evidentiary hearing. (*Van Cleave* Response, 1-21; Feb. 10 Order, 2.) Both parties called Lowry at the eventual hearing. Lowry testified that he had been an attorney for 33 years. (Ev. Hrg. Vol I, 23; Vol. II, 227.) He had a wide variety of experience, working in prosecution, insurance defense, and family law. (Ev. Hrg. Vol. II, 228-31.) That said, he testified that for the last 15 years, he primarily handled criminal defense cases. (Ev. Hrg. Vol. II, 232.)

As a defense attorney, Lowry handled all sorts of cases, including high-level felonies like rape, murder, bank robberies, and drug distribution conspiracies. (Ev. Hrg. Vol. II, 232-33.) He estimated that between state and federal court, he had handled at least 800 cases over the course of his career. (Ev. Hrg. Vol. II, 232.) Dozens of these, he testified were sexual assault cases. (Ev. Hrg. Vol. II, 233.) Several went to jury trial; in fact, Lowry remembered trying four sex-crimes cases between October 2017 and December 2019. (Ev. Hrg. Vol. II, 233-35.)

In his practice, Lowry tries to ensure that he receives, reviews, and organizes all

discovery from the State. (Ev. Hrg. Vol. II, 235.) Then, he determines what discovery will be useful at trial. (Ev. Hrg. Vol. II, 236.) He also discusses discovery with his clients, providing copies of documents and watching any recordings with them. (Ev. Hrg. Vol. II, 236.) He said, "[M]y goal is that they know everything I know." (Ev. Hrg. Vol. II, 236.)

When discovery contains a redacted report, Lowry usually requests an unredacted copy "if the document is important." (Ev. Hrg. Vol. II, 237.) If a judge releases documents after reviewing them in chambers, he looks over them or, if possible, makes copies. (Ev. Hrg. Vol. II, 238.)

Lowry testified that, in some cases, pretrial motions "are useless and a waste of time." (Ev. Hrg. Vol. II, 238.) For that reason, he uses them only when necessary—and when the facts and law support his argument. (Ev. Hrg. Vol. II, 238.) And while he had at times filed motions to prevent the State from calling the complaining witness the *victim*, he had never had one granted in Douglas County. (Ev. Hrg. Vol. II, 284.)

He also had experience in hiring expert witnesses, including psychologists and DNA experts. (Ev. Hrg. Vol. II, 239.) Like with pretrial motions, though, he only hires experts when he decides their testimony will be helpful. (Ev. Hrg. Vol. II, 239-40.) That said, he did not remember a time he had occasion to challenge the State's expert with a pretrial motion. (Ev. Hrg. Vol. II, 240.) Somewhat similarly, Lowry testified that he avoids objecting every time there is room for an objection, as it "annoys the jury." (Ev. Hrg. Vol. II, 242.)

He also testified that he tends to hire investigators in more complicated cases. (Ev. Hrg. Vol. II, 240-41.) If his client provides him information or contacts he thinks will be helpful to the defense, he tries to reach out to those people personally or through an investigator. (Ev. Hrg. Vol. II, 241.)

For trial, Lowry "tr[ies] to produce a narrative." (Ev. Hrg. Vol. II, 241.) He believes that "people understand stories better than they do facts," and for that reason, he puts together "a theory of a defense that people will understand that will relate to the average juror." (Ev. Hrg. Vol. II, 241-42.) He prepares for cross-examination by reading reports and past testimony, although "it's very difficult to always plan well in advance." (Ev. Hrg. Vol. II, 242.) For impeachment, he picks the issues "that matter." (Ev. Hrg. Vol. II, 243.) With sexual assault victims, Lowry testified he "take[s] a very gentle approach" that he believed worked better with juries "than being difficult, angry, or indignant." (Ev. Hrg. Vol. II, 243.) He often focuses on inconsistencies in the victim's account. (Ev. Hrg. Vol. II, 243.)

Time had passed since Wilson's trial, and Lowry recognized that his memory was no longer as clear as in the past. (Ev. Hrg. Vol. II, 244.) Nonetheless, he recalled that he had been appointed shortly the State charged Wilson, and he was the only attorney on the case. (Ev. Hrg. Vol. II, 245.) He consulted with Wilson immediately, and they developed a cordial relationship. (Ev. Hrg. Vol. II, 245.) Lowry said, "[Wilson] was very involved, he and his family both. . . . [H]e called me fairly often and we talked. He always had suggestions and he always had . . . pretty good answers [to my questions]." (Ev. Hrg. Vol. II, 245-46.)

With Wilson's help, Lowry developed their theory of defense: namely, that Doe consented to Wilson's advances but later regretted it. (Ev. Hrg. Vol. II, 246-47.) Lowry believed that Wilson's testimony, combined with inconsistencies in Doe's statements, the surveillance recordings, and the DNA evidence, supported this defense. (Ev. Hrg. Vol. II, 247, 249-50.) In fact, he did not think he needed to hire a DNA expert because the existing DNA evidence favored their theory of the case. (Ev. Hrg. Vol. II, 285.)

Lowry declined to file any pretrial motions. (Ev. Hrg. Vol. II , 250.) Nicole Robinson, Wilson's sister-in-law, had e-mailed him to suggest he ask for a psychological evaluation of Doe. (Ev. Hrg. Vol. I, 33-34; Vol. II, 250.) Lowry opted against filing such a motion as he feared it might just confirm the opinion from the State's expert. (Ev. Hrg. Vol. I, 36, 54; Vol. II, 251.) In retrospect, he thought he should have hired an expert to review Spiridigliozzi's findings. (Ev. Hrg. Vol. II , 251.) He also did not file any motions to prevent Spiridigliozzi from testifying, although he did ask that the expert not comment on Doe's credibility. (Ev. Hrg. Vol. I, 41-43.)

Lowry retained an investigator to find Trey and the rest of the friends Wilson saw at The Hawk on the evening in question. (Ev. Hrg. Vol. I, 24-25; Vol. II, 252.) The investigator never located any of them. (Ev. Hrg. Vol. I, 25-26, 252-53.) He did not, however, write Lowry a formal report. (Ev. Hrg. Vol. I, 25-26.)

In cross-examining the State's witnesses, Lowry focused on what they really knew, whether their accounts lined up with the surveillance recordings, and any inconsistences in Doe's reports to them. (Ev. Hrg. Vol. II, 258-59.) For some, like Doe's cousin, that meant bringing out certain discrete facts. (Ev. Hrg. Vol. II, 249.) For Doe personally, Lowry homed in on a number of topics: her youth, the amount she drank, her failure to assert herself, Wilson's nonthreatening behavior, and her decision to change her Facebook profile picture hours after the assault. (Ev. Hrg. Vol. I, 57-58; Vol. II, 259-61.) He also questioned her about her ability to maintain good grades and go on to college despite the mental-health issues she had reported. (Ev. Hrg. Vol. II, 261-62.) At the same time, though, Lowry testified that he took her presentation at preliminary hearing, which he described as "fragile" and "unsure" into account. (Ev. Hrg. Vol. II, 259-60.) He worked to demonstrate to the jury

that Doe "seemed not at home with her testimony at all" and, at times, inconsistent. (Ev. Hrg. Vol. II, 259-60.) Overall, he felt like he got what he wanted from the State's witnesses. (Ev. Hrg. Vol. II, 262-63.)

Still, while Lowry recalled picking up the download of Doe's phone, he did not really remember going through the contents. (Ev. Hrg. Vol. II, 263.) He recognized that having evidence from the phone that showed that she carried on with her usual life after the assault would have helped the defense. (Ev. Hrg. Vol. I, 59-60, 66; Vol. II, 263-64.) He testified similarly about any past mental-health issues or alcohol use. (Ev. Hrg. Vol. I, 67-68, 70-72; Vol. II, 274.) He believed they helped call Doe's credibility into question. (Ev. Hrg. Vol. II, 270-72.) That said, he acknowledged that many of the photographs Wilson admitted at the hearing seemed to be taken on the same night and they did not necessarily demonstrate how Doe felt internally. (Ev. Hrg. Vol. II, 264-66.) He also recognized that he did not know whether questioning Doe about her past mental-health issues would have resulted in helpful answers. (Ev. Hrg. Vol. II, 273-74.)

Lowry believed that he could refute Spiridigliozzi's conclusions the same way he impeached Doe. (Ev. Hrg. Vol. II, 253-54.) He believed the expert "was very partisan in his approach," and he thought he pointed that out to the jury on cross-examination. (Ev. Hrg. Vol. II, 254.) Lowry did not feel the need to object during Spiridigliozzi's testimony. (Ev. Hrg. Vol. I, 79-81.) In fact, he thought the expert's comments about Doe's blood-alcohol content helped the defense: "[H]e was alleging that her alcohol level was very high, and yet despite that, she was able to get up and walk . . . . So it seemed to counter what she—her level of inebriation that she claimed to have." (Ev. Hrg. Vol. I, 83-84.) He also disputed how Wilson interpreted some of Spiridigliozzi's testimony. (Ev. Hrg. Vol. II, 280-81.) For

example, he did not believe the expert's remark about confirming Doe's self-report vouched for her testimony or required he lodge an objection. (Ev. Hrg. Vol. II, 280-81.)

Lowry never showed Spiridigliozzi the recordings from The Hawk at trial. (Ev. Hrg. Vol. II, 285.) He feared Spiridigliozzi might "explain it away." (Ev. Hrg. Vol. II, 285.)

That said, Lowry did not remember if he ever read Spiridigliozzi's unredacted report. (Ev. Hrg. Vol. I, 45-47.) When he reviewed the unredacted document, he thought some of the information looked familiar. (Ev. Hrg. Vol. I, 36, 46-48.) Nonetheless, he thought the full report would have been helpful for cross-examination and might have led him to retain an expert. (Ev. Hrg. Vol. I, 51-53; Vol. II, 254.)

Similarly, Lowry did not have a concrete memory of reviewing Doe's counselling records. (Ev. Hrg. Vol. I, 55; Vol. II, 256.) He did, however, recall the district court releasing them, and his ordinary practice would be to read through them. (Ev. Hrg. Vol. II, 256.) He also remembered questioning Doe on her therapy history. (Ev. Hrg. Vol. II, 256.)

Lowry also discussed his failure to strike a juror who had a personal connection to sexual assault. (Ev. Hrg. Vol. I, 73-75.) Wilson had not included this particular issue in his initial motion, but the district court allowed the line of questioning. (Ev. Hrg. Vol. I, 73-74.) Lowry testified that he ordinarily did not leave people with that kind of history on the jury. (Ev. Hrg. Vol. I, 74-76.) At the same time, he had no memory of this juror—or if she reached a conclusion about being fair and impartial. (Ev. Hrg. Vol. II, 267.) As for the juror who e-mailed the parties after the trial, Lowry recognized that the caselaw did not support impeaching the verdict with her message. (Ev. Hrg. Vol. II, 267-68.)

The State's expert from the trial, Dr. John Spiridigliozzi, also testified. He explained that his evaluation relied mostly on self-report and those documents that the State, Doe, and

organizations associated with her provided to him. (Ev. Hrg. Vol. I, 109-11.) While he tries to confirm what an examinee like Doe tells him, he testified that his confirmation is limited by the information he receives. (Ev. Hrg. Vol. I, 110-11.) In Doe's case, Spiridigliozzi never received her medical records, cell phone download, or the recordings from The Hawk. (Ev. Hrg. Vol. I, 112, 115, 126-27, 142-43, 146-48.) He also did not talk to anyone who had seen Doe on the night in question. (Ev. Hrg. Vol. I, 111-14, 206-07.) At the same time, he testified that he had unsuccessfully tried to contact more people than he eventually interviewed. (Ev. Hrg. Vol. I, 111-14, 206-07.) Still, he believed much of Doe's account had been confirmed by the materials he reviewed. (Ev. Hrg. Vol. I, 111-12.)

At the hearing, Spiridigliozzi reviewed the surveillance recordings from the night in question. (Ev. Hrg. Vol. I, 117-25.) He disputed some of Wilson's characterizations of Doe's appearance and behavior, and at points, observed that the clips showing Doe were quite short. (Ev. Hrg. Vol. I, 118-19, 132, 189.) He similarly read text messages about Doe's past drinking and mental-health medications. (Ev. Hrg. Vol. I, 143-44, 153.)

Honesty, Spiridigliozzi explained, is important in a self-report examination. (Ev. Hrg. Vol. I, 136-37, 140.) A lack of honesty might suggest that the examinee is trying to look better or worse than they actually feel. (Ev. Hrg. Vol. I, 171.) He also acknowledged that false sexual-assault allegations do happen. (Ev. Hrg. Vol. I, 171-74.)

If Spiridigliozzi had known that Doe had sent text messages suggesting more experience with alcohol than she had shared, he would have questioned her on the inconsistency. (Ev. Hrg. Vol. I, 143-44, 191.) He testified similarly about past mental-health medications, saying he would have to consider that information in his evaluation. (Ev. Hrg. Vol. I, 153.) In sum, Spiridigliozzi recognized that he did not have all possible information

relevant to Doe's experience. (Ev. Hrg. Vol. I, 153.)

Spiridigliozzi denied that an individual's past sexual experience has a relationship to their perception of a sexual assault. (Ev. Hrg. Vol. I, 168.) He did, however, acknowledge that the history is at times relevant. (Ev. Hrg. Vol. I, 168-70.) He had not learned about any additional sexual encounters outside of those Doe had reported. (Ev. Hrg. Vol. I, 170-71.)

Spiridigliozzi explained that when estimating Doe's blood-alcohol level, he compared her descriptions of how she felt to a chart he had. (Ev. Hrg. Vol. I, 106-07, 133.) He did not ask her about her weight, eating habits, or alcohol tolerance. (Ev. Hrg. Vol. I, 107-09, 134-35.) He also testified that he had some medical training. (Ev. Hrg. Vol. I, 127-28.) That said, he also recognized that her perception might have been impacted if she drank while taking mental-health medications. (Ev. Hrg. Vol. I, 160-62.)

At the same time, Spiridigliozzi had been hired to determine if Doe had a major mental disorder, not to determine her blood-alcohol content or sexual history. (Ev. Hrg. Vol. I, 185-86.) To that end, he explained that tests he used in his evaluation were appropriate. (Ev. Hrg. Vol. I, 179-82.) He reached his diagnosis by combining the results of these tests with Doe's self-report, the information provided by the State, and his collateral contacts. (Ev. Hrg. Vol. I, 187-88, 202-03.) While Doe's level of intoxication needed to be considered, being sober is not a requirement for PTSD. (Ev. Hrg. Vol. I, 188, 190.) In fact, Spiridigliozzi testified that knowing Doe had more experience with alcohol than she let on would not change his diagnosis. (Ev. Hrg. Vol. I, 191.) He testified similarly about Doe's prior mental-health treatment. (Ev. Hrg. Vol. I, 194-96.)

Wilson presented the report of Dr. Gerald Gentry, a forensic psychologist who thoroughly criticized Spiridigliozzi's methods and conclusions. (Ev. Hrg. Vol. II, 287-88;

Defendant's Ex. 18.) The State hired another psychologist, Dr. Christy Blanchard, to review both doctors' reports and Spiridigliozzi's testimony. (Ev. Hrg. Vol. II, 309.) Blanchard refuted most of Gentry's concerns about missing information, unexplored inconsistencies, unsupported claims, outdated tests, and description of PTSD. (Ev. Hrg. Vol. II, 311-35.) She testified that the purpose of information like an examinee's sexual history is to provide context. (Ev. Hrg. Vol. II, 311-13.) Absent some concern that the examinee had experienced sexual assault or trauma in the past, it is not relevant to the examination. (Ev. Hrg. Vol. II, 313.)

Blanchard also detailed the various factors that play into decision-making and the myriad responses to a traumatic event or experience. (Ev. Hrg. Vol. II, 314-24.) For example, she explained that the testimony about Doe being able to leave Wilson's apartment despite her intoxication is indicative of a flight-or-fight response. (Ev. Hrg. Vol. II, 315-17.) Similarly, some of the decisions Doe made that Spiridigliozzi did not seem to question suggested a traumatic response like dissociation or shock. (Ev. Hrg. Vol. II, 318-19.) Plus, she explained, avoidance and inability to connect to a therapist—responses that Gentry cast as abnormal—are also often features of PTSD. (Ev. Hrg. Vol. II, 321-24.)

Blanchard had no concerns about the tests that Spiridigliozzi used, the collateral contacts he chose, or how he described PTSD at trial. (Ev. Hrg. Vol. II, 325-33.) She did think that his comments about Doe's blood-alcohol level and intellect potentially exceeded Spiridigliozzi's expertise, but neither are diagnostic criteria for PTSD. (Ev. Hrg. Vol. II, 328-29.)

Like Spiridigliozzi, Blanchard recognized that it is important that an examinee be honest in their self-report. (Ev. Hrg. Vol. II, 339-42.) Along the same lines, she

acknowledged that knowing about an examinee's past mental-health treatment is important. (Ev. Hrg. Vol. II, 341-42, 344-47.) Blanchard testified that if a forensic psychologist knows they are missing information, they should note it in their report. (Ev. Hrg. Vol. II, 348.) In the instant case, Blanchard believed that knowing about Doe's past mental-health medications would be important. (Ev. Hrg. Vol. II, 349-50.) She testified similarly about Doe's history with alcohol and her past sexual encounters. (Ev. Hrg. Vol. II, 351-52.)

She hesitated, however, to directly connect dishonesty to malingering. (Ev. Hrg. Vol. II, 353.) In fact, she explained examinees are sometimes "extremely guarded" because of guilt, shame, or embarrassment. (Ev. Hrg. Vol. II, 383.) Other examinees might not perceive certain information as relevant. (Ev. Hrg. Vol. II, 383.) At the same time, Blanchard did acknowledge that it is harder to evaluate whether an examinee is malingering without all the relevant information. (Ev. Hrg. Vol. II, 355-56.)

Blanchard also clarified that a history of depression or anxiety does not preclude a PTSD diagnosis. (Ev. Hrg. Vol. II, 384.) She testified, "I would argue that having a history of depression or . . . anxiety may make an individual more prone to the effects of trauma." (Ev. Hrg. Vol. II, 384.)

CONCLUSIONS OF LAW

To prevail on a claim of ineffective assistance of counsel, the defendant needs to demonstrate both that counsel's performance was deficient under the totality of the circumstances and that performance prejudiced them. *Sola-Morales v. State*, 300 Kan. 875, 882, 335 P.3d 1162 (2014) (relying on *Strickland v. Washington*, 466 U.S. 668, 687, 164 S. Ct. 3562, 82 L. Ed. 2d 864 [1984]). Importantly, judicial scrutiny of counsel's performance is highly deferential, with courts strongly presuming that an attorney's conduct fell within the

broad range of professional assistance. *State v. Kelly*, 298 Kan. 965, 970, 318 P.3d 987 (2014).

Strategic decisions are the sole province of the trial attorney. See *State v. Ames*, 222 Kan. 88, 100, 563 P.2d 1034 (1977). The attorney needs to consult with their client, but all "technical and professional decisions" are theirs alone. 222 Kan. at 100. And when an attorney's strategic decision arises out of a thorough investigation of the case at hand, that decision is virtually unassailable. *State v. Cheatham*, 296 Kan. 417, 437, 292 P.3d 318 (2013). Only in situations where counsel's failure to investigate prevented them from making an informed decision is "any argument of 'trial strategy' . . . inappropriate." *Mullins v. State*, 30 Kan. App. 2d 711, Syl. ¶ 2, 46 P.3d 1222 (2002).

"There are countless ways to provide effective assistance in any given case," and even the most seasoned attorneys likely "would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. As such, "'Monday-morning quarterbacking is not a sport encouraged by the laws governing ineffective assistance claims.'" *U.S. v. Caracappa*, 614 F.3d 30, 48 (2d Cir. 2010). Instead, "'a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" *State v. Davis*, 277 Kan. 309, 315, 85 P.3d 1164 (2004).

As for prejudice, the movant must demonstrate a reasonable probability that, but for their attorney's deficient performance, the outcome of their case would have been different. *Miller v. State*, 298 Kan. 921, 934, 318 P.3d 155 (2014). In other words, the defendant needs to present evidence sufficient to undermine confidence in the jury's verdict. 298 Kan. at 934.

Failure to adequately use discovery from Doe's phone.

First, Wilson challenges how Lowry used—or did not use—the discovery in this case. It is undisputed that the discovery included a download of Doe's cell phone taken some weeks after the assault. Lowry remembered this discovery being made available to him. Ev. Hrg. Vol. II, 263.) He also testified that his ordinary practice is to collect, review, and organize all discovery from the State. (Ev. Hrg. Vol. II, 235-36.) He usually talks through the discovery with his clients, too. (Ev. Hrg. Vol. II, 236.) He did not, however, remember seeing the text messages and photographs that Wilson admitted at the hearing. (Ev. Hrg. Vol. II, 263.) He testified that they would have helped him demonstrate that she carried on with her ordinary life after the assault. (Ev. Hrg. Vol. I, 59-60, 66; Vol. II, 263-64.) He testified similarly about the text messages indicating some alcohol use. (Ev. Hrg. Vol. I, 67-68, 70-72; Vol. II, 274.)

Still, Lowry did not know if questioning Doe about past mental-health issues would have been helpful. (Ev. Hrg. Vol. II, 273-74.) He did, however, question her about the mental-health treatment she sought after the assault. (Ev. Hrg. Vol. II, 256.) He also challenged her on whether her symptoms impacted her daily life as much as she suggested. (Ev. Hrg. Vol. II, 261-62.) The jury trial transcript reflects his careful questioning on these matters.

It is important to note that many of the text messages in Exhibits 6, 9, 10, and 17A are portions of conversations removed entirely from their context. For instance, the first text messages in Exhibit 17A makes clear that Doe's mother planned on preventing young people from drinking, not the opposite. (Defendant's Ex. 17A, 1.) In other messages, friends accuse her of being drunk without any confirmation from Doe. (Defendant's Ex. 17A, 10,

42.) Doe often couples her messages about drinking with *haha*, *lol*, or *lmao* suggesting that she is kidding, exaggerating, or both. (Defendant's Ex. 17A, 16, 46-48, 67.)

Wilson counts these text messages as conclusive evidence that Doe had more experience with alcohol than she indicated at trial. At the same time, she clearly testified that she had never been as drunk as on the night in question. (Jury Trial, Vol. II, 356.) Even assuming that the text messages are not jokes or exaggerations, they do not change the fact that Doe felt more intoxicated on the night of the assault than she had in the past. It also does not change her testimony that she had trouble walking, slurred her speech, and tracking all the events that night. (Jury Trial, Vol. II, 356-57.) Plus, Lowry cross-examined her and other witnesses about her level of intoxication that night. (Jury Trial, Vol. II, 413-18, 437-38, 449, 519-21, 527-28.) In short, these messages are not as powerful as Wilson seems to believe.

The same is true with the photographs. Lowry acknowledged that many of them seemed to come from the same event. (Ev. Hrg. Vol. II, 264-66.) They did not reveal how Doe felt inside, even if she presented a smile to the world. (Ev. Hrg. Vol. II, 264-66.) Lowry had touched on this concept at jury trial when he asked Doe about changing her Facebook profile picture shortly after the assault. (Jury Trial, Vol. II, 456-58; Ev. Hrg. Vol. I, 57-58; Vol. II, 259-61.) While the photographs at issue reinforce this concept, they are far from the only evidence suggesting that Doe carried on with her life after the assault. At best, they would have provided Lowry a bit more ammunition on cross-examination.

Lowry is an experienced attorney. He has practiced for more than 30 years and handled dozens of sexual assault cases. (Ev. Hrg. Vol I, 23; Vol. II, 227, 233.) He makes it a point to know everything the State knows before trial (Ev. Hrg. Vol. II, 236.) Given this

testimony, and the time that passed between Wilson's trial and the evidentiary hearing, it is likely that he simply forgot that he had reviewed Doe's phone download. (Ev. Hrg. Vol. II, 244.) After all, neither the text messages nor the photographs demonstrate that Doe is totally unbelievable. And as much of the testimony at trial revealed that Doe did not want to talk about or dwell on the assault, it is unsurprising that she tried to attend dances and school as normal. She explained as much when talking about the Facebook picture on redirect. (Jury Trial, Vol. II, 465-66.) It cannot fairly be said, then, that the evidence Wilson highlights is incontrovertible. It is simply additional fodder for cross-examination, and Lowry's failure to use it at trial is not inherently ineffective.

Failure to fully challenge Spiridigliozzi's conclusions.

Wilson also challenges how Lowry dealt with Spiridigliozzi's testimony and conclusions. First, it is important to recognize that several of Lowry's decisions surrounding Spiridigliozzi were quite clearly strategic. For instance, he declined to move for an evaluation of Doe because he worried that a second evaluation might just confirm Spiridigliozzi's findings. (Ev. Hrg. Vol. I, 36, 54; Vol. II, 251.) He thought the testimony about Doe's blood-alcohol level helped the defense because it ran counter to how Doe appeared on the surveillance recordings. (Ev. Hrg. Vol. I, 83-84.) He also limited his objections because his experience had taught him that juries do not care for objections. (Ev. Hrg. Vol. I, 79-81; Vol. II, 242.) And he decided against showing Spiridigliozzi recordings from The Hawk out of a concern he might explain them away. (Ev. Hrg. Vol. II, 285.)

Again, strategic decisions are virtually unassailable in proceedings like this one. *Cheatham*, 296 Kan. at 437. Lowry's reasoned decisions on how to approach Spiridigliozzi and his testimony are not grounds for a new trial in this case. Notably, Spiridigliozzi's

reaction to the recordings from The Hawk reveal that Lowry's suspicions were accurate. He disputed some of Wilson's characterizations of Doe's behavior and highlighted the short length of the clips. (Ev. Hrg. Vol. I, 118-19, 132, 189.) In short, he behaved exactly as Lowry thought he might. (Ev. Hrg. Vol. II, 285.)

Lowry testified that he thought, in retrospect, hiring an expert to challenge Spiridigliozzi's conclusions might be helpful. (Ev. Hrg. Vol. II, 251.) His opinion appears to be based, at least in part, on reading the unredacted report at the hearing. (Ev. Hrg. Vol. I, 51-53; Vol. II, 254.) Again, however, Lowry did not know for certain if he had reviewed that report in the run-up to trial. (Ev. Hrg. Vol. I, 45-47.) Elements of the unredacted portion seemed familiar, and his ordinary practice was to request and review unredacted reports. (Ev. Hrg. Vol. I, 36, 46-48; Vol. II, 237.)

However, even assuming that Lowry never requested the unredacted report, it cannot fairly be said that a second expert would have wholly defeated Spiridigliozzi's testimony either before or during trial. While Gentry's report might seem to tear down much of Spiridigliozzi's work in this case, Blanchard clearly explained why those so-called infirmities are misleading or baseless. For example, Blanchard found no fault with the tests Spiridigliozzi relied on, the way he described PTSD at trial, or his failure to drill down on perceived inconsistencies in Doe's account. (Ev. Hrg. Vol. II, 311-35.) She provided detailed explanations for why most of Gentry's criticisms were unfounded. (Ev. Hrg. Vol. II, 311-35; State's Ex. 2, 1-7.) Even if Blanchard's practice is not wholly devoted to evaluating sexual-assault victims, she is thoroughly qualified to testify on best practices in forensic examination—and, as a corollary, whether Spiridigliozzi complied with the same. Plus, Spiridigliozzi answered similarly on many of the questions concerning issues like tests and

collateral contacts. (Ev. Hrg. Vol. I, 179-82, 187-88, 202-03.)

There is admittedly some reason to believe that Doe did not provide Spiridigliozzi with every detail of her personal life. The text messages discussed at the hearing seem to indicate that she had a bit more experience with alcohol and mental-health treatment than she revealed to him. (Defendant's Ex. 5, 6, 9, 10.) He had not been provided with these messages when preparing her evaluation. (Ev. Hrg. Vol. I, 112, 115, 126-27, 142-43, 146-48.)[2]

Still, there is no indication that reading those messages would have changed Spiridigliozzi's conclusions. In fact, he testified he would simply have asked her questions about them. (Ev. Hrg. Vol. I, 153, 191, 194-96.) Learning about them at the hearing did not change his opinion. (Ev. Hrg. Vol. I, 191, 194-96.) Meanwhile, Blanchard testified that dishonesty in an examination is not automatically an indicator of malingering. . (Ev. Hrg. Vol. II, 353.) Instead, she explained, an individual might leave out information because they believe it is irrelevant or feel shame. (Ev. Hrg. Vol. II, 383.) Spiridigliozzi also testified that a lack of honestly sometimes indicates that an examinee is trying to look better than they feel. (Ev. Hrg. Vol. I, 171.)

Doe's evaluation took place roughly 18 months after the assault. (Defendant's Ex. 2, 1.) Many of the text messages discussed at trial predate the assault by weeks or months. (Defendant's Ex. 17A.) It is entirely possible that Doe did not recall these conversations or

[2] At times, Wilson's questioning of Blanchard implied that Spiridigliozzi had evidence he did not review. He testified that he reviewed all of the documents listed on the final page of his report. (Ev. Hrg. Vol. I, 115.) That list includes reports about Doe's phone download and The Hawk recordings, but it does not mention the actual digital files. (Defendant's Ex. 2, Appendix A.) It is also important to note Spiridigliozzi was very forthcoming about the materials he asked for but never received. (Ev. Hrg. Vol. I, 111-15, 126-27, 142-43, 146-48, 206-07.) Wilson's assumption that Spiridigliozzi had this information in his possession is unsupported by the rest of the evidence at the hearing.

thought them irrelevant. It is equally likely that she felt ashamed, as Blanchard described. (Ev. Hrg. Vol. II, 383.) There is no reason to believe the gaps in Doe's background are the result of willful malingering or fabrication—or that filling in those gaps would have resulted in a different conclusion. Plus, a person's alcohol consumption and past mental-health issues do not preclude a PTSD diagnosis. (Ev. Hrg. Vol. I, 188, 190; Vol. II, 328-29, 384.)

Wilson also asked Spiridigliozzi about text messages concerning Doe's relationship history. It is important to remember that the past sexual behavior of a complaining witness is ordinarily inadmissible at trial. K.S.A. 2020 Supp. 21-5502(b). A defendant who wants to admit such evidence needs to first demonstrate to the district court why it is relevant and admissible. *State v. Gilliland*, 294 Kan. 519, 540, 276 P.3d 165 (2012). Wilson never asked Lowry if he had considered the admissibility of these messages—or, indeed, any past relationships that Doe had. It is also unclear how those messages are relevant now, except perhaps to paint Doe as dishonest. Credibility of a witness is usually relevant at trial. *State v. Bowman*, 252 Kan. 883, Syl. ¶ 1, 850 P.2d 236 (1993); *State v. Salas*, No. 103,605, 2011 WL 2637423, at *2 (Kan. App. 2011) (unpublished opinion). However, even impeachment evidence is inadmissible if it is much more prejudicial than probative. *Van Hoozer v. Farmers Ins. Exchange*, 219 Kan. 595, 613, 549 P.2d 1354 (1976).

Text messages about Doe's personal life from months before the assault are not much significantly more prejudicial than probative. Their admission at trial dramatically increases the likelihood of blaming and shaming her as the victim. There are also potential hearsay objections available, as Doe is not the only person communicating throughout the messages. K.S.A. 2020 Supp. 60-460 (excluding hearsay except in certain enumerated circumstances).

More to the point, and without going into detail, the text messages at issue are not

inconsistent with Doe's report to Spiridigliozzi. She reported that she had intercourse a single time before the assault. (Defendant's Ex. 2, 4.) The text messages do not directly contradict this report. (Defendant's Ex. 17A, 10-21, 30-32.) They are also, again, removed from their proper context. As such, it cannot be known for certain what precisely is being discussed or the meaning that the participants in the conversation ascribe to certain words and phrases.

Wilson's implication that Lowry needed to confront Spiridigliozzi, rather than Doe, with these messages is also problematic. It is not clear that they are actually relevant for the purposes of impeaching the quality of Spiridigliozzi's report, especially as Blanchard explained that absent some indication of past trauma, an examinee's sexual history is not usually relevant to their examination. (Ev. Hrg. Vol. II, 313.) Spiridigliozzi rejected Wilson's assertion that an examinee's sexual history impacts how they perceive sexual assault. (Ev. Hrg. Vol. I, 168.) At most, he said that sexual history is sometimes relevant. (Ev. Hrg. Vol. I, 168-70.) These remarks are a far cry from Gentry's claim that it is important to know if an examinee felt "used" by their past sexual experiences. (Defendant's Ex. 18, 1.)

Lowry's trial cross-examination of Spiridigliozzi also touched on these issues. He asked a number of questions about Doe's continued scholastic achievements. (Jury Trial, Vol. III, 767-68.) He also challenged Spiridigliozzi's estimation of Doe's blood-alcohol level and the apparent lack of concrete detail in her report. (Jury Trial, Vol. III, 766-69.) In other words, Lowry did not leave Spiridigliozzi completely unchallenged. He believed he demonstrated the "partisan" nature of the evaluation on cross-examination. (Ev Hrg. Vol. II, 254.)

And, again, Lowry also cross-examined multiple witnesses, Doe included, about her symptoms and behaviors after the assault. (Jury Trial, Vol. II, 459-63, 543-44; Vol. III, 767-68.) The fact that he did not confront Spiridigliozzi with the messages highlighted at the hearing does not mean he left the question of how Doe's mental health impacted her life wholly unchallenged.

In his initial motion, Wilson suggested that Lowry should attempted to exclude Spiridigliozzi's testimony from trial. (*Van Cleave* Motion, 2-8.) A motion to exclude expert testimony, ordinarily called a *Daubert* motion, exists to test the witness and ensure their opinion is rooted in facts that support a reasonably accurate conclusion. *Smart v. BNSF Ry. Co.*, 52 Kan. App. 486, 494, 369 P.3d 966 (2016). The question is not if their conclusion is correct but if the methodology underpinning that conclusion is reliable. 52 Kan. App. 2d at 497. A district court faced with a *Daubert* motion has many benchmarks to consider. *Daubert v. Merrell Down Pharmaceuticals, Inc.*, 509 U.S. 579, 593-94, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Still, "rejection of expert testimony is the exception rather than the rule," and in most cases, cross-examination and contrary evidence "remain the . . . appropriate means of attacking shaky but admissible evidence." *Smart*, 52 Kan. App. 2d at 496-97.

Gentry clearly believes that there are significant weak points in Spiridigliozzi's evaluation. (Defendant's Ex. 18.) Blanchard, on the other hand, wrote and testified that his methodology and remarks were appropriate. (Ev. Hrg. Vol. II, 311-35; State's Ex. 2, 1-7.) Spiridigliozzi's testimony also touched on why some of his alleged shortcomings, such as the tests he used, are without merit. (Ev. Hrg. Vol. I, 106-07, 133, 179-82.)

Lowry is an attorney who, in his practice, avoids unnecessary and unsupported pretrial motions. (Ev. Hrg. Vol. II, 238.) The evidence from the hearing makes clear that

there is little support for a *Daubert* motion in this case. Lowry cannot be held ineffective for failing to challenge Spiridigliozzi in this particular way.

Finally, Wilson's *Van Cleave* motion and some of his questioning implies that courts in Kansas have previously rejected or excluded Spiridigliozzi's testimony. (*Van Cleave* Motion, 5-6.) Read carefully, the cases at issue say little about Spiridigliozzi's qualifications or overall credibility. Instead, each case merely mentions that contrary evidence had undermined Spiridigliozzi's opinion. *Wolfe v. Kansas Pub. Employees Ret. Sys*, No. 110,011, 2014 WL 2226470, at *4 (Kan. App. 2014) (unpublished opinion); *State v. West*, No, 107,865, 2013 WL 5422316, at *3, *6 (Kan. App. 2013) (unpublished opinion).

Wilson also brought up a few cases at evidentiary hearing. In one, the district court withheld Spiridigliozzi's testimony as a discovery sanction, not because of any infirmity with his methods or conclusions. *State v. Skillicorn*, 944 S.W.2d 877, 896-98 (Mo. 1997), *overruled on other grounds by Joy v. Morrison*, 254 S.W.3d 885 (Mo. 2008). The second case only mentions Spridigliozzi in passing. *K.W.P. v. Kansas City Public Schools*, 296 F. Supp. 3d 1121, 1129 (W.D. Mo. 2017).

To say that these cases render Spiridigliozzi an inherently unreliable witness is an overstatement of their holdings. None of these courts rejected his testimony based on a failure of his methodology, the tests he employed, or the conclusions he reached. In fact, apart from *Skillicorn*, Spiridigliozzi participated in each case. These cases do not support Wilson's contentions.

Also, it is important to remember that witnesses generally cannot be impeached by extrinsic evidence of a collateral matter. See *Stickney v. Wesley Medical Center*, 244 Kan. 147, 155, 768 P.2d 253 (1989). Our Supreme Court has actually held that declining to impeach

an expert witness about unrelated past conduct is not ineffective assistance of counsel. *Pabst v. State*, 287 Kan. 1, 19, 192 P.3d 630 (2008). Even if Wilson's expansive reading of these cases is accurate, the fact remains that it is improper to impeach Spiridigliozzi with this evidence.

Put simply, then, Lowry effectively challenged Spiridigliozzi's testimony at trial. His failure to confront Spiridigliozzi with largely inadmissible evidence from Doe's phone is not grounds for a new trial in this case. The same is true for his decision not to hire a competing expert or file a *Daubert* motion.

Miscellaneous additional claims.

Wilson has also asserted that Lowry needed to better investigate his case by interviewing the people in his life. (*Van Cleave* Motion, 10.) Lowry's testimony on this point is clear: he hired an investigator to search for the people at The Hawk on the night of the assault. (Ev. Hrg. Vol. I, 24-25; Vol. II, 252.) Despite the investigator's best efforts, they could not be located. (Ev. Hrg. Vol. I, 25-26, 252-53.) There is little else that Lowry could have done to find these people. Wilson did not present any evidence at the hearing that they were available, easily located, and ready to testify. He appears to just assume that their absence means a lack of effort on Lowry's part. Lowry is not ineffective simply because his investigator did not successfully locate these people.

Lowry also explained that he decided against hiring a DNA expert because he thought that evidence supported their theory of the case. (Ev. Hrg. Vol. III, 285.) This conclusion is sensible. After all, the sexual-assault examination did not find seminal fluid anywhere on Doe's clothes or body. (Jury Trial, Vol. III, 723-25.) Doe's chest had Wilson's DNA on it, but both of them testified that he had kissed her there. (Jury Trial, Vol. II, 381;

Vol. III, 798, 824.) Lowry highlighted these findings on cross-examination with the relevant witnesses. (Jury Trial, Vol. III, 630, 726-27, 739-41.) In short, this strategic and carefully considered decision is not deficient representation on Lowry's part.

Finally, Wilson asserted at the hearing that Lowry failed to strike a juror with a personal relationship to sexual assault. The transcript reveals that this juror's sister-in-law had been raped by a stranger roughly a decade earlier. (Sealed Voir Dire Transcript, 20.)[3] Initially, the juror seemed concerned about being able to put aside her sister-in-law's experience. (Sealed Voir Dire Transcript, 21-22.) As she talked to counsel, however, she became more certain that she would be able to judge Wilson's case on its merits. (Sealed Voir Dire Transcript, 22-24.) And while she warned the parties some evidence might led to angry feelings, she assured the district court that those feelings would be based on the instant case, not her sister-in-law's experience. (Sealed Voir Dire, 23-24.) As she said at the end, "[My sister-in-law's] at peace with it, so I'm at peace with it." (Sealed Voir Dire, 24.)

It is undeniable that Lowry testified he tries not to leave people with these sorts of experiences on juries. (Ev. Hrg. Vol. I, 74-76.) Nevertheless, he also had very little memory of this juror. (Ev. Hrg. Vol. II, 267.) And given how confident she ultimately felt about her ability to judge the evidence on the merits, it cannot fairly be said that Lowry failed Wilson by not striking her. After all, peremptory strikes exist to remove prospective jurors who might be "'inclined against' a party's interests." *State v. Hill*, 290 Kan. 339, 359, 228 P.3d 1027 (2010). It is unclear that this juror was ever inclined against Wilson—or that such an inclination remained after questioning. It is also likely that Lowry had other jurors he wanted to strike. Four of the jurors that were removed with peremptory strikes had a

[3] The sealed voir dire transcript is not numbered. A copy of the relevant pages is attached at the end of this document for the Court's convenience.

history with sexual assault. (Jury Trial, Vol. I, 299; Sealed Voir Dire, 37, 42-43, 46-47, 57.) Those four all revealed that they, personally, had been victims. It cannot fairly be said that electing to strike jurors who had been assaulted over someone whose relative had that experience is ineffective.

Prejudice.

Even assuming, however, that Lowry rendered deficient performance, Wilson has failed to show the required prejudice. He, as the movant, needs to demonstrate a reasonable probability that the trial would have turned out differently but for Lowry's performance. See *Miller*, 298 Kan. at 934, In other words, he needs to undermine this Court's confidence in the jury's verdict. See 298 Kan. at 934.

It is well-settled that a defendant who accepts appointed counsel cannot "dictate the procedural course of [their] representation." *Ames*, 222 Kan. at 100. It is unsurprising, then, that our appellate courts routinely decline to find prejudice when counsel elects against filing a meritless pretrial motion. See, e.g., *State v. Tucker*, No. 113,469, 2016 WL 3856982, at *6 (Kan. App. 2016) (unpublished opinion). The evidence at the evidentiary hearing makes clear that there is no merit to a motion to exclude Spiridigliozzi's testimony.

Similarly, there is little reason to believe that the district court would have allowed Wilson to evaluate Doe. After all, our Kansas cases require the defendant demonstrate compelling circumstances before ordering such an evaluation. *State v. Berriozabal*, 291 Kan. 568, 581, 243 P.3d 352 (2010). This inquiry looks at the totality of the circumstances, including the amount and nature of corroborating evidence and whether the victim has a demonstrated lack of veracity, mental instability, or a history of false accusations. 291 Kan. at 581. Mere inconsistencies in the victim's account or the bald allegation of a preexisting

mental condition are insufficient to constitute compelling circumstances. 291 Kan. at 581.

Here, there are no such circumstances. Again, there is no reason to believe Doe intentionally left information out of her evaluation with Spiridigliozzi. There is also no evidence of a serious, preexisting mental condition or past false allegations. The most Lowry could have done, then, was here an expert to comment on Spridigliozzi's evaluation and conclusions. He decided against doing so. The fact that he regrets this decision in hindsight is immaterial. See *Davis*, 277 Kan. at 315 (observing that counsel's conduct needs to be evaluated based on their perspective during trial).

Throughout the hearing, Wilson tried to call Doe's credibility into question. It is undeniable that Doe's account of the assault has been incredibly consistent. She told the same essential facts to everyone she spoke to: her cousin, her mother, a sorority sister, investigators, and Spiridigliozzi. (Jury Trial, Vol. II, 392-93, 396-98, 400, 496-97, 525-26, 531-34, 561-64; Vol. III, 604-05, 610.) Apart from the assault itself, much of the evidence is undisputed. No one has ever questioned, for example, that she entered and exited The Boom Boom Room with Wilson. Similarly, there is no doubt that she left and returned to The Hawk with him. In the end, then, the jury had to decide which they believed: Doe's repeated and consistent report of sexual assault or Wilson's claim that he ended a wholly consensual encounter when he received a text message.

Lowry's claimed failures do little to suggest that Doe's account is the less-credible one. To start, it is unclear if the evidence from Doe's phone that Wilson highlighted at the hearing is actually admissible. Both our rape shield and hearsay statutes prevent many, if not all, of the messages at issue from coming in at trial. K.S.A. 2020 Supp. 21-5502(b); K.S.A. 2020 Supp. 60-460. As for the photographs, Lowry recognized that they showed

only a few moments in Doe's life. (Ev. Hrg. Vol. II, 264-66.) They did not indicate how she felt internally, either. (Ev. Hrg. Vol. II, 264-66.) And given how Doe explained her decision to change Facebook profile picture at trial, there is no reason to believe she would not have had an answer for these photographs if Lowry confronted her.

Blanchard's testimony also makes clear that there is no standard response to a traumatic event. (Ev. Hrg. Vol. II, 320-21.) She explained, "[T]here are as many variations as there are similarities to responses to trauma." (Ev. Hrg. Vol. II, 320.) Common emotions include "horror, shame, guilt, embarrassment, [and] rage." (Ev. Hrg. Vol. II, 320.) Blanchard also explained that a person's functioning after a traumatic event is not consistent from one moment to the next:

> "There may be some days where a person is quite capable of distracting themselves from intrusive thoughts and maybe had a better night's sleep. You may—you need to have the ability to avoid triggers, so they have a couple of weeks where they do well and then thoughts come back and how horrible they are. And so it really just kind of depends on the person." (Ev. Hrg. Vol. II, 321.)

Beneath Wilson's claims lurks the insidious implication that attending a school dance is entirely incompatible with PTSD—and, by extension, with being sexually assaulted. These things are not mutually exclusive. Just because Doe posed and smiled with her friends does not mean she exaggerated or fabricated her symptoms. Doe explained this general concept in her testimony, saying, "I think a lot of people put pictures where they look happy on social media when they're not happy in reality." (Jury Trial, Vol. II, 465.)

Blanchard's testimony also reveals another weakness in this evidence. Assuming for a moment that Lowry had presented the photographs and text messages at trial, it is almost certain that Spiridigliozzi could explain why they are irrelevant to whether Doe actually experienced trauma. Avoidance, Blanchard explained, is often a feature of PTSD. (Ev. Hrg.

Vol. II, 321-24.) An individual might work to "avoid[] any kind of triggers which could include people, places, situations, objects, and even sleep." (Ev. Hrg. Vol. II, 322.) They might not talk to trusted people about their experience, let alone law enforcement or strangers. (Ev. Hrg. Vol. II, 322-33.)

More to the point, Spiridigliozzi clearly testified that the information he heard about at the hearing did not change his conclusions. (Ev. Hrg. Vol. I, 191, 194-96.) He simply would have wanted to ask Doe more questions. (Ev. Hrg. Vol. I, 143-44, 153, 191.) And, like Blanchard, he did not believe that this missing information directly translated to malicious malingering on Doe's part. (Ev. Hrg. Vol. I, 171-72; Vol. II, 353.) Wilson has never produced any evidence that draws this conclusion, either. He is conflating correlation with causation and assuming without any evidence that any inconsistency in Doe's self-report is the product of intentional deceit. As explained before, the passage of time and Doe's perception of what information would be relevant or useful is likely responsible. It also, again, does not take away from the fact that she suffered from PTSD.

Blanchard, meanwhile, testified that a history of anxiety and depression might make someone more prone to the impact of a traumatic event. (Ev. Hrg. Vol. II, 355-56.) In other words, knowing that Doe had previously received mental-health treatment would likely have reinforced, rather than contradicted, the conclusion that she had developed PTSD after the assault in question.

It is also important to remember that nearly everyone in Doe's life witnessed the mental-health symptoms that Spiridigliozzi described. She, her cousin, and her mother testified about her mental health at trial. (Jury Trial, Vol. II, 408-11, 501-02, 538-41.) A school counsellor and a friend described similar observations in their conversations with

Spiridigliozzi. (Defendant's Ex. 2, 8-9.) These accounts dramatically undermine the conclusion that Doe fabricated or exaggerated her symptoms either on the stand or during the evaluation. Many people in her life noticed how she changed after the assault. These facts are unchanged by evidence Wilson presented at the hearing.

Put simply, Wilson is asking this court to find prejudice because evidence from Doe's phone—evidence that Lowry, for whatever reason, did not present at trial—shows that she did not behave like a sexual-assault victim who experienced PTSD. There is, however, no one way for a victim to behave. The record at trial provides a description of her symptoms but no moment-by-moment timeline that precludes her ability to present normally for a school dance. In fact, the descriptions of her continued scholastic success indicate that she did maintain some semblance of normalcy even after the assault. Her experience with PTSD is not dulled or invalidated by these facts. And the text messages from before the assault—the ordinary, often playful text messages of a modern teenager—do not undermine her repeated, consistent report of Wilson taking her to his house, putting her on his bed, and raping her. He has provided no authority to support the assumption that Doe fabricated the assault or her self-report to Spiridigliozzi.

Meanwhile, the trial testimony demonstrates that Doe repeatedly and consistently told the people in her life, including those who investigated this crime, that Wilson raped her. And while Wilson claimed that he stopped the encounter at his home before they had sex, elements of his testimony undermine this account. He insisted that she appeared sober, but at the same time, he testified that she tripped on a broken sidewalk on the way to his house. (Jury Trial, Vol. III, 792-93, 824.) He never fully explained to the prosecutor why he would halt a heated consensual encounter simply to respond to a text message. (Jury Trial,

Vol. III, 826-29.) He insisted that Doe seemed angry about this decision, but he never really described her reaction. He said only that she gave him "an evil glare." (Jury Trial, Vol. III, 801-02.) His behavior when he and Doe returned to The Hawk is also odd; while he said he ran off to greet some friends, the recording from that night shows him dashing away from Doe with urgency. (Jury Trial, Vol. III, 803-04; State's Trial Ex. 3.) He even leapt over a rock. (Jury Trial. Vol. III, 831-32; State's Trial Ex. 3.) The jury considered these inconsistencies along with the rest of the evidence before finding him guilty.

In short, the clear and unequivocal testimony from Doe, Spiridigliozzi, and the other people who saw Doe on the night in question or shortly after demonstrate that Lowry's alleged failings did not change the outcome of the case. Wilson's claim of prejudice must fail.

CONCLUSION

Memory fades, and forensic examinees do not always understand what information is relevant and important to an evaluation. In this case, it is evident that most of Lowry's choices were well-reasoned, strategic decisions. There is also no reason to believe that the evidence Wilson highlights would have changed the outcome at trial. It is not even clear that the information at issue is admissible. In short, Wilson is not entitled to a new trial in this matter, and his appeal should resume.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that December 21, 2020, I submitted a copy of the foregoing motion to the Clerk of the District Court for electronic filing, as well as e-mailing a copy to:

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253 P.3d 798 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

STATE of Kansas, Appellee,

v.

Ralph SALAS, Jr., Appellant.

No.
103,605
.
|
July 1, 2011.

Appeal from Seward District Court; Clint Peterson, judge.

Attorneys and Law Firms

Derek W. Miller, of Miller Law Firm, LLC, of Liberal, for appellant.

Don L. Scott, county attorney, and Steve Six, attorney general, for appellee.

Before PIERRON, P.J., ATCHESON, J., and LARSON, S.J.

MEMORANDUM OPINION

PER CURIAM.

***1** Defendant Ralph Salas, Jr., appeals the verdict of a Seward County jury convicting him of aggravated burglary and two lesser charges. Because the trial court impermissibly limited cross-examination of a cooperating co-defendant supplying the only evidence linking Salas to the crime, we reverse and remand for a new trial. Salas has also challenged the sufficiency of the evidence, but that argument fails.

Salas and Braun Horner stood trial on September 22 and 23, 2009, for aggravated burglary, conspiracy to commit aggravated burglary, and felony theft. At trial, Matthew Carter testified that one evening after dark in late May 2009, he, Horner, and Salas were driving around Liberal, Kansas, more or less aimlessly. According to Carter, the three saw a garage with the door open and their decidedly bad intentions overcame their limited good sense. Carter drove around the block and parked in front of the house with the open garage. He testified that Salas and Horner hopped out of the car and entered the garage. Carter said each of them returned quickly carrying a set of golf clubs. At trial, the homeowner testified that he had inadvertently left the door to the garage open overnight. He and his family were in the house, which is attached to the garage, but nobody heard or saw anything amiss. The next morning the man called the police to report that three sets of golf clubs had been stolen from the garage.

Around the time the homeowner reported the golf clubs stolen, police were looking at Carter and Horner as suspects in several other property crimes. About a week after the theft of the golf clubs, Carter agreed to cooperate with the law enforcement officers. He told them about taking the golf clubs and implicated Salas and Horner.

Carter provided the only evidence tying Salas to the crime. Carter's trial testimony was quite vague as to what the trio did that day both before and after stealing the golf clubs; it wasn't much more detailed about the crime. The State produced no other witnesses to the offense. Nobody later saw Salas with an unexplained bag of golf clubs. The police had no forensic evidence suggesting Salas' involvement in the burglary. At trial, Horner testified that he had loaned his car to Carter but was not with him. Salas did not testify. The jury convicted Salas and Horner.

By the time Carter testified at trial, he had been placed on diversion for his involvement in the golf club caper, had received diversion in a second case, and had been charged with burglary and theft in yet another incident. Horner was also a defendant in one of those other cases. Salas' trial counsel wanted to go into all of those offenses with Carter on cross-examination as being relevant to his credibility. But the trial court denied counsel that opportunity. In a brief hearing outside the presence of the jury after opening statements and before presentation of any evidence, counsel for Salas told the trial court he should be permitted to examine Carter (and, presumably, offer related evidence) about the matters because they bore on truthfulness or, more aptly, its lack. The trial court challenged counsel to provide some authority—"a specific cite" in the judge's words—for the propriety of that line of inquiry. Salas' lawyer had no citations at hand but reiterated that Carter's bias and veracity would be at center stage in the trial. The district court assured Salas' counsel

that he was wrong in believing evidence of Carter's "prior criminal conduct" to be admissible and effectively directed that it not be presented to the jury. While less than entirely clear, the trial court's ruling seemed to permit questioning of Carter about the diversion he received in connection with the charges related to the theft of the golf clubs.

*2 Clearly though, the case against Salas turned on Carter's credibility and that alone.

In reviewing a trial judge's decision to admit or exclude evidence, the appellate courts look at the basis for the ruling. When the trial judge finds the proffered evidence to be precluded as a matter of law, as was the decision here, appellate review may be plenary and, thus, without deference. See *State v. Riojas,* 288 Kan. 379, 383, 204 P.3d 578 (2009).

Salas' challenge to the trial court's ruling limiting the cross-examination of Carter implicates both evidentiary and constitutional considerations.

The evidentiary issue rests on elemental and, really, elementary principles. First, of course, all relevant evidence should be admitted at trial absent some rule to the contrary. K.S.A. 60–407(f). Evidence is relevant if it makes some proposition material to the case more or less likely to be true. K.S.A. 60–401(b) (defining "relevant evidence"); (c) (defining "proof"). Second, the credibility of a witness called at trial is always relevant. *State v. Ross,* 280 Kan. 878, 886, 127 P.3d 249, *cert. denied* 548 U.S. 912 (2006) (" ' "[P]roof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." ' " [quoting *State v. Knighten,* 260 Kan. 47, 54, 917 P.2d 1324 (1996)]); *Lindquist v. Ayerst Laboratories, Inc.,* 227 Kan. 308, 315, 607 P.2d 1339 (1980) ("[E]vidence of bias or prejudice of a witness is relevant and may be shown on cross-examination or in rebuttal or by other witnesses or evidence."); *State v. Scott,* 39 Kan.App.2d 49, 56, 177 P.3d 972 (2008) ("One of the methods or techniques for attacking the credibility of a witness is to show partiality, including bias, motive, and interest in the outcome.").

Credibility can be attacked in any number of ways. A witness might not have gotten a good look at the incident about which he or she is testifying or might have trouble recalling the circumstances. A witness may have given differing accounts of the pertinent events on various occasions. A witness might have a bias or prejudice disposing him or her toward one side or against the other. Similarly, a witness could have something to gain or lose by testifying favorably for one side or the other. All of those are generally appropriate and admissible considerations in challenging a witness. Whether they should be engaged in a given case or with a given witness goes more to counsel's trial strategy than limitations imposed by the rules of evidence.

This court has recognized that a party challenging a witness as biased, prejudiced, or with a strong self-interest should be afforded ' "wide latitude in establishing [that sort of] partiality ." ' *Scott,* 39 Kan.App.2d at 56 (quoting Barbara, Lawyers Guide to Kansas Evidence § 3.1, p. 60 (5th ed.2007). Those considerations are especially pronounced when a putative accomplice testifies as a State's witness against his or her alleged cohorts in crime. See *State v. Sharp,* 289 Kan. 72, Syl. ¶ 8, 210 P.3d 590 (2009) ("The credibility of an accomplice witness is subject to attack, and great leeway should be accorded the defense in establishing the witness' subjective reason for testifying."); *State v. Davis,* 237 Kan. 155, 158, 697 P.2d 1321 (1985) (cases cited). The reason, of course, lies in the inducement that the government may have given the witness to secure the testimony—typically, a reduction in criminal charges often coupled with a favorable sentencing recommendation. Seldom do putative accomplices decide to testify from a newly kindled sense of public spirit. As the Kansas Supreme Court has pointed out: "[I]nquiry into whether the witness was offered any 'arrangement or deal' by the State in exchange for his testimony is crucial." *Davis,* 237 Kan. at 158.

*3 The advisory committee on pattern jury instructions recommends use of a cautionary instruction on accomplice testimony. Notes on Use, PIK Crim.3d 52.18. The instruction states: "An accomplice witness is one who testifies that [he or she] was involved in the commission of the crime with which the defendant is charged. *You should consider with caution the testimony of an accomplice.*" (Emphasis added.) PIK Crim.3d 52.18. The failure to give the instruction creates trial error, particularly when the accomplice testimony is uncorroborated. *State v. Moody,* 223 Kan. 699, 702, 576 P.2d 637, *cert. denied* 439 U.S. 894 (1978).

Here, the trial court gave the accomplice instruction but denied Salas' counsel the evidence necessary to argue the significance of those words to the jury in any meaningful way. In short, the trial court's ruling left Salas' counsel with nothing in the record to explain to the jurors why they should have looked at Carter's testimony skeptically—the

critical issue for the defense. The trial judge's decision was something akin to allowing an instruction on self-defense in an aggravated battery case without allowing evidence that the putative victim attacked the defendant with a deadly weapon prompting an immediate response. A cautionary jury instruction alone, without supporting evidence, loses its relevance and fails to serve its intended purpose.

Evidence of the government's promise of leniency to a witness in a criminal case carries such potential impact at trial that the prosecution's failure to disclose that information to the defense amounts to a denial of constitutional due process. *Giglio v. United States,* 405 U.S. 150, 154–55, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). In turn, the jury should be allowed to hear that evidence to properly assess the credibility of the cooperating witness. 405 U.S. at 154–55. As Chief Justice Burger explained:

> "Here the Government's case depended almost entirely on [co-conspirator] Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it." 405 U.S. at 154.

More recently, the United States Supreme Court held that precluding all cross-examination of a prosecution witness about the favorable disposition of the witness' criminal charge violated a defendant's right of confrontation under the Sixth Amendment to the United States Constitution. *Delaware v. Van Arsdall,* 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). The Court noted that the key purpose for requiring confrontation, as guaranteed in the Sixth Amendment, is to permit defendants in criminal cases the chance to cross-examine those called as witnesses against them. 475 U.S. at 678. While trial courts "retain wide latitude ... to impose reasonable limits on such cross-examination," consistent with the Confrontation Clause, defense counsel must be afforded an opportunity for effective questioning of the adverse witnesses. 475 U.S. at 679. In that case, the government dismissed a public drunkenness charge against a witness before calling him to testify against Van Arsdall, and the trial court prohibited defense counsel from asking anything about the dismissal. The Supreme Court found that limitation on cross-examination to be constitutional error: "By thus cutting off all questioning about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony, the court's ruling violated [Van Arsdall's] rights secured by the Confrontation Clause." 475 U.S. at 679.

***4** This case comes directly within the rules laid down in the Kansas appellate courts and the United States Supreme Court regarding the treatment of accomplices or other cooperating witnesses and the means that must be afforded to cross-examine them in criminal proceedings. The trial court here impermissibly constrained into near oblivion potentially telling (and clearly relevant) evidence about considerations the State extended to Carter to induce his appearance as a witness.

At a minimum, Salas' counsel should have been permitted to question Carter about the diversion agreements he received regarding this criminal episode and in the other matter. The record indicates that the diversion agreements extended to Carter were finalized after he cooperated with law enforcement officers. Counsel should have been able to introduce the general terms of the diversion agreements at least to the extent they would have allowed Carter to avoid prosecution on the charges if he abided by the conditions of diversion. A diversion term requiring his testimony against others who he said participated in the theft of the golf clubs would be significant.

We also understand that typically in Seward County a person is eligible for diversion in one case only, rather than two. In fact, the prosecutor asked Carter during that trial, "Did you understand that ... a diversion is available to only first-time offenders?" To which Carter replied, "Yeah." The prosecutor, thus, incorrectly intimated to the jury that Carter's criminal problems were substantially less serious than the record shows. In addition, the record evidence suggests Carter got some special consideration with multiple diversion agreements. The jury was entitled to the full picture, not just part of it. Counsel for Horner did ask a couple of questions about the diversion Carter received for the burglary and theft charges related to the golf clubs. But that fell well short of what should have been permitted.

Salas' counsel likewise should have been able to show the jury Carter had been charged with burglary and theft in yet another case that remained unresolved as of trial. The open charge would support an argument that Carter had every reason to curry favor with the State to get a deal on it, too. The jury should have been given that information and allowed to weigh that possibility in evaluating Carter's veracity. (If that case actually had been resolved by the time of trial—the record is

not entirely clear on the point—then defense counsel for Salas and Horner were entitled to the details of that resolution. The *Giglio* decision requires nothing less.)

In presenting that evidence to the jury, Salas' counsel would not have been confined to questioning Carter. For either real or feigned reasons, Carter left much to be desired as an historian in his appearance in front of the jury. As indicated in *Lindquist,* 227 Kan. at 315, counsel may show a witness' bias, prejudice, or interest through various evidentiary sources. Other witnesses and relevant documents could be used to lay out the evidence for the jury.

***5** Nothing in the Kansas Code of Evidence would have precluded introduction of the diversion arrangements extended to Carter or his open felony case as bearing on his credibility. The Code does contain some provisions limiting use of similar evidence for other purposes. For example, a witness may be impeached by showing he or she has been convicted of a crime of dishonesty. K.S.A. 60–421. The diversion agreements and the unresolved criminal case are not convictions and would not have been admissible under K.S.A. 60–421. But they are circumstances having independent relevance to Carter's testimony and his incentive to favor the State. They are, therefore, admissible for that reason and for the purpose of showing bias, prejudice, and self-interest. Similarly, K.S.A. 60–455 prohibits using evidence of a person's criminal activities or civil wrongs to show that he or she has a "disposition" to act in those bad ways and, therefore, did so on a particular occasion. Here, again, the evidence would not have been offered to show Carter had a criminal disposition or behaved criminally at a particular time and place. Rather, the circumstances outline the incentives Carter had to testify against Salas and Horner to secure his own freedom. See *State v. Bowman,* 252 Kan. 883, 888–90, 850 P.2d 236 (1993) (Evidence of a witness' criminal conduct may be admitted independently of K.S.A. 60–421 and K.S.A. 60–455 to show "relationship and bias," and the court notes that K.S.A. 60–455 may be applicable to only the defendant in a criminal case.). Those incentives would be for the jurors to weigh along with Carter's demeanor and comportment on the stand in determining how much or little credit to give his testimony. See *State v. Scaife,* 286 Kan. 614, 624, 186 P.3d 755 (2008) ("One of the reasons appellate courts do not assess witness credibility from the cold record is that the ability to observe the declarant is an important factor in determining whether he or she is being truthful.").

In looking at the evidence in this case, we cannot say that the error in limiting the cross-examination of Carter was harmless. Errors are treated as harmless in a criminal case if they "do not affirmatively prejudice the substantial rights of a complaining party[.]" *State v. Dixon,* 289 Kan. 46, 67, 209 P.3d 675 (2009). In turn, we ask whether "substantial justice has been done" notwithstanding those errors. 289 Kan. at 67. Even a Confrontation Clause violation is subject to harmless error analysis. *Van Arsdall,* 475 U.S. at 682–84 (noting rule and remanding to state court for harmless error review, since the witness was one of many the prosecution presented in building a circumstantial case against the defendant).

As we have noted, Carter provided the *only* evidence linking Salas to the loss of the golf clubs. The case rose and fell (for each side) on Carter's credibility. And the courts have long held, as we have outlined here, that any deal a purported accomplice has struck or hopes to strike with the prosecution bears directly and often powerfully on his or her veracity. To deprive jurors of that information is to leave them without some of the information vital to their task as factfinders. The jurors in this case should have had that information, and Salas was denied a fair trial because they didn't. We, of course, would not presume to suggest what a fully informed jury would or should have concluded. But a jury reasonably might have measured Carter's credibility differently.

***6** The State has suggested the evidence about Carter's diversions and pending case had to be excluded because Horner was supposedly involved in at least some of the other incidents. But the issue here is what Carter received by way of consideration for his testimony and what pending criminal charges he may have hoped to get additional consideration on—not who his purported colleagues in crime may have been in those other incidents. Any reference to Horner could have been eliminated through a motion and order in limine to that effect. If the State or Horner were concerned that an order in limine might have been inadequate, either could have sought separate trials for the defendants. The State called four witnesses in its case in chief, and the entire trial was concluded in less than 2 days. The burden of separate trials would not have been substantial, though the State's witnesses at least would have had to appear at both proceedings.

We have no information about the status of the case against Horner. He, too, was convicted. Were both defendants to be retried, the district court should take appropriate steps to permit adequate cross-examination of Carter regarding any deals extended to him by the State and the status of

any unresolved criminal charges without unduly prejudicing Horner. The trial judge is better situated than this court to assess whether an order in limine could successfully serve that purpose or whether separate trials would be necessary. Excluding the evidence would not be appropriate, especially given the constitutional dimension reflected in satisfying the Confrontation Clause.

The district court, nonetheless, retains considerable control over particulars about how the evidence concerning Carter should be presented and what details may be given to the jury in a new trial. See *Sharp,* 289 Kan. at 99–100 (The trial court did not abuse its discretion in precluding defense counsel's questions to a government witness specifically about whether he planned to seek a downward sentencing departure, since the jury had been informed that he entered into a plea agreement reducing the charges against him and calling for him to testify against Sharp). As outlined in *Sharp* and *Davis,* courts are concerned that jurors may discern the sort of penalties a defendant could face from questions put to a cooperating witness about a deal he or she may have received. *Sharp,* 289 Kan. at 97–98; *Davis,* 237 Kan. at 157–58. That is, a cooperating witness may have faced the same criminal charge as the defendant and, hence, the same penalties. But with a deal, he or she may be allowed to plead to a lesser charge or walk free. Whether a cooperating witness should be questioned in front of the jury about the extent of the benefit in terms of the specific reduction in prison time has divided courts. See *United States v. Chandler,* 326 F.3d 210, 222–24 (3rd Cir.2003) (citing conflicting decisions on the issue).

There are competing considerations. 326 F.3d at 222–24 (The majority lays out the arguments for admitting evidence about the extent of the benefit given to a cooperating witness with respect to his or her reduced sentence and finds reversible error in the trial judge's decision to limit that inquiry.); 326 F.3d at 225–26 (Roth, J., dissenting) (In dissent, Judge Roth outlines the argument against allowing that sort of inquiry and cites supporting case authority.). On the one hand, the full benefit of the witness' deal may not be apparent without considering the punishment he or she would have faced without testifying and the punishment he or she expects to receive or has received as part of an agreement to testify. For example, jurors might find it significant to learn that a witness garnered a sentence of 6 months for misdemeanor theft instead of facing a possible 5 years in prison on an aggravated burglary charge in exchange for testifying. Just knowing about the reduced charges arguably does not capture the full flavor of that deal. On the other hand, jurors are not to concern themselves with the possible sentence the defendant faces, and information about punishment is generally kept from them.

*7 Jurors are instructed to disregard issues beyond proof of guilt—specifically including what may happen in the case after the verdict. PIK Crim.3d 51.10. If requested, a court could give a supplement to PIK Crim.3d 51.10 or 52.18 informing jurors that they should consider the reduction in punishment extended to the accomplice witness only for the purpose of weighing the credibility of his or her testimony and nothing else.

The law, of course, indulges the presumption that jurors follow the instructions they are given. *State v. Becker,* 290 Kan. 842, 856, 235 P.3d 424 (2010) ("Appellate courts presume that a jury follow[s] the jury instructions."). The courts rely on that presumption when, for example, they caution juries to consider other crimes evidence admitted under K.S.A. 60–455 for the limited purposes outlined in that statute and not to establish the defendant's propensity to be bad. See, *e.g., State v. Lane,* 262 Kan. 373, 391, 940 P.2d 422 (1997); PIK Crim.3d 52.06. A court would not abuse its discretion in treating evidence about potential punishment an accomplice witness has avoided in the same way. In other words, a court reasonably could conclude that a properly instructed jury would consider the information only to assess the witness' credibility and not as an external influence on a decision about the guilt of the defendant. See *Sharp,* 289 Kan. at 99–100 (reviewing issue using abuse of discretion standard). But, again, the handling of those sorts of details commonly should be left for a trial court in light of the circumstances of a particular case.

We pause briefly to consider Salas' additional argument contesting the sufficiency of the evidence to support the convictions for aggravated burglary, conspiracy to commit aggravated burglary, and felony theft. In reviewing a sufficiency challenge, we construe the evidence in a light most favorable to the party prevailing below and in support of the jury's verdict. An appellate court will neither reweigh the evidence generally nor make credibility determinations specifically. *State v. Trautloff,* 289 Kan. 793, 800, 217 P.3d 15 (2009); *State v. Pham,* 281 Kan. 1227, 1252, 136 P.3d 919 (2006). Measured against that standard, Salas' argument comes up short.

As to the aggravated burglary charge, Salas says the jury could not have found that he lacked authority to enter the

garage or that he entered with the intent to commit a theft. The homeowner's testimony established that no one was given permission to go into the garage. And the circumstances surrounding the activities Carter described would permit a jury to conclude that Salas and Horner entered the garage with the idea of taking something of value. Circumstantial evidence is sufficient to support a criminal conviction and to establish the requisite bad intent. *State v. Richardson,* 289 Kan. 118, 127, 209 P.3d 696 (2009). Sufficient evidence supported the aggravated burglary verdict.

***8** Salas contends there was no evidence to support a conspiracy to commit burglary. A conspiracy essentially amounts to an agreement between two or more persons to commit a particular crime coupled with some tangible step—an overt act—taken in furtherance of that agreement. K.S.A. 21–3302(a). The agreement need not be detailed in writing or even orally; a course of joint conduct undertaken with a common understanding is sufficient to establish a criminal conspiracy. *State v. Northcutt,* 290 Kan. 224, 231–32, 224 P.3d 564 (2010) (" '[I]t is enough if the parties tacitly come to an understanding in regard to the unlawful purpose, and this may be inferred from sufficiently significant circumstances.' " [quoting *State v. Swafford,* 257 Kan. 1023, 1040, 897 P.2d 1027 (1995)]). Here, given Carter's testimony, a jury could find a conspiracy based on the decision to drive around the block and park in front of the house after seeing the open garage door combined with the purported conduct of Horner and Salas in taking the golf clubs. All of that indicated an agreement or understanding among the three as to a course of criminal conduct, especially given Carter's willingness (based on his own account) to ferry the other two away with the clubs. If accepted, Carter's testimony sufficiently supported the conspiracy verdict.

While Salas also says the evidence would not support a verdict for felony theft, he really makes no distinct argument on the point. Plainly, the homeowner's testimony that he did not authorize anyone to take the golf clubs and his assessment of their value as exceeding $1,000 satisfies the elements of felony theft in this case. See K.S.A. 21–3701(a)(1), (b)(3). The remaining element is a defendant's intent to permanently deprive the owner of the property. Nothing in the evidence suggests the people taking the golf clubs planned to play a few rounds at the Liberal County Club and return them. Accordingly, the jury could properly infer the requisite intent from the circumstances. The verdict on the felony theft charge was adequately supported in the evidence.

We have considered the other points Salas has raised on appeal and find them insufficient to warrant any relief.

Reversed and remanded for a new trial.

All Citations

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End of Document

324 P.3d 1153 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

James D. WOLFE, Appellant,

v.

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, Appellee.

No.
110,011

May 16, 2014.

Review Denied April 29, 2015.

Appeal from Shawnee District Court; Franklin R. Theis, Judge.

Attorneys and Law Firms

Ethan S. Kaplan, of Bretz & Young, of Hutchinson, for appellant.

J. Phillip Gragson and Matthew J. Donnelly, of Henson, Hutton, Mudrick & Gragson, LLP, of Topeka, for appellee.

Before HILL, P.J., SCHROEDER, J., and HEBERT, S.J.

MEMORANDUM OPINION

PER CURIAM.

*1 James D. Wolfe was denied continuing disability coverage by the Kansas Public Employees Retirement System (KPERS) after he was found to no longer be "totally disabled." The KPERS Board of Trustees affirmed, as did the Shawnee County District Court on judicial review under the Kansas Judicial Review Act (KJRA). Wolfe now appeals. Finding no error, we affirm.

Facts

James D. Wolfe's last day of employment with the City of Topeka was on February 9, 2005, apparently due in part to impending criminal charges and their effect on his mental well-being and his ability to show up to work. On February 25, 2005, Wolfe was arrested for sex crimes involving a minor.

Wolfe's wife, Christine, applied for KPERS disability coverage on his behalf, acting through a general power of attorney. KPERS defines a "total disability" as

> "disability which prevents the *member* from performing each and every duty of any and all occupations for which the *member* is reasonably qualified by education, training or experience, and in any case, disability that requires the regular and continuous care of a *physician* unless such care would serve no useful purpose."

Wolfe's application was ultimately approved on March 31, 2006, retroactive to August 9, 2005, by KPERS' third-party disability plan administrator, Disability Consulting Group (DCG). KPERS requires individuals with disabilities to provide access to their medical records and ongoing proof of continuing disability. In 2009, KPERS determined Wolfe's medical records no longer supported a determination of total disability. By a letter dated April 6, 2009, KPERS claimed Wolfe's medical records indicated his depression was in remission and Dr. Zaylor had no reason to believe he was not capable of employment, which meant Wolfe "no longer [met] the definition of disability." KPERS provided Wolfe 30 days to "submit additional medical documentation" to support his claim for disability.

In response, Wolfe hired Dr. Milfred "Bud" Dale to perform an independent psychological evaluation of Wolfe's ability to work. Dr. Dale determined Wolfe did not meet the "criteria for the diagnosis of major depression" and if Wolfe were not incarcerated, he would be able to utilize support systems like therapy and medication to maintain employment. Wolfe took exception to the adverse determination by Dr. Dale. Wolfe indicated he did not want Dr. Dale's report released to DCG.

DCG reviewed Dr. Dale's report and advised Wolfe the "additional medical information" provided did not change the decision and "from a mental health perspective [he] no longer [met] the definition of disability per the

KPERS plan." Christine requested an administrative hearing regarding the denial of Wolfe's disability claim, pursuant to K.S.A.2009 Supp. 74–4904(2). Wolfe obtained another medical evaluation from Dr. John Spiridigliozzi.

Wolfe's appeal was timely heard. Wolfe's list of exhibits does not appear in the record. Wolfe's counsel relied in part on the Social Security Administration (SSA) determination of disability as well as on Dr. Spiridigliozzi's testimony to argue KPERS erred in terminating Wolfe's disability benefits. Dr. Spridigliozzi's report indicated Wolfe might have "inflated" his test results by self-selecting certain responses and his results could only be interpreted with "caution."

***2** The presiding officer acknowledged Dr. Spiridigliozzi diagnosed Wolfe as depressed, but found Wolfe no longer fit the KPERS definition of totally disabled because he was capable of accommodated employment.

Wolfe petitioned the KPERS Board of Trustees for review, and the Board affirmed the hearing officer, adopting the order in full. Wolfe exhausted his administrative remedies and then petitioned for judicial review.

The district court denied Wolfe's requested relief and affirmed the Board's decision. Finding "no space between the agency's opinion as adopted from its hearing officer's findings" and its own decision, the district court ruled the decision by KPERS to terminate Wolfe's disability claim was supported by substantial evidence.

Wolfe now timely appeals.

Analysis

Was the KPERS Order Denying Wolfe Continuing Disability Coverage Made Using the Correct Legal Standard?

Wolfe asserts the district court erred by affirming the presiding officer's initial order in light of the fact he had been found disabled by the SSA. The State responds Wolfe did not frame his argument to fit clearly within the statutory scope of review enumerated in the KJRA at K.S.A.2013 Supp. 77–621(c)(1) through (8).

Standard of Review

Orders of the KPERS Board of Trustees are subject to review by the Shawnee County District Court. K.S.A.2013 Supp. 77–603; K.S.A. 77–606; K.S.A.2013 Supp. 74–4904(1). The reviewing court is only able to grant relief if it finds one or more instances of error enumerated at K.S.A.2013 Supp. 77–621(c). The petitioner has the burden of proving the agency action was invalid. K.S.A.2013 Supp. 77–621(a)(1). On appeal, this court exercises "the same statutorily limited review of the agency's action as does the district court, as though the appeal had been made directly to the appellate court." *Golden Rule Ins. Co. v. Tomlinson,* 47 Kan.App.2d 408, 416, 277 P.3d 421 (2012) (citing *Kansas Dept. of Revenue v. Powell,* 290 Kan. 564, 567, 232 P.3d 856 [2010]).

Burden of Proof

Wolfe argues "the [presiding] officer and district court erred by failing to properly apply the definition of 'Total Disability.' " This appears to be an argument under K.S.A.2013 Supp. 77–621(c)(4) ("the agency has erroneously interpreted or applied the law"). However, the crux of Wolfe's argument is that the presiding officer "failed to consider and interpret the decision of the Social Security Administration correctly." This seems more like an argument under K.S.A.2013 Supp. 77–621(c)(7) ("the agency action is based on a determination of fact ... not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole").

Regardless, there does not appear to be any error in the order. The presiding officer noted the definition of "disability" used by the SSA is not the same as the definition of "total disability" used by KPERS. The SSA's definition of "disability" is "inability to engage in any substantial gainful activity by reason of any medically determinable ... impairment." 42 U.S.C. § 423(d)(1)(A) (2012). The definition of "total disability" used by KPERS is "disability which prevents the member from performing each and every duty of any and all occupations for which the member is reasonably qualified." A worker might be unable to engage in substantial gainful activity but still be able to perform some duties of some of the occupations for which he or she is qualified. Accordingly, a worker might qualify for Social Security disability but not qualify for KPERS disability. However, Wolfe argues distinguishing the KPERS definition on this basis puts too much weight on the " 'each and every' " and " 'any and all' " standards; instead, he argues, those standards should be liberally construed not to " 'require total helplessness on the part of the insured.' " *Brown v. Continental Casualty Co.,* 209 Kan. 632, Syl. ¶ 1, 498 P.2d 26 (1972). This argument is compelling but not pertinent; the presiding officer found Wolfe was previously disabled but

has sufficiently recovered to be capable of accommodated employment.

*3 Wolfe acknowledges "Social Security Disability standards ... are different from that of KPERS" but argues this court should nevertheless employ "other standards and statutory provisions" to interpret the KPERS disability program. For example, Wolfe points this court to *Munck v. KPERS,* 35 Kan.App.2d 311, 318–19, 130 P .3d 117 (2006). In *Munch,* the claimant attempted to use his refusal to engage in accommodated employment to justify continued receipt of his KPERS benefits for his disability. A panel of this court approved of the district court's adoption of a principle from workers compensation cases that a claimant "must attempt reasonably accommodated employment in order to qualify for disability benefits under KPERS." 35 Kan.App.2d at 318. However, the panel's holding was limited to an approval of the analogy, not an approval of using worker's compensation statutes to interpret the KPERS policy. The panel noted "an employee is not totally disabled ... if he or she is capable of performing duties comparable to those performed prior to the disability. Implicitly, comparable employment would encompass a position held prior to the disability which is made suitable by reasonable accommodation." 35 Kan.App.2d at 319. Accordingly, *Munck* only stands for the premise that accommodated employment is still employment, and an employee who is capable of accommodated employment is not totally disabled within the meaning of the KPERS disability policy. Wolfe's proposed "liberal definition" would preclude finding an employee who is capable of accommodated employment is nevertheless "totally disabled" under the KPERS definition, which is contrary to this court's holding in *Munch.*

The district court did not err in declining to adopt the SSA's definition of "disability."

Is the Posthearing Order Denying Wolfe Continuing Disability Coverage Supported by Substantial Competent Evidence?

Wolfe argues "Dr. Spiridigliozzi's testimony and report, in addition to the absence of contradictory evidence, provides an ample showing that [he] is incapable of performing his previous duties due to his manic episodic symptoms and behavior," implicitly arguing the presiding officer's order was not "supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole." K.S.A.2013 Supp. 77–621(c)(7). KPERS asserts substantial evidence supports the presiding officer's posthearing order and asks this court to affirm.

This court must review the whole record to determine whether the factual findings of the presiding officer are supported by substantial evidence. K.S.A.2013 Supp. 77–621(c)(7). The order "may be set aside if it is based on factual findings that are not supported by substantial evidence." *In re Protests of Oakhill Land Co.,* 46 Kan.App.2d 1105, 1115, 269 P.3d 876 (2012). Substantial evidence is that which "a reasonable person could accept ... as being sufficient to support the conclusion reached ." *In re Protests of Oakhill Land Co.,* 46 Kan.App.2d at 1114 (citing *Herrera–Gallegos v. H & H Delivery Service, Inc.,* 42 Kan.App.2d 360, 362–63, 212 P.3d 239 [2009]).

*4 The record demonstrates a split in opinion among medical professionals regarding whether Wolfe was still totally disabled. Dr. Barnett believed Wolfe's ability "to consistently maintain employment may be limited by his current psychiatric symptoms." Dr. Zaylor, however, suspected Wolfe's symptoms were feigned or exaggerated. Dr. Spiridigliozzi's report also acknowledged Wolfe might have "inflated" some of his test responses. Dr. Dale did not believe Wolfe met the diagnostic criteria for either bipolar disorder or major depression and opined he was capable of accommodated employment. Dr. Spiridigliozzi diagnosed Wolfe with both bipolar disorder and a schizotypal personality disorder. At the hearing, Dr. Spiridigliozzi testified Wolfe "would not be able to be gainfully employed from a psychological perspective."

Viewed alone, Dr. Spiridigliozzi's report and his direct testimony would probably be accepted by a reasonable person as sufficient to support a finding of "total disability" under the KPERS definition. However, on cross-examination, Dr. Spiridigliozzi admitted that bipolar disorder is treatable with medication and acknowledged Wolfe had previously been employable with certain accommodations. Thus, Dr. Spiridigliozzi's testimony, when tested by cross-examination, lost some of its believability and it is likely a reasonable person would no longer accept it as sufficient to support the conclusion Wolfe was "totally disabled" under the KPERS definition.

Viewed in light of the record as a whole, a reasonable person could accept the conclusion the order was based on evidence that was sufficient to support the presiding

officer's conclusions. Wolfe was capable of accommodated employment when his exaggerated symptoms were removed.

Wolfe wants this court to consider Dr. Spiridigliozzi's testimony uncontroverted, but it was not. To the extent Wolfe asks this court to reweigh Dr. Spiridigliozzi's report, we are precluded by law from "reweigh[ing] the evidence or engag[ing] in de novo review." K.S.A.2013 Supp. 77–621(d).

In a final attempt to convince this court the evidence weighed in his favor, Wolfe relies on the SSA's determination of disability. However, Wolfe also acknowledges his SSA disability determination was based in part on "a disorder of the back [which] was included in the list of severe impairments." Although he characterizes the physical impairment as not being used for the "justification" of the disability determination, this argument may not be tenable; federal law requires the SSA to consider the "combined effect of all of the [applicant]'s impairments" in determining whether the applicant's impairments are "of a sufficient medical severity that such impairment ... could be the basis of eligibility" for disability. 42 U.S.C. § 423(d)(2)(B). Thus, the SSA's determination of disability would only be persuasive if Wolfe's KPERS claim was also based on a back injury. The presiding officer did not err in declining to consider the SSA's determination of disability as evidence weighing in Wolfe's favor.

***5** Viewed in light of the record as a whole, the initial order is based on determinations of fact supported by substantial evidence. The district court did not err in affirming the decision of KPERS finding Wolfe was no longer "totally disabled."

Affirmed.

All Citations

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309 P.3d 974 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

STATE of Kansas, Appellee,

v.

Lorenzo Charles WEST, Appellant.

No.
107,865

Sept. 27, 2013.

Review Denied Aug. 28, 2014.

Appeal from Finney District Court; Michael L. Quint, judge.

Attorneys and Law Firms

Christina M. Kerls, of Kansas Appellate Defender Office, for appellant.

Tamara S. Hicks, assistant county attorney, Susan Lynn Hillier Richmeier, county attorney, and Derek Schmidt, attorney general, for appellee.

Before MALONE, C.J., POWELL and SCHROEDER, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** A jury convicted Lorenzo Charles West of multiple crimes involving his step-daughter, including three counts of rape. In this direct appeal, West argues that (1) the district court erred by limiting his cross-examination of the complaining witness, (2) there was insufficient evidence to support the conviction of aggravated battery that caused great bodily harm, (3) the district court erroneously believed that the Kansas Supreme Court's prior rulings on the constitutionality of Jessica's Law sentences disposed of his arguments on constitutionality, (4) the district court erred in denying his motions for downward departures, and (5) the district court violated his rights under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Finding no reversible error, we affirm the district court's judgment.

Factual and Procedural Background

We will review the facts in considerable detail. On November 9, 2010, Shirley Milholland called West at work, concerned because her son, Justin Soukup, was dating West's step-daughter, P.B. At the time, P.B. was 15 years old and Soukup was 18 years old. MilhoUand testified that she called West in the hopes that he would talk to P.B. about the situation, but West became upset and asked MilhoUand for details about the relationship between Soukup and P.B. and whether they were sexually active. When MilhoUand told West that P.B. and Soukup were not sexually active, West said that he would take care of the situation immediately and hung up the phone.

West went to the workplace of S.B., P.B.'s mother, to discuss the situation with her. West later testified that they were concerned about P.B. dating Soukup because he was 18 years old. West and S.B. decided that they should talk with P.B. before Soukup could tell her that his mother had called West, but when they attempted to pick up P.B. from school, the school informed S.B. that P.B. was not in class. S.B. asked the school to call her when P.B. returned, which the school did, and S.B. picked up P.B. at school at approximately 10:30 a.m. The events of the day from that point on differ greatly according to P.B., S.B., and West.

S.B. testified at trial that when she and P.B. arrived at home, and S.B. and West asked where P.B. had been, P.B. first said she was walking around the school with her friends. West and S.B. asked P.B. if she was dating Soukup, but P.B. repeatedly denied it; the situation escalated and everyone became upset and loud. When P.B. eventually admitted that she had been with Soukup that morning skipping class, West slapped P.B.'s face. P.B. fell down, and West pulled her hair and told her to go to her room. S.B. later saw P.B. in the bathroom washing her face because she had been crying, but there was no blood on P.B.'s face or in her hair.

West testified that when P.B. and S.B. came home from the school, West asked P.B. where she had been and P.B. initially said she had been in the bathroom with a girlfriend. When West accused P.B. of lying, P.B. said that they had been

walking around the school. West told P.B. that he had received a call from her boyfriend's mother that morning and asked P.B. who her boyfriend was. P.B. denied having a boyfriend, and West "got in her face" and cornered her by a guitar on the wall. West grabbed P.B. by the hair and put her head against the wall and, when P.B. admitted she had been with Soukup, West slapped her. West testified that the physical altercation lasted 15 to 20 minutes and, while he did not remember all the details, he admitted that he had hit P.B. Afterward, West and P.B. apologized to each other and there was no further fighting.

*2 P.B.'s version of events differs greatly from S.B.'s and West's. According to P.B.'s trial testimony, she went to school on November 9, 2010, and met Soukup; instead of going to class, they walked around together. When she went to her next class, she was told that her mother was coming to pick her up. When they arrived at home, West was waiting and threw P.B. into the wall, yelling, "So who's Justin?" West choked P.B. and punched her in the face, then grabbed her hair and hit her head against the floor repeatedly. P.B. testified that the fighting lasted for approximately an hour, until West punched P.B. in the face and told her to go to her little sister's bedroom. P.B. was sitting in the bedroom crying when West came into the room and asked if she had sex with Soukup. When P.B. denied having sex, West spread her legs open and punched her in the vagina. West then returned to the living room and, after approximately 5 to 10 minutes, P.B. got a book and followed West into the living room, where she sat down to read. West knocked the book out of her hands, told S.B. to close the door and curtains, and began beating P.B. again. West pulled her hair, threw her across the room, punched and spit in her face, grabbed her by the back of her head, and shoved her face into the living room wall. Afterward, both P.B. and West went to his bedroom, where P.B. slept on the floor while West slept on the bed.

Later, according to P.B., West sent S.B. out of the house on an errand, and he then asked P.B. if she had kissed Soukup. When P.B. denied it, West spread her legs open and punched her in the vagina. P.B. also testified that the beating continued in the bathroom, where West threw her against a mirror, threw her into the bathtub, punched her, dunked her head in the toilet bowl, hit her head on the side of the toilet, and hit her over the head with a trash can. West then dragged her out of the bathroom back into the living room and continued beating her. P.B. testified that this "second beating" lasted approximately an hour or two.

Afterward, P.B. snuck out the back door and went to find her neighbor, Tara Holmes. No one was home, so P.B. hid in Holmes' empty swimming pool. At one point, P.B. went to another neighbor's house and called her friend Brittany Hahn, saying that West had beaten her because she was dating a boy and that she needed a ride. Hahn was out of town and tried to arrange another ride, but was unsuccessful. When Holmes and her mother got home, P.B. told them what had happened but asked them not to call the police. Holmes later testified that P.B. was barefoot, in shorts and a t-shirt, with messy hair and a swollen face. Holmes' mother testified that P .B. was squinting and it was hard for her to walk. In an attempt to help P.B. clean up, Holmes brushed P.B.'s hair; she noticed dried blood in P.B.'s hair and on her scalp and a part of her scalp felt "mushy."

The following morning, P.B. and Holmes went to Officer Addison Morgan, the school resource officer at Garden City High School, and P.B. told Morgan that West had beaten her severely the day before. Morgan later testified that when P.B. arrived at his office, she was visibly upset, had some redness and swelling above her left eyebrow, and was walking gingerly, as though in pain.

*3 As P.B. talked to Morgan, he decided to involve Master Patrol Officer Hailey Knoll, another school resource officer, who had specialized training in the areas of domestic violence, sexual assault, and forensic interviewing. After receiving Morgan's call, Knoll went to the high school and met with P.B. After learning that P.B. had been beaten for several hours the previous day, Knoll took her to the emergency room, where she photographed P.B.'s injuries and Dr. Harold Perkins examined her. Perkins later testified that he saw evidence of trauma consistent with hair-pulling; swelling and bruising above and below both eyes; swelling and bruising in front of P.B.'s left ear and on both her elbows; bruising on the left side of her chin; scrapes, scratches, and abrasion to the back of her neck, her gluteal cleft, and her right buttock; bruising on the back of both shoulders; scrapes in her mouth; damage consistent with her biting her tongue; cuts on her upper lip; and an abrasion on her lower back and her left labia.

After the examination, Knoll took P.B. to the police station and conducted a forensic interview. In this interview, P.B. told Knoll that West had beaten her from approximately 10 a.m. to 3:45 p.m. the day before because he was mad at her for "cheating on him" by hanging out with another man. When asked to elaborate, P.B. told Knoll that West was her

boyfriend, that they were in a relationship, and that West accused her of cheating on him any time she had contact with another male. Moreover, P.B. told Knoll that she first had sex with West on August 16, 2006, and that they had frequent oral and vaginal sex since then.

After the interview, Knoll took P.B. back to the hospital, where Johanna Comett, a registered nurse trained as a sexual assault nurse examiner performed a sexual assault exam. Cornett later testified that P.B. had bruising on her face, head, left ankle, right elbow, left arm, and hand. When Cornett asked, P.B. said she received the injuries in an altercation with her stepfather, described the altercation much as she had to Knoll, and told Cornett that West had been her boyfriend for 4 to 5 years. P.B. said that the sex was consensual, that West was her only sexual partner, and that she and West shared a bedroom and her mother slept in a different room.

As a result of P.B.'s statements, the Garden City police executed a search warrant that same day at P.B.'s home and arrested West and S.B. Officer Omar Mora of the Garden City Police Department interviewed S.B. at the police department. He testified at trial that S.B. told him that there were two holes in the wall that happened when West pushed S.B. into the wall twice and that West had used his fists on P.B. According to Mora, S.B. also said that she did not think P.B. deserved what happened to her but that S.B. had not tried to intervene because if she had, she would not still be alive. S.B. told Mora that if she reported West to the police, he would kick her out and she would have nowhere to go.

*4 On December 8, 2010, Knoll interviewed P.B. a second time; Knoll and P.B. went over every event of sexual abuse P.B. alleged, creating a timeline. P.B. related over 30 specific dates of vaginal, oral, or anal sex, many of them on holidays or birthdays, and many more unspecified recollections. P.B. also told Knoll that she once had a sexual encounter with Fabian, one of S.B.'s former boyfriends, and that West was extremely upset by this fact. When Knoll asked P.B. why she had not told him about the situation with West before, P.B, said that West had threatened to kill her if she talked to Knoll.

On January 3, 2011, the State charged West with 12 counts of rape, one count of aggravated intimidation of a witness or victim, seven counts of aggravated criminal sodomy, two counts of criminal sodomy, seven counts of aggravated indecent liberties with a child, one count of aggravated kidnapping, two counts of aggravated battery, and one count of criminal threat. After a preliminary hearing, the district court dismissed one count of aggravated criminal sodomy and allowed the State to amend the information to change one count of aggravated criminal sodomy to aggravated indecent liberties with a child.

The jury trial began on December 5, 2011, and we will summarize the testimony of each witness. The State first presented testimony from Hahn, who testified about the phone call she received from P.B. Hahn also testified that P.B. had told her prior to this incident that West hit her when he was drunk and that P.B. and West had been having sex since P.B. was 8 years old. Hahn further testified that P.B. and West's body language was more like a couple than a father and daughter. Holmes and her mother both testified to the events of the night P.B. arrived at their house. Holmes also testified that P .B. had previously come to school with a black eye she said West caused and that P.B. had told her that previous school absences were due to West beating her. On cross-examination, Holmes stated that, although West and P.B. acted as though they were best friends, P.B. had never told her prior to West's arrest that she had a sexual relationship with West.

The State also called Summer Miller, a high school teacher in Garden City, who had seen P.B. and Holmes at school on November 10, 2010; she testified that P.B.'s face was "very badly bruised and swollen." Morgan testified about the statement P.B. gave him about her injuries and his subsequent request for Knoll's involvement. Morgan stated that while at the hospital, he overheard Dr. Perkins tell someone, "Whoever did this took some time to beat on this girl ." Knoll testified extensively as to the events related above, and the photographs Knoll took of P.B.'s injuries were admitted into evidence.

The State also presented testimony from a teacher and a school counselor at P.B.'s middle school, who testified about suspicious things P.B. had said while attending that school, including that P.B. took naps in her dad's bed and that she and her dad had a secret room in the attic. Officer Mora testified as to her interview with S.B. Detective Tanya Bradley, who had photographed P.B.'s injuries in the women's locker room at the police station, testified that P.B .'s scalp felt spongy and that she had seen bruising on P.B.'s arms, back, buttocks, face, and vaginal area. Perkins and Cornett also testified about P.B.'s injuries and their observations.

*5 The State also presented the testimony of Soukup, Milholland, S.B ., and P.B.'s younger sister, H.B., who

testified that when she lived with P.B., P.B. slept mostly with H.B. but slept in West's room "a few times." Dr. Sue Dowd, a clinical psychologist, testified generally about the ways in which people disclose abuse, the effects when an abuser is related or otherwise connected to a child victim, the effects of a child's IQ on disclosure, the effects when an abuser is romantically involved with a child's mother, and the effects of molestation on children. On cross-examination, Dowd conceded that she had never met P.B. or talked with S.B.

On the fourth day of trial, P.B. testified. P.B. described the events on November 9, 2010, and she testified about her sexual history with West. P.B. also testified about the allegations she had made about Fabian, S.B.'s ex-boyfriend. On cross-examination, P.B. admitted that she lied when she told Knoll that she and West had sex on Martin Luther King, Jr. Day; she said she lied because she wanted to get West into more trouble. The cross-examination focused on the inconsistencies in P.B.'s version of the events. After P.B.'s testimony, the State rested its case and the court dismissed eight counts that were not supported by the evidence and allowed the State to amend two additional charges.

West began presenting his evidence by calling Dr. John Spiridigliozzi, who had evaluated P.B. in September 2011 for purposes of the trial. Spiridigliozzi had reviewed documents and spent several hours with P.B., S.B., and West's parents, and he testified extensively about his evaluation and conclusions. Spiridigliozzi testified that P.B.'s family history included mental retardation, schizophrenia, bipolar disorder, anxiety, and depression. He further testified that he watched a videotape of Knoll's interview with P.B. at which P.B. recited the dates on which she and West had sexual contact. Spiridigliozzi then took 14 of those dates and asked P.B. about what had happened on those dates to see if P.B. could recall with the same detail and events she reported to Knoll. Spiridigliozzi testified that P.B. was inaccurate on all 14 of the instances.

Next, West called Kim Ramsey, a social worker with SRS who in October 2009 had investigated suspected sexual abuse of P.B. by West. Ramsey had interviewed P.B., who told her that Fabian had inappropriately touched her but no one else had done so since then. P.B. also told Ramsey she slept in a bedroom with H.B. After investigating further, Ramsey concluded the allegations of sexual abuse were unsubstantiated.

West then recalled Knoll, questioning her about the inconsistencies in P.B.'s telling of the events between her interview with Knoll and her trial testimony. Josh Mercedes, West's longtime friend, and Joaquin Cruz, West's older brother, both testified as well. They testified that they had seen P.B. and West together but had never seen anything sexual. Gary and Lucinda West, West's parents, both testified that they never saw any unusual injuries to P.B. Gary West testified, however, that on one occasion, he saw P.B. chase S.B. out of her house with a knife.

***6** West, who was 28 years old at the time of the trial, testified on his own behalf about his version of the events on November 9, 2010. Although he admitted hitting P.B. and putting her head against the wall, he denied having beaten P.B. prior to that occasion. He stated that he did not force P.B. to stay in the house, and that he was never in the bathroom with her, never punched her in the vagina, and never accused her of cheating on him. He also explicitly denied ever having a sexual relationship with P.B, touching her inappropriately, being touched inappropriately by her, having oral or vaginal sex with her, kissing her romantically, or threatening to kill her.

West also called Sheryl Pearson from St. Catherine's Hospital, who brought medical records that showed West was hospitalized between January 1 and January 10, 2009. Dr. Edward Mangosing testified that he treated West while he was hospitalized; he had diagnosed West with diabetic ketoacidosis, a complication of uncontrolled diabetes, and West had been in critical condition. This testimony was to rebut P.B.'s claim that she and West had oral and vaginal sex on January 1, 2009.

The State called Dowd as a rebuttal witness. Dowd expressed concern that Spiridigliozzi interviewed P.B., S.B., and West's parents but did not interview others. Moreover, Dowd was troubled that Spiridigliozzi had not included in his report exactly what was said in the interviews. After Dowd's testimony, the judge instructed the jury and the parties gave closing arguments. The jury found West guilty of three counts of rape, one count of aggravated intimidation of a witness, one count of aggravated criminal sodomy, two counts of aggravated indecent liberties with a child, one count of aggravated kidnapping, one count of criminal threat, and two counts of aggravated battery, including one count of aggravated battery that caused great bodily harm.

Prior to sentencing, West filed a motion for departure moving his off-grid crimes of rape and aggravated criminal sodomy to the sentencing guidelines grid, and he filed a separate motion for a downward departure on all convictions. The district court held the sentencing hearing on January 30, 2012, and denied West's motions for departure. For each rape and the aggravated criminal sodomy conviction, the district court imposed a life sentence without the possibility of parole for 25 years under Jessica's law. The district court imposed a presumptive guideline sentence for the other convictions, including a sentence of 554 months' imprisonment for aggravated kidnapping. All sentences were to be served concurrently. West timely appealed the district court's judgment.

LIMITING CROSS–EXAMINATION

West first argues that the district court erred by limiting his cross-examination of the complaining witness, P.B. During her testimony on direct examination, while describing West's genitals, P .B. stated, "[H]is penis was the biggest one I've ever seen." On cross-examination, the following exchange occurred:

*7 "Q. You had mentioned that Lorenzo's private area is the biggest one you've ever seen?

"A. Yes.

"Q. Have you seen a lot of private areas?

"MS. HICKS [the prosecutor]: Objection, Your Honor.

"THE COURT: The nature, legally, of the objection?

"MS. HICKS: Rape shield.

"MS. COTT [defense counsel]: Just because you've seen one doesn't—

"THE COURT: Do you want to respond to the rape shield issue?

"MS. COTT: Just because she has seen a penis doesn't mean she's had sex with that person. It could be a movie, books, magazines.

"THE COURT: This is not excluded by—this is not testimony that we have excluded from the protection of a rape shield. The objection is sustained. We will not go in this direction."

West argues that the district court violated his right to a fair trial by refusing to allow him to further cross-examine P.B. about her statement. Specifically, West argues that the evidence was relevant, was not prohibited by the rape shield statute, and that the error of limiting cross-examination was not harmless. The State argues the opposite, contending that the evidence was irrelevant, the rape shield statute prevented further questioning, and, if there was error, it was harmless.

When reviewing a district court's decision concerning the admission of evidence, an appellate court first determines whether the evidence is relevant. All relevant evidence is admissible unless statutorily prohibited. *State v. Riojas,* 288 Kan. 379, 382, 204 P.3d 578 (2009). Evidence is relevant if it has "any tendency in reason to prove any material fact." K.S.A. 60–401(b). There are two elements of relevant evidence: a materiality element and a probative element. *State v. Houston,* 289 Kan. 252, 261–62, 213 P.3d 728 (2009). Evidence is probative if it has " 'any tendency in reason to prove' " a fact. *State v. Reid,* 286 Kan. 494, 505, 186 P.3d 713 (2008) (citing K.S.A. 60–401[b]). The issue of whether evidence is probative is reviewed under an abuse of discretion standard whereas the materiality of evidence is reviewed de novo. *State v. Berriozabal,* 291 Kan. 568, 586, 243 P.3d 352 (2010). However, even if evidence is both probative and material, the trial court must still determine whether the probative value of the evidence outweighs its potential for producing undue prejudice. Appellate courts review this determination for abuse of discretion. *State v. Wells,* 289 Kan. 1219, 1227, 221 P.3d 561 (2009).

Moreover, "[a] district court's decision to limit cross-examination is reviewed under an abuse of discretion standard. [Citation omitted.]" *State v. Stafford,* 296 Kan. 25, 41, 290 P.3d 562 (2012). An abuse of discretion occurs when a judicial action (1) is arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3) is based on an error of fact. *State v. Floyd,* 296 Kan. 685, 687, 294 P.3d 318 (2013). If no reasonable person would agree with the action of the district court, the action constitutes an abuse of discretion. 296 Kan. at 687.

*8 West argues that the evidence was relevant to P.B.'s credibility; if he could have established that P.B. had never seen another penis, it would have shown the jury that she was embellishing her testimony. Our Supreme Court has found, in a similar situation, that the credibility of an alleged victim of a sexual offense "was a material issue at trial because

it certainly had a legitimate and effective bearing on the jury's determination of whether [the defendant] committed the criminal acts against [the victim]." *Stafford,* 296 Kan. at 44.

Even if the evidence were relevant, the district court must then apply the statutory rules controlling the admission and exclusion of evidence. *Riojas,* 288 Kan. at 383. Here, the district court cited the Kansas rape shield statute, K.S.A.2010 Supp. 21–3525(b), which stated, in pertinent part:

> "Except as provided in subsection (c), in any prosecution to which this section applies, evidence of the complaining witness' previous sexual conduct with any person including the defendant shall not be admissible, and no reference shall be made thereto in any proceeding before the court, except under the following conditions: The defendant shall make a written motion to the court to admit evidence or testimony concerning the previous sexual conduct of the complaining witness."

Although the district judge did not make a detailed finding as to why the cross-examination was prohibited, he sustained the State's objection, which was clearly based upon the rape shield statute. "A district court's decision to exclude evidence under the rape shield statute is subject to an abuse of discretion standard." *State v. Lackey,* 280 Kan. 190, 219, 120 P.3d 332 (2005), *cert. denied* 547 U.S. 1056 (2006), *overruled on other grounds by State v. Davis,* 283 Kan. 569, 575, 158 P.3d 317 (2006). To the extent that analysis requires interpretation of the rape shield statute, however, this court exercises unlimited review. *State v. Ross,* 295 Kan. 1126, 1132, 289 P.3d 76 (2012).

West first argues that the rape shield statute's protections were inapplicable because he was not attempting to question P.B. about her prior sexual conduct. West asserts that P.B. could have seen other penises in movies, books, or magazines, none of which would involve P.B.'s previous sexual conduct. West's argument is based upon an assumption that P.B.'s answer would have involved only movies, books, or magazines. As the State notes, if P.B. had responded that she had seen male genitalia in person, such an answer could easily involve her prior sexual conduct.

As West continues, however, such testimony was admissible pursuant to subsection (c) of the rape shield statute, which provides:

> "In any prosecution for a crime designated in subsection (a), the prosecuting attorney may introduce evidence concerning any previous sexual conduct of the complaining witness, and the complaining witness may testify as to any such previous sexual conduct. *If such evidence or testimony is introduced, the defendant may cross-examine the witness who gives such testimony* and offer relevant evidence limited specifically to the rebuttal of such evidence or testimony introduced by the prosecutor or given by the complaining witness." (Emphasis added.) K.S.A.2010 Supp. 21–3525(c).

***9** If a statute is plain and unambiguous, an appellate court will not read into the statute something not readily found in it. *State v. Urban,* 291 Kan. 214, 216, 239 P.3d 837 (2010). The plain language of subsection (c) appears to apply here. On direct examination, P.B. testified that West's penis was "the biggest one I've ever seen." Because the testimony was introduced by the State, subsection (c) explicitly allows West to cross-examine P.B. about the testimony. Thus, the district court erred by relying upon the rape shield statute to limit the cross-examination.

The State argues that any error in denying West further cross-examination was harmless. Under the harmless error standards of K.S.A. 60–261, K.S.A. 60–2105, and the constitutional harmless error rule of *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, *reh. denied* 386 U.S. 987 (1967), the test is whether the error affected substantial rights; in other words, the question is whether the error affected the outcome of the trial. *State v. Ward,* 292 Kan. 541, 565, 256 P.3d 801 (2011), *cert. denied* 132 S.Ct. 1594 (2012). West claims that the limitation of cross-examination affected his ability to confront an accuser as guaranteed by the Sixth Amendment to the United States Constitution. Likewise, our Supreme Court recently held that "[a] defendant's right to impeach a complaining witness' credibility is a fundamental right, protected by the Confrontation Clause of the Sixth Amendment." *State v. Brooks,* 297 Kan. ——, 305 P.3d 634, 2013 WL 3853202, *5 (July 26, 2013). Accordingly, we must apply the federal constitutional harmless error rule, which "generally provides that 'an error may be declared harmless where the party benefitting from the error proves beyond a reasonable doubt that the error did not affect the outcome of the trial in light of the entire record, *i.e.,* where there is no reasonable possibility that the error contributed to the verdict.' [Citation omitted.]" See *State v. Holman,* 295 Kan. 116, 143, 284 P.3d 251 (2012).

In *Brooks,* our Supreme Court recently addressed an issue similar to the one presented here. In that case, a jury convicted

the defendant of rape and aggravated criminal sodomy but acquitted him of five additional counts. The victim testified at trial that the defendant had a scar on his penis. On appeal, the defendant contended that he received ineffective assistance of trial counsel when his counsel failed to seek a continuance to obtain evidence that would have rebutted the existence of such a scar. This court found that although trial counsel's performance was deficient, the defendant failed to establish prejudice in order to prevail on his claim of ineffective assistance of counsel. 2013 WL 3853202, at *1.

On review, the Kansas Supreme Court noted that the victim's credibility was critical to the State's prosecution and that an effective impeachment of that credibility would have been significant. 2013 WL 3853202, at *4. The Supreme Court found that this court "speculated about the weight the jury might have given to such impeachment evidence" and "engaged in an assessment of [the victim's] credibility, concluding that her believability with the jury would have survived the successful rebuttal of her allegedly inaccurate description of [the defendant's] penis. [Citation omitted.]" 2013 WL 3853202, at *4–5. The Supreme Court determined that this analysis "ran afoul of the oft-stated rule that an appellate court will not determine the credibility of witnesses or weigh conflicting evidence. [Citation omitted.]" 2013 WL 3853202, at *5. Specifically, the Supreme Court held that "[t]he relative importance of testimony about the presence or absence of a penile scar was something the jury was supposed to decide." 2013 WL 3853202, at *5.

***10** Here, West, like the defendant in *Brooks,* was convicted of some charges and acquitted of others. Additionally, like the victim in *Brooks,* P.B.'s credibility " 'was an all-important element in the State's case.' " Nevertheless, there are important distinctions between *Brooks* and the instant case. In *Brooks,* the victim's claim rested on whether the defendant had a scar on his penis. Had the defendant presented medical records at trial stating he had no visible scars on his penis, such as he presented at the ineffective assistance of counsel hearing, this evidence would have challenged the factual basis for the victim's testimony. See 2013 WL 3853202, at *2. Here, the testimony on which West bases his claim of error was that his penis was "the biggest one [P.B. had] ever seen." This is not such a claim that establishes an objectively identifying physical characteristic. Even if West could have somehow successfully undermined the truthfulness of this subjective statement through cross-examination, the impeachment would not have directly rebutted P.B.'s claim of sexual abuse, as the impeachment would have accomplished in *Brooks* .

Moreover, our Supreme Court in *Brooks* made much of the State's closing argument, pointing out that the State argued, " 'You heard [the victim] which is unrefuted describe [the defendant's] genitalia. How it was uncircumcised and how it had a small scar. Unrefuted. How would she know that?' " 2013 WL 3853202, at *6. No such use of P.B.'s statement and the lack of cross-examination of the statement to bolster P.B.'s credibility occurred here. There is no evidence that P.B.'s statement was a "weighty part" of the State's case. See 2013 WL 3853202, at *6.

Our Supreme Court has provided guidance to follow when determining whether a Confrontation Clause issue has run afoul of the federal harmless error rule:

> "The correct inquiry is whether, assuming that the damaging potential of the cross-examination was fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, and, of course, the overall strength of the prosecution's case.' [Citation omitted.]" *Holman,* 295 Kan. at 143.

P.B.'s testimony was important; she was the complaining witness and her credibility was critical to the State's case while West's ability to undermine her credibility was critical to his defense. P .B.'s statement that West's penis was the biggest she had ever seen, however, was not critical to the State's case or to West's theory of defense. West impaired P.B.'s credibility in many ways throughout the trial. On cross-examination, P.B. admitted that she lied when she told Knoll that she and West had sex on Martin Luther King Day and that she had lied in order to get West into more trouble. West also extensively explored the inconsistent statements P.B. gave to different people about the abuse. West introduced testimony about an investigation of previous allegations of sexual abuse of P.B. by West; after an investigation, the allegations were found to be unsubstantiated. The jury was well-equipped to evaluate P.B.'s credibility.

*11 After a review of the relevant factors quoted in *Holman,* considered in light of the warnings in *Brooks* not to usurp the role of the jury and reweigh evidence, we conclude beyond a reasonable doubt that any error in limiting the cross-examination of P.B. about penis size did not affect the outcome of the trial in light of the entire record. In other words, there was no reasonable possibility that the limitation of cross-examination on that statement contributed to the verdict. Thus, the district court's error does not require the reversal of West's convictions.

Sufficiency of the Evidence to Support Conviction of Aggravated Battery that Caused Great Bodily Harm

Next, West argues that there was insufficient evidence to support his severity level 4 aggravated battery conviction. Specifically, West alleges that the State failed to present sufficient evidence to prove that West caused great bodily harm or disfigurement to P.B. as required by K.S.A. 21–3414(a)(l)(A). The State, on the other hand, argues that the evidence was sufficient to support the conviction.

When the sufficiency of the evidence is challenged in a criminal case, an appellate court reviews such claims "by looking at all the evidence in a light most favorable to the prosecution and determining whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt." *State v. Frye,* 294 Kan. 364, 374–75, 277 P.3d 1091 (2012). In determining whether there is sufficient evidence to support a conviction, the appellate court will not reweigh the evidence or assess the credibility of witnesses. *State v. Hall,* 292 Kan. 841, 859, 257 P.3d 272 (2011).

K.S.A. 21–3414(a)(1)(A) provides that aggravated battery is "[i]ntentionally causing great bodily harm to another person or disfigurement of another person." West argues that the State failed to prove beyond a reasonable doubt that P.B. suffered great bodily harm or disfigurement. West points to Dr. Perkins' testimony that P.B. suffered no intracranial bleeding, no fractures, and no internal bleeding. Although P.B. suffered numerous scrapes and bruises, West contends that these injuries alone are not sufficient to show great bodily harm.

West cites *State v. Dubish,* 234 Kan. 708, 675 P.2d 877 (1984), a case in which the defendant was convicted of aggravated battery by causing great bodily harm, and the court stated that "[t]he word 'great' distinguishes the bodily harm necessary in this offense from slight, trivial, minor or moderate harm, and as such it does not include mere bruises, which are likely to be sustained in simple battery." 234 Kan. at 715. But like the victim in *Dubish,* P.B. did not suffer mere bruises, the likes of which are sustained in simple battery. Perkins testified that P.B. suffered swelling and bruising above and below both eyes, in the front of her ear, on the left side of her chin, and on both elbows; bruising on the back of both shoulders; cuts on her upper lip; scratches and abrasions on the back of her neck, and outside her right knee, her left ankle, and her right buttock; and an abrasion on her lower back and her left labia. Cornett, a registered nurse, testified similarly. P.B. testified that at the time of the trial, over a year later, she still had problems with her right elbow that limited her ability to lift weight with that arm.

*12 "Ordinarily, whether a victim has suffered great bodily harm is a question of fact for the jury to decide. [Citation omitted.]" *State v. Williams,* 295 Kan. 506, 523, 286 P.3d 195 (2012). West's argument that the State's evidence did not support the jury's finding that P.B. suffered great bodily harm asks this court to reweigh the evidence, which this court does not do. See *Hall,* 292 Kan. at 859. We conclude there was sufficient evidence, viewed in a light most favorable to the prosecution, for a rational factfinder to find beyond a reasonable doubt that West's actions caused great bodily harm to P.B.

Constitutionality of Jessica's Law Sentences

Next, West argues that the district court erroneously believed that the Kansas Supreme Court's prior rulings on the constitutionality of Jessica's Law sentences disposed of West's arguments on constitutionality. Prior to sentencing, West filed a motion for departure moving his off-grid crimes of rape and aggravated criminal sodomy to the sentencing guidelines grid, and he filed a separate motion for a downward departure on all convictions. The motions summarily challenged the presumptive sentences for the off-grid crimes as being "cruel and unusual punishment." The motions did not provide any analysis of the *Freeman* factors that are generally used by a defendant for case-specific proportionality challenges under the Eighth Amendment to the United States Constitution and under § 9 of the Kansas Constitution Bill of Rights. See *State v. Freeman,* 223 Kan. 362, 367, 574 P.2d 950 (1978).

At the sentencing hearing, West's counsel made the following brief statement challenging the constitutionality of West's presumptive sentences under Jessica's Law:

> "But before I call witnesses, I would also like to make the argument that the defendant is arguing that Jessica's law in general is unconstitutional, that it's cruel and unusual and disproportionate—not just disproportionate, but also individually disproportionate as well, Your Honor. The fact that he could go commit intentional second-degree murder and receive less time does not seem appropriate. The fact that Joaquin De Anda is going to have an opportunity for parol[e] before Mr. West if he is not granted departure, just is disproportionate. It encourages violence. If—if you can get rid of the victim by killing them, and you get less time, it's actually inviting violence of children on sex crimes to know that you could—he could have killed [P.B.] and maybe received a lesser sentence does not seem constitutional or proportionate.
>
> "Also, we would argue that it's individually proportionate —disproportionate as well with the facts of this case, that the facts of this case do not warrant consecutive life sentences or a life sentence, Your Honor. We would like to preserve, obviously, that as part of the record as far as appeal purposes."

The State did not address West's constitutional challenges to Jessica's Law. After sentencing West, the district court adjourned court, then reopened the record to make the following statement:

> ***13** "Counsel for the defendant made an argument and objected to the imposition of sentences based upon the federal constitution and that of the State of Kansas as it relates to an allegation that these sentences as imposed by the Kansas legislature and directly imposed by me in this case are a violation of the cruel and unusual punishment feature of the Bill of Rights. Court's going to find that that decision has been taken out of the Court's hands in large part, and that there are in fact decisions of the Kansas Supreme Court which would negate that, and that it is not in their opinion and in this Court's ruling a violation of the federal constitution in making these rulings."

West now argues that the judge's statement shows that the district court believed it was unable to find that a life sentence was unconstitutional in this case because our Supreme Court had found a life sentence constitutional in other cases. West frames the issue as whether the district court erred in determining whether it had authority to address the constitutional challenge to Jessica's Law, which allows de novo review by this court. *See State v. Warren,* 297 Kan. ——, 304 P.3d 1288, 2013 WL 3483812 (July 12, 2013); see also *State v. Cisneros,* 42 Kan.App.2d 376, 379, 212 P.3d 246 (2009) (stating that whether a sentencing court misunderstood its authority to grant a departure sentence is a question of law). Because West does not discuss the merits of his constitutional challenge on appeal, the only question here is whether the district court incorrectly believed it lacked the authority to find West's sentence unconstitutional.

Both challenges under § 9 of the Kansas Constitution Bill of Rights and case-specific proportionality challenges under the Eighth Amendment to the United States Constitution depend upon the factual circumstances of the specific case. Our Supreme Court has stated:

> "Three factors are considered when determining whether a sentence violates the constitutional prohibitions against a cruel and unusual punishment:
>
> " '(1) The nature of the offense and the character of the offender should be examined with particular regard to the degree of danger present to society; relevant to this inquiry are the facts of the crime, the violent or nonviolent nature of the offense, the extent of culpability for the injury resulting, and the penological purposes of the prescribed punishment;
>
> " '(2) A comparison of the punishment with punishment imposed in this jurisdiction for more serious offenses, and if among them are found more serious crimes punished less severely than the offense in question the challenged penalty is to that extent suspect; and
>
> " '(3) A comparison of the penalty with punishments in other jurisdictions for the same offense.' *State v. Freeman,* 223 Kan. 362, 367, 574 P.2d 950 (1978)." *State v. Roberts,* 293 Kan. 1093, 1096, 272 P.3d 24 (2012).

Here, West did not argue the specific *Freeman* factors, nor did he ask the district court to make the necessary legal and factual findings to determine the constitutionality of his life sentence. West's only basis for asserting that the district court misunderstood its authority is his interpretation of the judge's brief statement at the sentencing hearing. A more reasonable interpretation, however, is that the brief and general nature of the district court's denial resulted from the brief and general nature of West's constitutional arguments. The judge stated that his decision on the constitutionality

of West's sentence had been taken out of his hands "in large part" by recent Kansas Supreme Court decisions upholding the constitutionality of sentences under Jessica's Law. This statement indicates the judge realized he had some discretion in considering West's constitutional challenge. Finally, as a practical matter, we note that had West not been sentenced under Jessica's Law, his mitigated presumptive sentence under the guidelines would have been 554 months' imprisonment for each rape conviction. The record does not support West's claim that the district court erroneously believed it lacked authority to address the constitutional challenge. For this reason, we conclude that West's claim of error fails.

Motions for Downward Sentencing Departures

***14** As a separate issue, West argues that the district court erred in denying his motions for downward durational and dispositional sentencing departures. Prior to sentencing, West filed a "Motion for Downward Dispositional Departure on Off–Grid Felonies," in which he requested a departure that would move his off-grid felony convictions of rape and aggravated criminal sodomy to the Kansas Sentencing Grid. West filed a separate "Motion for Downward Durational Departure," in which he asked the district court for a downward durational departure on all convictions. West now argues that the district court erred in denying these motions.

Although West does not specify in his brief whether he is appealing the denial of departure sentences for his off-grid or on-grid convictions, this issue is necessarily limited to the off-grid crimes because West received the presumptive sentence for his other convictions. See *State v. Williams,* 37 Kan.App.2d 404, 407–08, 153 P.3d 566 ("When a trial court imposes a sentence within the presumptive guidelines for that crime, an appellate court lacks jurisdiction to consider an appeal even when a trial court denied a motion for departure. [Citations omitted.]"), *rev, denied,* 284 Kan. 951 (2007). However, this court does have jurisdiction to consider West's challenge to the denial of his departure motion under Jessica's Law.

Jessica's Law, formerly codified at K.S.A. 21–4643 and now codified at K.S.A.2012 Supp. 21–6627, provides mandatory terms of imprisonment for certain sex offenders. Under Jessica's Law, two of West's crimes of conviction —aggravated criminal sodomy involving a child under 14 years of age and rape by sexual intercourse with a child under 14 years of age—require a sentence of lifetime imprisonment with a mandatory minimum of not less than 25 years. See K.S.A.2010 Supp. 21–4643(a)(1)(B), (D). Jessica's Law further allows, however, that if it is a first-time conviction of a Jessica's Law offense and a sentencing judge reviews mitigating circumstances and finds substantial and compelling reasons, the judge may impose a departure sentence. K.S.A.2010 Supp. 21–4643(d). Mitigating circumstances include, but are not limited to:

> "(1) The defendant has no significant history of prior criminal activity.
>
> "(2) The crime was committed while the defendant was under the influence of extreme mental or emotional disturbances.
>
> "(3) The victim was an accomplice in the crime committed by another person, and the defendant's participation was relatively minor.
>
> "(4) The defendant acted under extreme distress or under the substantial domination of another person.
>
> "(5) The capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of the law was substantially impaired.
>
> "(6) The age of the defendant at the time of the crime." K.S.A.2010 Supp. 21–4643(d).

An appellate court reviews a district court's denial of a motion for a departure from a Jessica's Law sentence for an abuse of discretion. *State v. Floyd,* 296 Kan. 685, 687, 294 P.3d 318 (2013). An abuse of discretion occurs when a judicial action (1) is arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3) is based on an error of fact. 296 Kan. at 687. If no reasonable person would agree with the action of the district court, the action constitutes an abuse of discretion. 296 Kan. at 687.

***15** A "substantial" mitigating factor is a factor that is real and not imagined or ephemeral, while "compelling" implies that the facts of the case force the court to leave the status quo and go beyond what is ordinary. 296 Kan. at 688. The sentencing judge is only required to elaborate on the substantial and compelling mitigating factors if the judge grants a departure; if the judge denies the departure, the judge need not explicitly address the asserted mitigating factors. *State v. Florentin,* 297 Kan. ——, 303 P.3d 263,

269 (June 14, 2013).

Here, West asserted as mitigating factors: (1) these were his first convictions for rape and aggravated criminal sodomy, (2) until his incarceration, he had steady employment, (3) his significant other relied on him for financial support, (4) he had a supportive family, and (5) he was willing to participate in anger management or any other court-recommended program. At the sentencing hearing, four of West's relatives gave statements showing familial support for West. West argues that these are substantial and compelling reasons for a departure, cites cases in which similar reasons were considered sufficient, in conjunction with other circumstances, to justify a departure, and asserts that the district court erred in not granting his request for a departure here.

As the State notes, while consideration of these factors is appropriate, none of the cases cited by West *require* a court to impose a departure sentence. See *State v. Baptist,* 294 Kan. 728, 734, 280 P.3d 210 (2012) ("[A] district court is not obligated to depart simply because a mitigating factor exists."). Here, the district judge explicitly stated:

> "The Court ... is making a specific finding that the downward durational departure and the downward dispositional departure are not justified based upon the facts that have been presented to the Court. There are some clear findings of fact that I can present, but it is not sufficient to justify a substantial and compelling reason for departing from the statutory framework of the charges against you."

Our Supreme Court has upheld the denial of departure motions involving Jessica's Law offenses where an offender has cited mitigating circumstances including those on the statutory list, as West did here. See *Florentin,* 303 P.3d at 269–70; *Floyd,* 296 Kan. at 689. In other words, just because the evidence establishes the existence of some mitigating sentencing factors, a district court does not necessarily abuse its discretion by denying a departure motion. As our Supreme Court has recognized, a person attempting to successfully challenge the denial of a motion for departure on a Jessica's Law sentence must meet "a substantial burden." See *Florentin,* 303 P.3d at 269. "[O]ur task is not to determine whether we believe a reasonable person, or even most reasonable people, would disagree with the judge's decision. Rather, if only one reasonable person would agree with the district court judge, we must affirm the decision." 303 P.3d at 269. We conclude that West has not met his burden to show on appeal that the district court's denial of his request for a sentencing departure was an abuse of discretion.

Apprendi Issue

***16** Finally, West argues that the district court violated his constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution as recognized in *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), when it sentenced him based in part on his criminal history without first requiring his criminal history be alleged in the charging document and proven beyond a reasonable doubt to a jury. West concedes that the Kansas Supreme Court has already decided this issue against him. See *State v. Ivory,* 273 Kan. 44, 45–48, 41 P .3d 781 (2002).

This court is duty bound to follow Kansas Supreme Court precedent absent some indication that the court is departing from its earlier position. *State v. Shaw,* 47 Kan.App.2d 994, 1006, 281 P.3d 576 (2012), *rev. denied* —— Kan. ——(May 20, 2013). There is no indication that the Kansas Supreme Court is departing from its position on this issue. Therefore, we conclude the district court did not violate *Apprendi* in sentencing West.

Affirmed.

All Citations

309 P.3d 974 (Table), 2013 WL 5422316

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376 P.3d 96 (Table)
Unpublished Disposition
This decision without published opinion
is referenced in the Pacific Reporter.
See Kan. Sup. Ct. Rules, Rule 7.04.
Court of Appeals of Kansas.

STATE of Kansas, Appellee,

v.

Roger D. TUCKER, Appellant.

No.
113,469
.
|
July 15, 2016.

Appeal from Sedgwick District Court; David L. Dahl, Judge.

Attorneys and Law Firms

Samuel Schirer, of Kansas Appellate Defender Office, for appellant.

Lance J. Gillett, assistant district attorney, Marc Bennett, district attorney, and Derek Schmidt, attorney general, for appellee.

Before McANANY, P.J., HILL and BRUNS, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** Roger D. Tucker appealed his theft conviction and the resulting sentence. After he filed his notice of appeal, the State notified this court that Tucker died. Initially, we agree with the State that Tucker's appeal is moot because even if it we found in his favor, the appropriate remedy would be a new trial—not exoneration. In addition, we do not find that resolution of the issue presented in this case would serve the interests of public policy. Moreover, even if we considered the merits of Tucker's appeal, he would not be entitled to relief. Thus, we dismiss this appeal.

Facts

On March 24, 2014, the State charged Tucker with felony theft. An affidavit submitted by law enforcement alleged that in February 2014, Tucker walked into a JC Penney's in Wichita, removed a pair of new shoes from a box, put on the new shoes, placed the shoes he was wearing in the box, and returned the box to the shelf. The affidavit further alleged that Tucker placed another pair of new shoes in a shopping bag and left the store without paying for either pair of new shoes.

The affidavit also claimed that a store security guard stopped Tucker—who had two prior theft convictions—outside the store and escorted him back into the store. Although Tucker did not have a receipt, he allegedly told the security guard that he had previously purchased the new shoes and was returning them to the store. A short time later, a law enforcement officer arrived at the store, took tucker's statement, and placed him under arrest.

Subsequently, the district court appointed an attorney to represent Tucker, released him on bond, and ordered him to appear for a preliminary hearing. Evidently, Tucker objected to his first attorney's representation, so the district court appointed Bradley Sylvester from the Sedgwick County Conflicts Office to represent him.

Tucker forfeited his bond when he failed to appear at his preliminary hearing. Accordingly, the district court issued a bench warrant for his arrest. Tucker was arrested in early June 2014, and the district court conducted a preliminary hearing on July 8, 2014. Before the State presented its evidence, Tucker advised the district court that he had filed a disciplinary complaint against the prosecutor. The prosecutor denied knowledge of the existence of any disciplinary complaint and argued that Tucker did not have the authority to direct who prosecuted him.

Throughout the preliminary hearing, Tucker interrupted the district judge and the attorneys and refused to use his attorney to voice his arguments. At one point, the district judge warned Tucker that if he did not cease interrupting, he would have him removed from the courtroom. The district court ultimately overruled Tucker's motion to disqualify the prosecutor and took judicial notice of Tucker's two prior theft convictions.

As the State began presenting its evidence, Tucker told the district court that he had a conflict with his attorney. He alleged that Sylvester had told him that he would not be pushed around like an attorney who had represented Tucker in a previous case. According to Tucker, Sylvester

refused to listen to his version of the events and refused to communicate with him. In response, the district court paused the proceedings to inquire into Tucker's assertions.

*2 Sylvester explained to the district court what he had said to Tucker:

> "[The attorney who previously represented Tucker] was in the same office I was at the time and it was a very stressful situation for her. In fact, I think personally it's part of the reason why she went into private practice and why she got off the appointment list.
>
> "Last time this case was up for preliminary hearing I was unable to do it, I can't remember why, but I said can somebody cover this for me. Nobody in my office would cover it because nobody would deal with Mr. Tucker because a lot of people in my office have.
>
> "So what I just told him is he's telling me stuff, for example, the whole litany we've had about this accepting prior convictions, taking judicial notice, I've told him I think the Judge is right, I think he's right, there still is this barrage of he disagrees with me, he's telling me all this stuff.
>
> "We have met. This is a shoplifting case, I am years beyond needing to understand how to do a shoplifting case. I mean, what I mean by that is I've met with him, we've talked. There is what's supposed to be a video. I found out today there's not a video, so I'm going to be cross-examining this witness. I am happy to represent Mr. Tucker, because I will be happy to deal with what I consider difficult clients. Mr. Tucker has been a difficult client today. The record can show he has talked incessantly. And I deal with clients like that and they do not push me around.
>
> "THE DEFENDANT: Yeah.
>
> "MR. SYLVESTER: So I will represent him and I will do everything I can for him. And if he doesn't realize that, I don't know what to tell ya, because sometimes clients don't. So I am here and I'll represent him. This is going into a store and taking shoes. And he's talked to me about what he did in the store. If he wants some more time to talk and that will cure the problem, great.
>
> "If he says he and I have some sort of irreconcilable differences and he can't ever trust me or can't do anything, he can raise that issue and try to go pro se or get different counsel, but I am not backing off the statement that I made to him, with the explanation I've given the Court. And I represent every client to the fullest, to my best of my ability."

The district court then asked Tucker if he wanted time to work out his issues with Sylvester. In response, Tucker said he did not think he could repair their relationship. He further claimed that Sylvester failed to notify him of the hearing date, which resulted in his arrest. The State argued that based on Sylvester's appointment date, he could not be blamed for Tucker's arrest.

The district court then denied Tucker's motion for a new attorney, stating that he had not established justifiable dissatisfaction with Sylvester. Specifically, it found that Sylvester and Tucker had not suffered a complete breakdown in communication, that there was not an irreconcilable conflict between the two, and that Sylvester did not have a conflict of interest. Thereafter, the store security guard testified about the events on March 24, 2014, and the district court found probable cause to bind Tucker over for trial.

*3 At a hearing on a motion for bond reduction held 3 days after the preliminary hearing, Sylvester told the court that he thought he and Tucker were "getting along quite well." Sylvester explained that Tucker did not trust any defense counsel or prosecutor to do the right thing. However, Sylvester indicated that "he and I are seeing probably better eye to eye than most of his other attorneys."

Over the following months, Tucker filed several pro se motions. One of which was a combined motion to dismiss and motion to substitute counsel that was filed about 2 weeks before the scheduled trial date. Tucker alleged in his motion that Sylvester had failed to help him discover exculpatory evidence and refused to file his pro se motions. At a motions hearing held on October 24, 2012, Tucker alleged that Sylvester had requested continuances without his permission, had lied to him about documents he possessed, and had refused to support his theory of defense. Tucker also claimed that Sylvester was "in bed with the district attorney" and that his relationship with Sylvester had ceased to exist.

When the district court asked Sylvester to respond, he explained that he investigated Tucker's claims but determined that they had no merit. Sylvester also stated that when he continued the case, he explained to Tucker that it was necessary because of his heavy caseload. Sylvester stated that he had made sure that he had obtained all the available discovery in the case and had provided Tucker with copies.

However, considering the nature of the case, Sylvester pointed out that there was not much in the way of discovery.

Sylvester summarized his feelings about the case as follows:

> "So I'm not objecting at all to the Court making a finding he needs a new attorney. He can battle this issue out with a new attorney if he wants to. Maybe it's like having a doctor and a fresh look will help him out. At the conflict office we're supposed to be the gatekeepers, and I don't say this on many cases, and just suck it up and deal with clients that have issues like this. He needs to understand if he does that, the speedy trial issues, if that's the catchall, because he objects I can't continue his case, this coming Monday I'm having to continue a Jessica's Law case because his case got bumped over. If Mr. Tucker thinks the way to do that is to put the two defendants in a courtroom and whoever wins the fight goes to trial, great. That's the only way I can think of doing it other than the attorney with his schedule saying this when I'm going to try it.
>
> "I'm just flabbergasted that he's still saying I violated every right in the book. I don't think from what he stated he should get a new attorney, but I think he believes wholeheartedly what he's saying and that makes him so angry we're never going to be able to talk again. I'll represent him at trial."

After confirming with Sylvester that he was prepared to effectively represent Tucker at trial—which was scheduled to begin in 3 days—and after hearing arguments from the State, the district court denied Tucker's motion. In doing so, the district court found that although Tucker indicated that he was dissatisfied with Sylvester, none of his justifications were sufficient to require the appointment of new counsel. It indicated that it was very familiar with Sylvester because he practiced before the court on a regular basis, and that Sylvester was "more than competent." The district court also pointed out that Sylvester was not required to adopt every pro se motion Tucker filed because he had a professional responsibility not to make frivolous arguments. The district court noted that the case involved a "fairly low-level offense" with only a few witnesses and limited evidence. As such, it found that Sylvester's representation would not prejudice Tucker's rights.

*4 Immediately thereafter, Tucker unequivocally invoked his Sixth Amendment right to self-representation. The district court then continued the hearing to consider his request. Three days later on October 27, 2014, Tucker reasserted his desire to represent himself, even after the district court explained to Tucker the risks and difficulties in representing himself. Thus, the district court granted Tucker's request and appointed Sylvester to serve as standby counsel.

The following month, the district court conducted an 8–day jury trial. The jury found Tucker guilty of theft, and the district court sentenced Tucker to serve 12 months' imprisonment. Thereafter, Tucker filed a timely appeal.

While the appeal was pending, the State notified this court that Tucker had died on April 29, 2015. Shortly thereafter, the State filed a motion for involuntary dismissal of the appeal on the ground of mootness. After Tucker's appellate counsel filed a response asserting that the appeal was not moot, the State's motion was denied so that the parties could brief the issue of mootness.

Analysis

At the outset, we will address the State's contention that Tucker's death moots his appeal. As a general rule, a court does not decide moot questions or render advisory opinions because its role is to " 'determine real controversies relative to the legal rights of persons and properties which are actually involved in the particular case properly brought before it and to adjudicate those rights in such manner that the determination will be operative, final, and conclusive.' " *State v. Bennett,* 288 Kan. 86, 89, 200 P.3d 455 (2009) (quoting *Board of Johnson County Comm'rs. v. Duffy,* 259 Kan. 500, 504, 912 P.2d 716 [1996]). Mootness—although not a jurisdictional issue—is a doctrine that recognizes that the role of courts is to determine real rather than abstract or hypothetical controversies. *Bennett,* 288 Kan. at 89.

The general test for mootness is whether it is clearly and convincingly shown that the actual controversy has ended. In other words, a case is moot if the only judgment that could be entered would be ineffectual for any purpose and would not impact any of the parties' rights. *State v. Montgomery,* 295 Kan. 837, 840, 286 P.3d 866 (2012). When a criminal defendant dies during the pendency of an appeal, we are only to address issues that "(1) [are] of statewide interest and of the nature that public policy demands a decision, such as those issues that would exonerate the defendant; (2) remain[ ] a real controversy; or (3)[are] capable of repetition." *State v. Hollister,* 300 Kan. 458, 467, 329 P.3d 1220 (2014).

Tucker's appellate attorney first argues that the Kansas Supreme Court wrongly decided the *Hollister* case. He acknowledges, however, that this court is duty bound to follow precedent from our Supreme Court absent some indication that it intends to depart from its prior position. See *State v. Hall,* 298 Kan. 978, 983, 319 P .3d 506 (2014). Because our Supreme Court has not signaled that it is departing from its holding in *Hollister,* we must follow its holding and determine whether an exception applies that would allow us to consider the merits of Tucker's claim.

***5** The sole assertion made on behalf of Tucker in this appeal is that the district court erred by not finding that he had established justifiable dissatisfaction with Sylvester. If we were to find that the district court abused its discretion by not appointing substitute counsel, the appropriate remedy would be a new trial. See *City of Lawrence v. Jackson,* No. 110,828, 2015 WL 1310152 (Kan.App.2015) (unpublished opinion) (reversing and remanding for new trial after finding that the district court failed to inquire into the nature of the alleged conflict between the defendant and his attorney); see also *State v. Sharkey,* 299 Kan. 87, 101, 322 P.3d 325 (2014) (reversing and remanding for a new hearing and directing trial judge to conduct a new trial if it found ineffective assistance of trial counsel). Obviously, a new trial in this case would be impossible because of Tucker's death. See *State v. Manns,* No. 111,205, 2015 WL 3514005, at *4 (Kan.App.2015) (unpublished opinion), *rev. denied* 303 Kan. —— (February 9, 2016) (dismissing appeal of denial of motion to suppress evidence because the deceased defendant's only available remedy on remand was to grant the motion to suppress rather than find that defendant was innocent).

Moreover, "the decision to grant a criminal defendant new appointed counsel depends heavily upon the circumstances presented in a given case, and *the district court possesses broad discretion in determining whether to appoint new counsel.*" (Emphasis added.) *State v. McCormick,* 37 Kan.App.2d 828, 836, 159 P.3d 194, *rev. denied* 284 Kan. 949 (2007). Given its case-specific nature, the resolution of the issue presented in this appeal would not resolve a matter of public policy. See *Hollister,* 300 Kan. at 467–48 (considering only the deceased defendant's challenge to the sufficiency of the evidence because it was the only issue that could have exonerated him). Thus, we conclude that the first *Hollister* exception does not apply.

Tucker's appellate counsel next suggests a real controversy remains because if the conviction is reversed, the fees associated with the conviction would be vacated—possibly affecting his estate. Of course, there is nothing in the record to indicate whether an estate has been or could be opened. Moreover, as indicated above, even if Tucker were to be successful on the merits, the remedy would not be exoneration but a new trial. It also appears that in *Hollister,* our Supreme Court rejected the notion that the fees imposed in a criminal case preserve a real controversy even upon an appellant's death. See 300 Kan. at 465–66. Indeed, if we accepted the argument that the assessment of fees automatically prevents an appeal from becoming moot upon the death of an appellant, we would eviscerate the holding in *Hollister* because most convicted defendants are assessed fees at sentencing. Therefore, we conclude that Tucker's appeal contains no real controversy. Accordingly, it is moot.

***6** We pause to note that even if Tucker's appeal was not moot, he would not prevail on the merits because the record does not reflect that the district court abused its discretion when it denied his requests for substitute counsel. Although criminal defendants have a constitutional right to representation, that right does not permit them to choose which attorney will represent them. *State v. Brown,* 300 Kan. 565, Syl. ¶ 2, 331 P.3d 797 (2014). To warrant the appointment of substitute counsel, a defendant must demonstrate justifiable dissatisfaction with appointed counsel—which includes a showing of a conflict of interest, an irreconcilable conflict, or a complete breakdown in communications between counsel and the defendant. See *State v. Moyer,* 302 Kan. 892, 360 P.3d 384 (2015).

Once a defendant articulates a statement of attorney dissatisfaction, the district court then must inquire into a potential conflict of interest. *Brown,* 300 Kan. at 575; see *Sharkey,* 299 Kan. at 98 (stating that failing to make an appropriate inquiry is an abuse of discretion). "But ultimately, as long as the trial court has a reasonable basis for believing the attorney-client relationship has not deteriorated to a point where appointed counsel can no longer give effective aid in the fair presentation of a defense, the court is justified in refusing to appoint new counsel." *State v. Sappington,* 285 Kan. 158, Syl. ¶ 5, 169 P.3d 1096 (2007).

The Kansas Supreme Court long ago explained that "[a]n indigent accused has a right to either appointed counsel or pro se representation, but both rights cannot simultaneously be asserted. [Citation omitted.] A defendant who accepts counsel has no right to conduct his own trial or dictate the procedural course of his representation by counsel." *State*

v. Ames, 222 Kan. 88, 100, 563 P.2d 1034 (1977). Tucker's unwarranted desire to control Sylvester's representation is evident in his complaint of Sylvester's refusal to adopt Tucker's several meritless pro se motions. As the district court pointed out, Sylvester was ethically precluded from bringing or defending a proceeding on a frivolous basis. See Kansas Rules of Professional Conduct, Rule 3.1 (2015 Kan. Ct. R. Annot. 592). Moreover, Sylvester had the right to exercise his professional judgment in making strategy decisions. See *Pfannenstiel,* 302 Kan. at 767; *State v. Brown,* No. 109,417, 2014 WL 1193422, at *5 (Kan.App.2014) (unpublished opinion) (finding that defense counsel was not ineffective for not filing a meritless motion to suppress), *rev. denied* 301 Kan. —— (March 12, 2015).

In a similar case, this court has found that a defendant's desire to control the strategy and tactical decisions of his defense caused the irreconcilable conflict and breakdown in communication alleged by the defendant. *McCormick,* 37 Kan.App.2d at 838–39. The panel in *McCormick* reminded the defendant that "[w]hile a criminal defendant has the right to consult with appointed counsel and to discuss the general direction of his or her defense, the strategic and tactical decisions are matters for the professional judgment of counsel." 37 Kan.App.2d at 838 (citing *State v. Bafford,* 255 Kan. 888, 895, 879 P.2d 613 [1994]). Accordingly, it found that a defendant cannot establish justifiable dissatisfaction when the defendant's actions were the cause of the conflict between the defendant and his attorney. 37 Kan.App.2d at 838–39.

*7 Tucker's appellate counsel also briefly argues that he had a complete breakdown in communications with Sylvester. However, 3 days after the district court denied Tucker's first request for new counsel, Sylvester explained to the district court that the two were "getting along quite well." Sylvester also told the court that he did not think that Tucker trusted any defense counsel or prosecutor to do the right thing, but that they were "seeing probably better eye to eye than most of his other attorneys." Thus, it appears that Tucker and Sylvester did not have a complete breakdown in communication at this point and any breakdown in communication that subsequently occurred, appears to have been the result of Tucker's refusal to permit Sylvester to do his job.

Appeal dismissed.

All Citations

376 P.3d 96 (Table), 2016 WL 3856982

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VENIREPERSON [redacted] Yeah. My sister-in-law was raped. It was a big case out in [redacted] And she was jogging and in a park and got raped by a guy. The DNA proved -- I think they called him a serial rapist, but it ended up being three DNA things on him. [redacted]

Nobody went to trial. I flew out there with her for the trial. And when he saw her in the courtroom, he pled guilty, and they sentenced him. So --

MS. McGOWAN: Okay.

VENIREPERSON [redacted]: I've been kind of through this process a little bit.

MS. McGOWAN: And that's your sister-in-law?

VENIREPERSON [redacted]: Mm-hmm.

MS. McGOWAN: How long ago was that?

VENIREPERSON [redacted]: You know, I can tell you the month. I think it's probably ten years.

MS. McGOWAN: Okay. Was everybody satisfied with the outcome on that?

VENIREPERSON [redacted] Yes.

MS. McGOWAN: Okay. So you have a

familiarity of kind of both sides of it, from someone you're close to going through it and then also the process we go through in the Criminal Justice System.

Do you think that you can put your sister's -- sister-in-law's experience aside while listening to evidence in this case?

VENIREPERSON [redacted]: I'd like to believe so, but --

MS. McGOWAN: Okay. And keeping in mind a different set of facts and a different victim --

VENIREPERSON [redacted]: Sure.

MS. McGOWAN: -- different situation, you think you could do that?

VENIREPERSON [redacted]: Yes.

MS. McGOWAN: Also, then, on the other side of that as well, you may have had some knowledge about how things went through the courts in -- did you say [redacted]?

VENIREPERSON [redacted]: Mm-hmm.

MS. McGOWAN: Yeah, in [redacted], which may be different here. You know, the --

VENIREPERSON [redacted]: Sure.

MS. McGOWAN: Talking about the instructions on rape and that kind of thing. Would you be able to follow the law even if it might be

different than the process you knew down there?

VENIREPERSON C[redacted]: Yes.

MS. McGOWAN: So ultimate question: Do you think you could be fair and impartial despite the information?

VENIREPERSON [redacted]N: With what I know, yes.

MS. McGOWAN: Okay. Great.

THE COURT: Okay. You have any questions, Mr. Lowry?

MR. LOWRY: Oh, just briefly.

Ms. O[redacted], do you -- do you -- is there -- I hear you saying that you think you can set all this aside. Is there some chance that you may be reflecting back on your sister-in-law's case while you were listening to the evidence in this case and being -- and apply the facts in that case to this case and confusing the two?

VENIREPERSON C[redacted]: No. I don't believe so. I mean, obviously I haven't heard everything.

MR. LOWRY: Sure.

VENIREPERSON O[redacted]: But when she talked about it, the -- yes, there are some things that are similar in it, sure.

MR. LOWRY: Okay. I think part of my

concern is if you -- you know, we go on facts, but we also go on feelings a lot of times.

VENIREPERSON C[redacted]: Sure.

MR. LOWRY: And we are concerned about jurors' feelings, which is kind of why we have these private conferences. Do you think that hearing the evidence, just -- I know you don't know much about it yet, but as the case progresses, is there a danger in your mind that it may give rise to such feelings of revulsion just because it's a similar charge?

VENIREPERSON C[redacted]: Sure.

MR. LOWRY: Even though not a similar fact pattern, but a similar charge that you may not be able to listen to the evidence completely impartially and may be thinking that he was guilty, therefore my client's guilty? That kind of thing?

VENIREPERSON O[redacted] I think the big emotion for me would have been anger. So I'd tell you that if any emotion came up, it would be -- it would be anger. But as far as mixing one person up with another, you know, not the same situation from what I've heard. But can I guarantee that I'm not gonna feel angry at some point because of hearing something? I don't know.

MR. LOWRY: And I understand that. But do

you think the anger that you feel would be based on what happened to your sister-in-law or simply on the facts themselves?

VENIREPERSON O[redacted]: Oh, say that again.

MR. LOWRY: Do you think the anger that you might have -- this is an impossible question to ask or answer, but let me do my best. Do you think that the anger you might feel in hearing the facts in this case would be more based on the facts themselves in this case or based more on your experience with your sister-in-law?

VENIREPERSON O[redacted]: I think it would probably be based on the facts in the case. I don't feel that anger with her stuff anymore.

MR. LOWRY: Okay.

VENIREPERSON [redacted]: And we've been through quite a few anniversaries with it. She's at peace with it, so I'm at peace with it.

MR. LOWRY: Okay. I have nothing further.

THE COURT: Okay. Thank you very much.

VENIREPERSON [redacted]: Okay.

MS. McGOWAN: Thank you.

THE COURT: You may just go back and take your seat in the jury room.

Is that it?

VENIREPERSON [redacted] Yes.

MS. McGOWAN: And I can't remember if you said it was yourself?

VENIREPERSON [redacted] Yes. I had a personal experience. It was 30 years ago. It was a campus date rape situation by force. But -- but we handled it internally at the college I was in, and I talked to the dean, and the dean talked to the student, and . . .

MS. McGOWAN: Okay. So there were no criminal charges filed?

VENIREPERSON [redacted] No.

MS. McGOWAN: Were you satisfied with that outcome?

VENIREPERSON [redacted] Yes. I mean, I think -- I'm not sure how I'm supposed to say this, but, like, in hindsight, I was pretty young, and I don't know that I necessarily followed up on things as quickly as I should have. I waited a few days.

MS. McGOWAN: Okay.

VENIREPERSON [redacted] And so -- but I was -- under the circumstances, I was satisfied with how it turned out.

MS. McGOWAN: And where was this? What college?

experiences, one being the niece, which we covered, and the other, I believe, was you yourself, right?

VENIREPERSON N[redacted]: Yes.

MS. McGOWAN: Okay. What can you tell us about that?

VENIREPERSON M[redacted]: My stepdad sexually molested me most of my childhood. I was 16 when it came to a stop, and he didn't go to jail or prison. He went through, like, three years of intense therapy. And then we had to have an apology session, which was kind of hard. But -- and then my -- he died in 2012, but I developed a close relationship afterwards.

MS. McGOWAN: Okay.

VENIREPERSON M[redacted]: I don't know, some people think that's weird, but I just -- I believed he was truly sorry for what he did.

MS. McGOWAN: Okay. And so he remained in the family once it came out about what had happened?

VENIREPERSON N[redacted]: Yeah.

MS. McGOWAN: Okay. And it's kind of an emotional deal, I imagine.

VENIREPERSON M[redacted]: I mean, my mom and him, they weren't -- they didn't live together for that three years. And I chose to live with my aunt just because I felt more comfortable there.

MS. McGOWAN: The three years while he was going through counseling?

VENIREPERSON [redacted]: Mm-hmm.

MS. McGOWAN: Okay. And you said it was 16 when it came to a stop. Is that when the other -- your mother and other people learned about it?

VENIREPERSON [redacted] Yeah. My sister, my older sister, someone -- not my stepdad, but someone else had molested her, and she was talking about it to my middle sister. And I guess I was kind of acting weird, and so that's how it came out. I was afraid no one would believe me, but then I felt like they could since it happened to her. So that's how it came out.

MS. McGOWAN: Okay. And there was never any involvement outside the home with law enforcement or anything like that?

VENIREPERSON [redacted] Actually, yeah. My dad went to work that day when I was 16, the last time he touched me. He went to work, and I called my sister. I had already then knew that he had already touched her. And I started to tell them stuff that happened to me, but then I just got nervous, and I didn't.

So then it was, like, a couple of weeks later when this happened. Then I called, and then she

VENIREPERSON W[redacted] So I was first raped when I was 15 years old by the same person that had the battery charge.

MS. McGOWAN: Oh, okay.

VENIREPERSON W[redacted] So, yeah. That's all connected.

MS. McGOWAN: Okay.

VENIREPERSON W[redacted] So that happened for about two years.

MS. McGOWAN: Were you in a relationship with him then?

VENIREPERSON W[redacted] Yes.

MS. McGOWAN: Okay. So it was a boyfriend?

VENIREPERSON W[redacted] Correct.

MS. McGOWAN: Okay. And please don't let me characterize something incorrectly.

VENIREPERSON W[redacted] Mm-hmm.

MS. McGOWAN: So you were -- for two years in the relationship he was raping you; in other words, it was nonconsensual sex --

VENIREPERSON W[redacted] Correct.

MS. McGOWAN: -- within the relationship?

VENIREPERSON W[redacted]: Correct.

MS. McGOWAN: Okay. And then the battery charge, did that come after that two years, or --

VENIREPERSON W[redacted]N: It was during the two years.

MS. McGOWAN: During the two years. So you -- it started when you were 15, and how old would he have been?

VENIREPERSON W[redacted] He was two years older.

MS. McGOWAN: Okay. So at some point he would have become an adult while this was occurring?

VENIREPERSON W[redacted]: Correct.

MS. McGOWAN: Okay. And did it ever -- since you did have police involvement and a battery charge, was there a point where you ever reported the nonconsensual sex to anybody?

VENIREPERSON W[redacted]: No. I did not.

MS. McGOWAN: Have you ever told anybody about it?

VENIREPERSON W[redacted] Yes.

MS. McGOWAN: But you did not report it to the police?

VENIREPERSON W[redacted] Correct.

MS. McGOWAN: So he was never arrested and charged with that?

VENIREPERSON W[redacted] Correct.

MS. McGOWAN: Is he someone who is still in

(THE FOLLOWING PROCEEDINGS WERE HELD IN CHAMBERS AND WERE SEALED BY THE COURT:)

(Venireperson G[redacted] enters the chambers at 3:38:)

MS. McGOWAN: Have a seat right here.

VENIREPERSON G[redacted] Okay.

THE COURT: "Ah" is right. How are you?

VENIREPERSON G[redacted]: I'm good. And you?

THE COURT: Fine. Would you state your name for the record, please?

VENIREPERSON G[redacted]: Sure. [redacted] G[redacted].

MS. McGOWAN: And you had some information that you thought you needed to disclose?

VENIREPERSON G[redacted]: I do. I had a very abusive husband who I would very much say raped me against my will, held a gun to my head, forced me to have sex with him. And when we separated, I had a restraining order against him, forced him out of the house.

So I've got that history, and I wanted to make sure I shared that.

THE COURT: Okay. Does that bring to mind any questions you'd like to ask, Ms. McGowan?