No. 19-122252-A

IN THE
SUPREME COURT OF THE
STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

Vs.

CARRODY BUCHHORN
Defendant-Appellant

APPELLEE'S PETITION FOR REVIEW

Petition for Review from the Kansas Court of Appeals
Memorandum Opinion No. 122,252
Appeal from the District Court of Douglas County, Kansas
Honorable Sally D. Pokorny, Judge
District Court Case No. 17CR385

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PRAYER FOR REVIEW

The Court of Appeals panel misapplied the standard of review in this case. First, the panel impermissibly reweighed evidence by disregarding testimony upon which the district court judge relied and crediting testimony that she deemed not credible. Second, the panel misapplied the *Strickland* ineffective assistance of counsel standard by demanding that attorneys know more about nuanced medical science than their medical experts.

This case presents an issue of importance because the panel's opinion imposes requirements for effective assistance of counsel that conflict with existing Supreme Court caselaw and that, if applied in other cases, would establish an unattainably high standard for defense counsel. Additionally, because the Court of Appeals misapplied the applicable standard of review and reached an incorrect result, this Court should employ its supervisory authority to grant review of the case.

DATE OF DECISION

The Court of Appeals issued its decision on August 13, 2021. (Appendix A.)

STATEMENT OF THE ISSUE FOR REVIEW

I. The Court of Appeals misapplied the applicable standard of review when it held that the district court erred by denying defendant's motion for a new trial.

STATEMENT OF FACTS

The factual recitation in the panel's opinion is inaccurate because it relays only those facts supporting a finding of ineffective assistance of counsel, reweighs conflicting evidence, and disregards those facts that the district judge credited when she ruled that trial counsel was effective. As such, the State now provides recitation of those facts considered and relied upon by the district judge in her ruling.

Oliver Ortiz was a healthy 9-month-old when his parents dropped him off at Gina

Brunton's daycare. Brunton employed Buchhorn. Oliver was a normal, happy baby in the morning and went down for a nap at noon. The uncontroverted testimony at trial was that defendant was the only person to have contact with Oliver from noon until she went to rouse him. Buchhorn twice interacted with Oliver during nap time. (R. XI, 455, 459.) At 3 p.m., Buchhorn went over, got Oliver out of his playpen, and carried him out of the sleeping area, face out. Buchhorn then said "what is he doing?" which caused Brunton to look over. Brunton "saw [Oliver's] face and immediately knew something was wrong" because "his eyelids were blue and he did not look right and he was not responding." (R. XI, 465.) Buchhorn, on the other hand, "didn't seem to realize anything was wrong." (R. XI, 466.) Brunton called 911. EMTs tried for an hour to revive Oliver, but never got a pulse.

An autopsy by Dr. Erik Mitchell revealed that Oliver had a bruise on his hairline, abrasions on his ear, bruising and bleeding in his abdominal cavity, a liver tear, multiple bruises to the back of his head and scalp, a blood clot on the surface of the dura (the tough outer layer of tissue that covers the brain within the skull), and a significant skull fracture. The skull fracture, abrasions, and bruising all appeared recent. (R. II, 65.)

After a police investigation, the State charged Buchhorn with first degree murder. The State's theory was that Buchhorn inflicted the above injuries on Oliver, including a fatal skull fracture. Buchhorn retained Paul Morrison and Veronica Dersch to represent her. They retained forensic pathologist Dr. Carl Wigren as the defense expert in the case. (R. VIII, 240-41.) At the preliminary hearing, Mitchell testified that Oliver died in part because of depolarization of the neurons in his brain or spine caused by the same blow that fractured his skull. At trial, Buchhorn, Brunton, Mitchell, Wigren, and myriad other

witnesses testified. Mitchell's testimony again included depolarization. After two days of deliberation the jury convicted Buchhorn of reckless second degree murder.

Less than a month after being convicted, Buchhorn retained new counsel. New counsel moved for a new trial alleging, among other things, ineffective assistance by trial counsel in how they handled Mitchell's testimony, specifically Mitchell's testimony about depolarization. To make their claim of ineffective assistance, post-trial counsel relied heavily on an affidavit from Wigren stating that he was never presented with a copy of the preliminary hearing transcript pre-trial, could not find any record of pre-trial discussion of depolarization, and that if he had been informed of the theory he would have addressed it in his report and testimony. (R. I, 275-76.)

The district court held four evidentiary hearings on the motion for a new trial and heard testimony from Morrison, Dersch, Mitchell, Wigren, and four new experts from the defense: Alice Craig, who the defense proffered as an expert on criminal defense; a psychiatrist; and two pediatric neurologists.

Morrison's testimony:

Morrison testified as follows. Morrison previously served as Johnson County District Attorney and Kansas Attorney General. (R. VIII, 221.) Before this case, Morrison tried over 150 jury trials including 30-40 homicide trials. (R. VIII, 205-06.) Morrison attended over 100 autopsies in his career and reviewed even more autopsy reports. (R. V, 211-14.) To prepare for this case, Morrison conducted independent research on brain injuries and subdural hematomas. (R. VIII, 176.)

Morrison contacted Wigren upon recommendation from a highly recommended forensic pathologist who himself was recommended by a well-regarded defense attorney.

(R. VIII, 203, 228-29, 239-40.) Morrison reviewed Wigren's credentials, hired him, then explicitly asked Wigren to "look at Dr. Mitchell's opinion in the case." (R. VIII, 241.) Morrison provided all the documents that Wigren requested. (R. VIII, 242.) Wigren helped the defense prepare for the preliminary hearing by helping draft Mitchell's cross-examination. (R. VIII, 242-43.) Morrison then provided Wigren a copy of the preliminary hearing transcript, including the testimony about Mitchell's theory that depolarization was part of the mechanism for Oliver's death. (R. VIII, 178, 243.)

Morrison and Wigren also discussed the defense hiring a neuropathologist, and Morrison told Wigren to let him know if the evidence suggested additional experts would be necessary. (R. V, 228.) Wigren consulted Dr. Roland Auer, a neuropathologist, who reviewed the evidence of Oliver's head injuries. (R. V, 33.) Wigren next consulted a pediatric pulmonary pathologist. (R. V, 30.)

Morrison and Wigren discussed the case on the phone 6–12 times before trial. (R. VIII, 244.) Morrison did admit he was frustrated that Wigren could be hard to get ahold of, but said that in his experience, this was "pretty common with a lot of experts." (R. V, 229.) Morrison discussed Mitchell's depolarization theory with Wigren "almost every time I talked to him." (R. VIII, 167.) Morrison recounted:

> "Dr. Wigren knew exactly about the theory that Mitchell had about what is now being called the electrical impulse thing, to the point where I am comfortable saying that it was an irritant to Wigren. I remember Wigren telling me on more than one occasion, 'It's an old injury. Why are you asking me about that for? This is old.' To the point where he wasn't really annoyed, but we started to get that feel a little bit." (R. VIII, 244.)

Morrison and Wigren also spent "a lot of time" discussing the autopsy video. (R. V, 232.) Wigren did not tell Morrison until the trial was underway that he did not think depolarization was scientifically credible. (R. V, 233.)

According to Wigren, Buchhorn could not have caused Oliver's death in the manner Mitchell described because Mitchell's theory hinged on Buchhorn inflicting a blow to Oliver's head that caused the skull fracture and instantaneous death. In Wigren's opinion, the skull fracture had aged and therefore had not been inflicted while Oliver was in Buchhorn's care. (R. V, 230-33.) This theory was fully exonerative because if Oliver's fatal injury could not have been inflicted by Buchhorn, then Buchhorn was innocent of Oliver's murder. Wigren based his report on this and testified accordingly at trial.

Morrison "bas[ed] parts of [his] trial strategy" on this information from Wigren. (R. VIII, 245.) However, Morrison did not cede strategic control of the case to Wigren. Morrison testified that he was the one who ultimately chose to rely on Wigren's fully exonerative age-of-skull-fracture theory as the defense theory of the case. (R. VIII, 245.) Morrison did this because Wigren was so emphatic about the age of the injury, and because Morrison believed that the aged-injury expert testimony "worked for [him] strategically" when he looked at the case as a whole, including what he characterized as the "lack of motive" for Buchhorn, the "circumstantial" nature of the State's case, and attacks on Mitchell's credibility. (R. V, 233; R. VIII, 246-47.)

Morrison also reviewed Wigren's expert report "20 or 25 times at a minimum" and spoke to Wigren about the report several times. (R. VIII, 248.) Morrison reiterated throughout the post-trial hearings that he repeatedly raised the issue of depolarization with Wigren. Nevertheless, Morrison said that Wigren responded to these inquiries by dismissing the theory as irrelevant until Wigren finally decided to critique depolarization when the trial was underway. (R. VIII, 181-82.)

Morrison explicitly testified that the allegations in Wigren's affidavit about not discussing depolarization were "a lie... an absolute untruth." (R. VIII, 194.) Morrison testified that he knew Wigren had not drafted the affidavit; it was post-conviction counsel Bill Skepnek who did so, and Skepnek "threatened to come out there and drag [Wigren] here or depose him or whatever if he didn't sign it." (R. VIII, 195.)

Dersch's testimony:

Dersch's testimony aligned with Morrison's. She said that Morrison and Wigren discussed depolarization on phone calls before trial. (R. V, 129.) Dersch testified that they "immediately" gave Wigren the autopsy video after hiring him, which contained Mitchell opining that Oliver's cause of death was from a compression or concussion of the spine—the same depolarization theory. (R. V, 137.) Likewise, Dersch testified that she believed the defense provided Wigren with a copy of the preliminary hearing transcript and that in phone calls Wigren discussed information that could have only come from the transcript. (R. V, 183-85.)

Dersch testified that Morrison conducted "a lot" of online research on the medical issues in the case, that she also conducted online research, and that the defense file even contained articles related to depolarization. (R. V, 139, 174.) She corroborated that the first time Wigren impugned depolarization was in the middle of trial. (R. V, 134.) Wigren had not derided the theory before despite Morrison raising it in conversations with Wigren. (R. V, 135.) Dersch testified that Wigren never told the defense that Mitchell's opinion about the mechanism of death was "impossible." (R. V, 196.) Nor did he mention that Mitchell's theory was "not scientifically valid" until the mid-trial meeting. (R. V, 196-97.) She summed it up: "our expert never said, 'His

conclusion is wrong because it's scientifically impossible.' He said, 'His conclusion is wrong because it was a healing injury, and he's just wrong,' and he's lazy—or not lazy—'he's overworked and hurried' and all of that." (R. V, 198-99.)

Dersch specifically testified that Wigren's mid-trial comment would have changed the defense's strategy if Wigren had pointed out earlier that, in his opinion, Oliver could not have died from a blow to the lower head/neck. (R. V, 136.) Dersch said that as an attorney—not a medical expert—she could not have intuited such a challenge to Mitchell's theory despite having done research on head injuries in babies. (R. V, 136.)

Dersch also testified that the defense could not explicitly tell Wigren what to look into when he was evaluating the medical evidence because the defense wanted an honest assessment of the case from Wigren and was "not trying to drive his opinion." (R. V, 181.) Instead, the defense provided Wigren with all the materials that he asked for and asked for his opinion on the medical evidence in the case. (R. V, 180-81.) This approach was validated by defense expert Craig, who testified that defense counsel should not coach expert witnesses on what kind of testimony would be needed, nor tell them what to say. (R. VIII, 111-12.)

Wigren's testimony:

Wigren's recollection of the number of contacts with Morrison differed. (R. V, 22-23.) He testified that he did not recall discussing depolarization with Morrison. (R. V, 28-29.) Wigren maintained that he never received a copy of the preliminary hearing transcript. (R. V, 75.) But Wigren had very few memories of his interactions with Morrison, and often said he did not recall the answers to questions or could answer only by looking at his notes. (R. V, 20-40; 87-96.) Wigren said that he did not prepare for his

testimony at the post-trial hearings "other than reading [his] affidavits and being prepared to answer those." (R. V, 78.) In fact, Wigren does not remember the mid-trial meeting where he first told the defense that Mitchell's depolarization theory was not credible. (R. V, 43-44.) Wigren also denied that he was ever asked to address Mitchell's testimony that death was instantaneous and related to the skull fracture. (R. V, 104-05.) This contradicted his earlier testimony and his report which addressed that death could not have been instantaneously caused by the skull fracture. (R. V, 71.)

Wigren testified that "an expert such as myself in forensic pathology could certainly talk about" the depolarization theory. (R. V, 55.) When asked why he did not address depolarization in his report, he said "[b]ecause it was never asked by Mr. Morrison to address that specifically. And I guess the analogy I would give is if I'm faced with a gunshot wound, why am I gonna talk about a stab wound if a stab wound isn't there?" (R. V, 57.) Wigren testified that he first learned about depolarization "[w]hen it was brought to my attention that there was a preliminary hearing of Dr. Mitchell's testimony from sometime in September." (R. V, 69.) He said he watched the entire autopsy video, but he did not recall Mitchell talking on the video about "the concussion of the spinal cord and the transfer of energy and the disruption and interference with the electrical currents." (R. V, 76.) But even defense expert Craig testified that Mitchell discussed the depolarization theory on the video. (R. VIII, 109-10.) In fact, Craig testified that Wigren "should have known about it." (R. VIII, 110.)

The district court denied the motion for a new trial:

In her ruling denying the motion for a new trial, the district judge found that "counsel were not ineffective." (R. II, 80.) She found that "the facts support a reasonable

strategy on the part of Mr. Morrison and Ms. Dersch." (R. II, 72.) Likewise, she found that:

> "[Morrison and Dersch] were effective. As previously stated, they searched for an expert, consulted with the expert, and hired the expert who directly contradicted the State's theory of the case. Dr. Wigren had access to the autopsy video, Dr. Mitchell's report, and the slides. His only disagreement with Dr. Mitchell was the timing of the injuries. In addition to looking at all the information Dr. Mitchell had, Dr. Wigren also consulted a pediatric pulmonary pathologist and a pediatric neurologist.
>
> "Attorneys are not medical experts. Mr. Morrison and Ms. Dersch hired a highly recommended forensic pathologist who believed Oliver's injuries pre-dated the time he was in the defendant's care at daycare. They relied upon their expert and his knowledge. If the jury had relied upon the testimony of Dr. Wigren, the verdict would have been not guilty." (R. II, 72.)

The district judge also explicitly did not credit Craig's testimony that Morrison was ineffective because

> "Craig's testimony supporting the defendant's argument of ineffectiveness of counsel is premised upon this Court striking Dr. Mitchell's testimony after a Daubert hearing. This Court has determined it would not strike Dr. Mitchell's testimony. Additionally, Professor Craig testified Mr. Morrison and Ms. Dersch were ineffective because they did not find a better expert. Once again, that premise is based upon hindsight and gives no deference to the testimony of Mr. Morrison and Ms. Dersch that they put considerable effort into finding the appropriate expert and to the amount of time they spent consulting their expert." (R. II, 72-73.)

The ruling is appended at Appendix B. Buchhorn appealed the denial of her motion for a new trial, and the Court of Appeals issued the opinion at issue in this petition.

ISSUE FOR REVIEW

I. The Court of Appeals misapplied the applicable standard of review when it held that the district court erred by denying defendant's motion for a new trial.

The panel's decision in this case is incorrect. First, the panel erred in applying the relevant standard of review because it impermissibly reweighed the evidence on appeal. Second, the Court of Appeals erred by imposing a heightened effective assistance of counsel standard in contravention of *Strickland* and its progeny.

Appellate courts review district courts' rulings on motions for new trials for an abuse of discretion, meaning that the appellate court may only reverse such a ruling if "(1) no reasonable person would take the view adopted by the district court; (2) the decision is based on an error of law; or (3) the decision is based on an error of fact." *State v. Ballou*, 310 Kan. 591, 615, 448 P.3d 479 (2019); *State v. Williams*, 303 Kan. 585, 595, 363 P.3d 1101 (2016). In cases like the one here, where a defendant moves for a new trial because of alleged ineffective assistance of counsel and the district court denies that motion after an evidentiary hearing, appellate courts are supposed to "review the district court's underlying factual findings using a substantial competent evidence standard and review the legal conclusions based on those facts de novo." *State v. Butler*, 307 Kan. 831, 853, 416 P.3d 116 (2018). When reviewing for substantial competent evidence, appellate courts cannot "reweigh evidence, resolve evidentiary conflicts, or make witness credibility determinations." 307 Kan. at 855. When, as here, a district court denies a motion and makes factual findings to which the defense does not object, the "trial court is presumed to have made all necessary factual findings to support its judgment." *State v. Combs*, 280 Kan. 45, 50, 118 P.3d 1259 (2005). Here, the district judge ruled that trial counsel was effective; the appellate courts must therefore presume that she made all necessary factual findings to support her judgment so long as those factual findings are supported by substantial competent evidence.

a. *The Court of Appeals panel impermissibly reweighed evidence*

Below, the district judge heard days of evidence before ruling. She resolved conflicts in the evidence in order to rule, and because the defense did not object to her factual findings below, appellate courts must presume she made all necessary factual findings to

support her judgment. *Combs*, 280 Kan. at 50. Either explicitly or under *Combs*, the district judge found that: 1) trial counsel conducted independent research into infant brain injuries and gathered articles relevant to depolarization (R. V, 139, 174; R. VIII, 176.); 2) trial counsel hired Wigren, who was qualified to address depolarization (R. V, 55; R. VIII, 135.); 3) Wigren was apprised of the depolarization theory by virtue of the autopsy video and the preliminary hearing transcript (R. V, 183-85, 232; R. VIII, 109-10, 243.); 4) trial counsel repeatedly raised depolarization with Wigren but he dismissed it as irrelevant (R. VIII, 178-81, 244); 5) trial counsel made a strategic decision based on the best information available to them to pursue the age-of-injury defense (R. II, 72; R. VIII, 245-47); and 6) it was reasonable for trial counsel to rely on Wigren's assessment of depolarization as irrelevant because he is the medical expert and attorneys lack the scientific expertise necessary to independently determine the validity of nuanced neuropathological theories and therefore challenge and reject their expert's assessment of a theory as irrelevant. (R. II, 72; R. V, 136). All of the above findings are supported by substantial competent evidence.

Nevertheless, in contravention of the standard of review, the panel's opinion is rife with instances where the panel impermissibly reweighed evidence, reassessed witness credibility, and resolved evidentiary conflicts in a manner opposite the district judge in order to reach its conclusion that trial counsel was ineffective.

For example, the panel wrote: "Buchhorn's counsel admit they did not independently research or investigate" depolarization. (Slip. Op., 16.) They wrote "counsel did not investigate Dr. Mitchell's theory on their own, with Dr. Mitchell (through examination at the preliminary hearing or trial), with Dr. Wigren, or with any other expert or consultant." (Slip op., 17.) They wrote that defense counsel did not "procure any

information to provide Dr. Wigren about the factual or scientific basis for Dr. Mitchell's theory." (Slip op., 17.) They wrote that "the record reveals [defense counsel] did not explore . . . with Dr. Wigren" that "Dr. Mitchell's depolarization theory had no medical basis or support in the medical community." (Slip op., 18.) The panel held that counsel "simply hired Dr. Wigren without providing him the necessary information and guidance to make the decisions on which they were apparently relying on him to make." (Slip op., 20.) The panel wrote that "counsel did not properly investigate the central issue." (Slip op., 20.)

Likewise, the panel wrote that the only time counsel discussed other experts with Wigren was during trial. (Slip op., 22.) This again violates the applicable standard of review by crediting Craig's testimony when the district court did not and disregarding Morrison's testimony to the contrary. (R. V, 228.) (Morrison discussed hiring a neuropathologist with Wigren, encouraged him to recommend any additional experts that would be helpful).

The panel wrote that counsel "cannot be said to have relied on an expert for advice they never sought (or, according to them, did not receive when requested)." (Slip op., 18.) Later, the court wrote that counsel "failed to utilize his expertise to address depolarization" and "pursued no information about the factual or medical basis for Dr. Mitchell's theory." (Slip op., 20.) Again, this reweighs evidence. The trial court credited counsel's testimony over Wigren's, and counsel testified that they repeatedly raised the issue of depolarization with Wigren but were consistently shut down and dismissed.

The panel wrote that "trial counsel lacked sufficient information to make an informed decision about how to address Dr. Mitchell's depolarization theory" and that they "fail[ed] to investigate this theory . . . or explore it with their medical expert." (Slip Op., 17.) To so conclude, the panel improperly disregarded the district judge's factual findings to the

contrary, and those findings were supported by substantial competent evidence. Again, Morrison and Dersch testified that Morrison researched depolarization. Likewise, they testified that Morrison raised the issue with Wigren ad nauseum, but that Wigren—the forensic pathologist qualified to opine on these matters—told them that it did not matter until changing his tune for the first time when the trial was already underway.

b. The panel misapplied Strickland

Next, the panel compounded its erroneous reweighing of evidence by imposing a standard for effective assistance of counsel not supported by *Strickland*. The panel held that trial counsel—who are attorneys, not medical experts—fell below the performance prong of *Strickland* by reasonably seeking and relying on the opinion of an expert forensic pathologist who was qualified to opine on depolarization.

Strickland does not require this result; it requires the opposite. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight." *Harrington v. Richter*, 562 U.S. 86, 110, 131 S. Ct. 770, 791, 178 L. Ed. 2d 624 (2011). "The selection of an expert witness is a paradigmatic example of the type of 'strategic choic[e]' that, when made 'after thorough investigation of [the] law and facts,' is 'virtually unchallengeable.'" *Hinton v. Alabama*, 571 U.S. 263, 274-75, 134 S. Ct. 1081, 1089, 188 L. Ed. 2d 1 (2014) (quoting *Strickland*). *Strickland* does not require "[that] counsel must continue looking for experts just because the one he has consulted gave an unfavorable opinion." *Dees v. Caspiri*, 904 F.2d 452, 454 (8th Cir. 1990). Relying on a qualified expert's

opinion and failing to shop around for a different expert after receiving that opinion is not ineffective assistance. *Sidebottom v. Delo*, 46 F.3d 744, 753-54 (8th Cir. 1995); *Poyner v. Murray*, 964 F.2d 1404, 1419 (4th Cir. 1992). To prevail on her claim, Buchhorn had to establish that "counsel acted unreasonably in relying on" their qualified expert. *Sidebottom*, 46 F.3d at 753. "That [defendant] later secured a more favorable opinion of an expert than the opinion of [the trial expert] does not mean that trial counsel's failure to obtain that expert testimony constituted deficient performance." *McClain v. Hall*, 552 F.3d 1245, 1253 (11th Cir. 2008); see also *Waye v. Murray*, 884 F.2d 765, 767 (4th Cir. 1989).

The panel wrote that trial counsel "cannot be said to have relied on an expert for advice they never sought (or, according to them, did not receive when requested)." (Slip op., 18.) Trial counsel here did seek out Wigren's opinion on depolarization. They directed Wigren to "look at Dr. Mitchell's opinion in the case," which included depolarization. (R. VIII, 241.) They provided Wigren the autopsy video and preliminary hearing transcript and asked him about the theory explicitly. (R. VIII, 178-81, 244). Wigren, when confronted by Morrison about depolarization, dismissed it as irrelevant. Wigren's dismissal of the issue is absolutely a response to counsel's inquiry: attorneys can reasonably expect that if their qualified forensic pathologist expert is asked to evaluate the coroner's findings and those findings include a neuropathological theory that is unsupported, their expert will tell them that theory is unsupported. Because Wigren did not tell trial counsel as much, they did not know, and could not reasonably have known. They sought out and followed the opinion of an expert qualified to address that theory. Their conduct was reasonable and satisfies the effective performance requirements of *Strickland*. *Strickland* does not require counsel to know better than their qualified medical expert about his field of expertise.

To satisfy the panel's standard for effective assistance of counsel set out in this case, trial counsel would have had to: 1) find and hire an expert forensic pathologist, 2) ask that expert about depolarization, 3) hear that expert opine that depolarization was irrelevant to the medical facts of the case, 4) push back on that expert to make sure that he was really sure the theory did not matter, 5) hear that expert double down that the theory was irrelevant, 6) decide that they, with no medical training, understood the forensic pathology better than the forensic pathologist, and therefore 7) seek out a different medical expert to counter the opinion of their already-retained forensic pathologist. This far exceeds *Strickland*'s requirements for effective performance.

CONCLUSION

Review in this case is justified for a variety of reasons. The panel misapplied the standard of review by reweighing evidence to reach its favored result and imposing a new, unattainable standard for performance by counsel that far exceeds *Strickland* and its progeny. The State respectfully asks this Court to grant review of the panel's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 7, 2021, I submitted the foregoing petition for review for electronic filing and e-mailed a copy to:

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/s/ Emma Halling #27924

Appendix A

NOT DESIGNATED FOR PUBLICATION

No. 122,252

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

CARRODY M. BUCHHORN,
Appellant.

MEMORANDUM OPINION

Appeal from Douglas District Court; SALLY D. POKORNY, judge. Opinion filed August 13, 2021. Reversed and remanded.

William J. Skepnek, of The Skepnek Law Firm, P.A., of Lawrence, *Keynen J. (K.J.) Wall*, *Quentin M. Templeton*, and *Russell J. Keller*, of Forbes Law Group, LLC, of Overland Park, *Stephan L. Skepnek*, of The Sader Law Firm, of Kansas City, Missouri, and *Kevin Babbit*, of Fagan & Emert, LLC, of Lawrence, for appellant.

Emma C. Halling, assistant district attorney, *Kate Duncan Butler*, assistant district attorney, *Charles E. Branson*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before ATCHESON, P.J., HILL and CLINE, JJ.

PER CURIAM: This matter involves a child who died unexpectedly at the home daycare where Carrody M. Buchhorn worked. Buchhorn was the last person who admitted having contact with the child. After the Douglas County coroner ruled the child's death was instantaneous and caused by a blow to the head, a jury convicted Buchhorn of second-degree murder. We reverse Buchhorn's conviction and remand for a

new trial because her trial counsel's constitutionally deficient performance prejudiced her right to a fair trial.

FACTS

Nine-month-old O.O. was found unresponsive in a Eudora daycare crib, following an afternoon nap. The owner called 911, while Buchhorn performed CPR on O.O. Despite Buchhorn's and first responders' efforts to resuscitate the baby, O.O. did not survive.

During the investigation of O.O.'s death, police interviewed Buchhorn twice. She waived privilege in both interviews and consistently denied harming O.O. Buchhorn, a mother of two grown children, had no history of abuse or violence and no prior criminal history.

The Douglas County coroner, Dr. Erik Mitchell, performed the autopsy on O.O. Dr. Mitchell's autopsy revealed that O.O. had suffered a significant skull fracture but no brain swelling. Dr. Mitchell deduced that O.O. died instantly following a blow to the head, which he claimed released mechanical energy into the base of the brain causing "temporary cessation of function at the base of the brain" or "depolarization of neurons." He suspected that O.O. was stepped on.

Since Buchhorn was the last person who admitted having contact with O.O., the State charged her with first-degree murder and in the alternative, second-degree murder, a felonious, unintentional, but reckless killing of a human being. Buchhorn retained law partners Paul Morrison and Veronica Dersch to represent her.

Dr. Mitchell testified about his "depolarization theory" on O.O.'s cause of death at the preliminary hearing. He said he believed, "going on statistics," that O.O. died

instantaneously due to "a direct effect on depolarization of neurons at the area of the base of the brain, upper spinal cord manila, [which] interferes with the ability to breathe, and that leads to death." He concluded O.O. had no "anatomic deformity or no anatomic reason to be dead other than the physical injury, and that this physical injury will release energy into the area that is critical for survival at the base of the brain."

Buchhorn's trial counsel did not elicit information about the foundation of Dr. Mitchell's depolarization theory or challenge it at the preliminary hearing. Her counsel did not ask Dr. Mitchell about the statistics on which he relied to develop his theory, nor did they ask Dr. Mitchell to identify any medical literature which may support or address this theory.

At trial, Dr. Mitchell recounted his opinion on O.O.'s cause of death. He again noted that O.O. had a skull fracture with little brain swelling, which caused him to conclude not much time had passed between the trauma and death. Dr. Mitchell said a skull fracture is not inherently fatal but becomes fatal if energy is transferred to the brain. He also testified that if someone were with O.O. when the injury occurred, that person would immediately recognize something was wrong with O.O. and that O.O. needed immediate care. Buchhorn's trial counsel raised no objections to Dr. Mitchell's testimony regarding his depolarization theory.

In addition to Dr. Mitchell's testimony, the State also admitted electronic messages from Buchhorn sent shortly before O.O.'s death, complaining about her low pay and disparaging the attitude of the daycare owner.

Buchhorn's trial counsel retained a forensic pathologist, Dr. Carl Wigren, to testify at trial. Dr. Wigren resided in Seattle, Washington, and was referred to them by another expert who was not taking any new cases. Dr. Wigren did not address Dr. Mitchell's depolarization theory in his testimony. Instead, he alternatively interpreted O.O.'s

injuries. Dr. Wigren testified that he believed O.O.'s skull fracture showed signs of healing from an injury that was a few days to a week old. When asked if he knew what killed O.O., Dr. Wigren said, "I honestly don't."

The State relied heavily on Dr. Mitchell's opinion on O.O.'s cause of death in closing arguments. Because Dr. Mitchell contended that death by depolarization is nearly instant, the State repeatedly argued this theory implicated Buchhorn, as the last person to care for the child. The State also argued Dr. Mitchell was more credible than Dr. Wigren, noting his opinions were more reliable because of his "impressive" professional experience. Buchhorn's counsel argued the State presented only circumstantial evidence.

The jury deliberated for two days before returning a verdict of guilty on the lesser charge of second-degree, reckless murder.

After the verdict, Buchhorn hired new counsel and moved for a new trial. Among other issues, Buchhorn challenged the admissibility of Dr. Mitchell's depolarization theory under the *Daubert* standard for expert opinion testimony and raised several ineffective assistance of counsel claims, including (1) trial counsel failed to investigate Dr. Mitchell's testimony, (2) trial counsel failed to file an appropriate *Daubert* motion, and (3) trial counsel failed to present responsive expert testimony at trial. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

Several witnesses testified at the subsequent evidentiary hearing. Dr. Mitchell also produced materials for this hearing, after the jury trial, that he contended supported his theory of depolarization.

Failure to challenge depolarization theory

Dr. Sudha Kessler, a licensed physician and board-certified pediatric neurologist, testified for Buchhorn. She practiced pediatric neurology at the University of Pennsylvania Children's Hospital in Philadelphia, and she had extensive experience treating pediatric brain injuries and assessing the effect of head trauma. Dr. Kessler testified she investigated causes of death as a quality review panel member.

Dr. Kessler evaluated Dr. Mitchell's depolarization theory and found it to be unreliable. She testified that some energy, such as electrical or electromagnetic, can impact the signals of the brain cells, but not kinetic or mechanical energy, such as a force from a blow to the head. Dr. Kessler was "not aware of any circumstances in which mechanical energy directly translates into electrical change in the brain." Dr. Kessler had never heard or read about a brain death with no evidence of brain injury.

Dr. Kessler reviewed texts, published studies, and other sources of medical research, but she found no support for the proposition that mechanical energy can depolarize, interfere with, or disrupt the brain cells or nerves and cause instant death, without causing injury to the brain. Dr. Kessler also reviewed the literature Dr. Mitchell produced posttrial and testified she did not believe it supported Dr. Mitchell's theory. Dr. Kessler further noted:

> "[Dr. Mitchell's theory is] just fantastical, because it's not something I have ever been taught, not something I teach, not something—just not consistent. It's not consistent with the medical literature because there is no literature on magical disruption of the brain that causes death and that doesn't exist. In addition to looking though my own textbooks, looking through the two database searches I did, I was so taken aback by all this that I . . . [asked] my colleagues if they have heard of this idea; and honestly, most of the time, the response that I got was laughter."

Dr. Yu-Tze Ng, the Chief of Neurology at Children's Hospital in San Antonio and a tenured pediatrics professor at Baylor College of Medicine in Houston, also testified for Buchhorn. Dr. Ng testified he does not like using the term "depolarization" because that is something that happens normally. Dr. Ng also said he believed Dr. Mitchell was trying to imply a sudden cessation of the whole brain. Dr. Ng stated:

> "[W]hether it's from depolarization, which is some function, [a sudden cessation of the whole brain], is just not possible without any evidence that there was some brain injury that would persist short of completely beheading the patient or cutting, disconnecting the upper brain stem, the medulla and all those brain parts to the spinal cord. I just can't fathom how a patient would have died with no evidence whatsoever [of brain injury]."

Dr. Ng testified that Dr. Mitchell's theory diverged from medical science. Dr. Ng said the articles Dr. Mitchell provided to support his theory actually contradicted Dr. Mitchell's claims. Dr. Ng stated that he did not know how O.O. died but, based on the evidence, O.O. did not die from a brain injury.

Dr. Wigren also testified at the posttrial hearing. He stated he did not know Dr. Mitchell would present his theory of depolarization or that the theory would be such a pivotal part of the argument in this case. Dr. Wigren said that in all his communications with Buchhorn's trial counsel, including during the trial, they never asked him to address Dr. Mitchell's opinion.

Dr. Wigren testified that if trial counsel had asked about the viability of Dr. Mitchell's theory, he would have written a supplemental report and recommended trial counsel consult with a neurologist. He also stated he had never heard this theory expressed and had been unable to find any authoritative medical literature to support it.

Dr. Mitchell testified for the State at the posttrial hearing. He admitted O.O.'s case was the exception, rather than the rule, because most head trauma cases included

observable injury. When asked about the statistics on which he relied to support his theory, Dr. Mitchell testified he was thinking of the transfer of energy to the brain which occurs in all brain injuries. He admitted he would probably change how he used the word statistics in his testimony. He also testified that his use of the word statistics was him trying to convey a likelihood, not to suggest he had actual statistical information, and that "it was a poor choice of words in retrospect."

Dr. Mitchell testified he had observed two cases in which immediate death occurred after a concussive injury to the brain stem, and, in both cases, neither victim had any sign of significant brain injury. He testified one of those cases occurred in 1980, during his residency in North Carolina, and the other occurred in the early 1980s or 1990s in New York. He had no records on these cases and had made no effort to find them. Dr. Mitchell testified that he had done about 12,000 autopsies during his nearly 40-year career. He admitted on cross-examination that 2 cases out of 12,000 is "a very small number."

When asked about the posttrial materials he supplied and relied on to support his theory of depolarization, Dr. Mitchell admitted his materials did not provide any studies of people who died after suffering blunt force trauma in which there was no evidence of injury to the brain. He acknowledged that much of the literature he had provided dealt with general neurological principles and not the exact issue of instantaneous death from concussive force.

Alice Craig, a professor at the University of Kansas School of Law and attorney at the Paul E. Wilson Project for Innocence & Post-Conviction Remedies, also testified for Buchhorn at the posttrial hearing. She testified that for trial counsel to fully understand and challenge evidence, he or she must independently research the issues and consult with experts if necessary. Craig also stated that given the complicated nature of cases involving a brain injury, counsel would at least need to hire a forensic pathologist and

may also need to hire a radiologist, biomechanical engineer, neuropathologist, or neurologist.

Craig testified she believed Buchhorn's trial counsel failed to provide objectively reasonable representation. Craig contended counsel violated the professional standard of care by failing to file a pretrial *Daubert* motion to exclude Dr. Mitchell's testimony and discover the scientific and factual basis for his depolarization theory. She testified Dr. Mitchell's preliminary hearing testimony raised enough questions about the science behind O.O.'s cause of death and the basis for Dr. Mitchell's theory that counsel should have filed a *Daubert* motion to challenge the validity of his theory.

Craig also testified that Buchhorn's counsel could not effectively cross-examine Dr. Mitchell or exclude his testimony without the right experts. She said counsel did not adequately challenge the State's theory of O.O.'s cause of death. Craig acknowledged that counsel hired Dr. Wigren, a forensic pathologist, but still believed a neurologist was necessary to testify in this case. Craig additionally criticized counsel's failure to ask Dr. Wigren specifically about Dr. Mitchell's theory that the blunt force injury interrupted and depolarized O.O.'s nerves.

Both Morrison and Dersch testified at the hearing. Morrison admitted Dr. Mitchell's testimony was "very important" and agreed they needed to challenge his depolarization theory. Yet, Buchhorn's trial counsel did not independently research or investigate Dr. Mitchell's depolarization theory. Instead, they relied on Dr. Wigren to define the medical issues they needed to address.

Morrison admitted they did not consult with or talk to any experts other than Dr. Wigren. Morrison testified he was "comfortable that [Dr.] Wigren could handle it," and "we took our direction from him." On the other hand, Morrison testified both he and his

co-counsel were frustrated with how difficult it was to get ahold of Dr. Wigren and how busy he was. Neither Morrison nor Dersch had ever worked with Dr. Wigren before.

Morrison admitted he never considered filing a *Daubert* motion and, in fact, both he and Dersch admitted they had never filed a *Daubert* motion in any of their cases. Morrison testified they relied on Dr. Wigren to tell them if they needed to file a *Daubert* motion. When asked if he regretted not filing a *Daubert* motion, Morrison said, "Yes." Dersch testified that, in hindsight, filing a *Daubert* motion would have been a good idea. She also testified they made no strategic decision to forgo filing a *Daubert* motion but, instead, she never considered it. She said it never came up in their discussions.

When asked about Dr. Wigren's testimony that trial counsel never asked him to address Dr. Mitchell's theory, Morrison stated that he had asked Dr. Wigren about Dr. Mitchell's theory, but Dr. Wigren never responded and instead focused on the age of O.O.'s skull fracture. Morrison admitted they never asked Dr. Wigren for something they could use to cross-examine Dr. Mitchell about his theory on cause of death.

The first time trial counsel met Dr. Wigren was when he flew in on the Sunday after trial had begun, the night before he testified. During this meeting, Dr. Wigren asked counsel if they had hired a biomechanical engineer to testify. Morrison responded by saying, "'It's a little late, Doc.'" Morrison and Dersch both testified the first time Dr. Wigren discussed the reliability or general acceptability of Dr. Mitchell's theory was during this meeting. They said he told them he did not believe Dr. Mitchell's theory, basically calling it nonsense. Despite this knowledge, they never asked Dr. Wigren to express any opinions on Dr. Mitchell's depolarization theory at trial. Morrison's explanation for not doing so was that he was uncertain what Dr. Wigren might say.

Besides failing to challenge Dr. Mitchell's depolarization theory, with both a *Daubert* motion and expert testimony, Buchhorn also pointed out her trial counsel failed

to elicit explanatory testimony from Dr. Wigren at trial, after his responses to the State's cross-examination suggested he agreed with Dr. Mitchell's depolarization theory. Buchhorn's new counsel pointed to the following exchange between Dr. Wigren and the State:

> "Q. [State's attorney C.J. Reig:] Would you agree that a child could suffer physical violence to their head that would change the electroconductivity to the brain and they would stop breathing? Yes or no.
> "A. [Dr. Wigren:] Yes, with an explanation.
> "Q So—thank you. The answer is yes.
> "A. With explanation.
> "Q. That's what—your client can come and ask questions if they want to.
> "MS. RIEG: Do you agree, Judge?
> "THE COURT: Well, I was going to tell the doctor that there can be a redirect to explain or expand on that."

Trial counsel's redirect of Dr. Wigren was very brief and did not address this issue. Thus, Dr. Wigren was never allowed to give the jury his explanation of the qualification to his answer.

Buchhorn's new counsel asked Dr. Wigren to provide this explanation at the evidentiary hearing on their posttrial motions. Dr. Wigren testified that while physical violence can change the electroconductivity of the brain and stop breathing, the impact in those situations is more violent than a skull fracture and this "very violent impact" would cause perceptible injury to the brain. The example he provided of this phenomenon was "crushing head injuries like in an occupational accident."

The trial court denied Buchhorn's motion for a new trial. It found Buchhorn's counsel was not ineffective for failing to request a *Daubert* hearing because the court held it would have denied a *Daubert* motion to exclude Dr. Mitchell's testimony. The

court found Buchhorn's counsel was not ineffective in hiring Dr. Wigren because the court found counsel appropriately relied on Dr. Wigren's expertise and knowledge. The court noted Dr. Wigren's theory on cause of death directly contradicted the State's theory. The court discounted Craig's testimony because the court found it depended on the incorrect assumption that trial counsel would be able to exclude Dr. Mitchell's testimony. The court found Craig improperly based her testimony on hindsight. The court also relied heavily upon the considerable expertise of trial counsel. The court pointed out they were very prepared, appeared to have formulated a potentially winning strategy, and appeared to have spent considerable time with their client. The court rejected Buchhorn's other claims and sentenced her to 123 months' imprisonment.

ANALYSIS

On appeal, Buchhorn argues the trial court abused its discretion when it denied her posttrial motion because (1) Dr. Mitchell's testimony was unreliable and should have been excluded under K.S.A. 60-456(b) and (2) Buchhorn's trial counsel was ineffective and prejudiced her right to a fair trial. Buchhorn has raised other grounds for reversing her conviction, which we need not address because we reverse her conviction for ineffective assistance of trial counsel.

The trial court may grant a new trial when it is "required in the interest of justice." K.S.A 2020 Supp. 22-3501(1). We review this decision for an abuse of discretion. Generally, a trial court abuses its discretion when its decision is found to be arbitrary, fanciful, or unreasonable, or based on an error of fact or law. *State v. Ashley*, 306 Kan. 642, 650, 396 P.3d 92 (2017). The decision must be such that no reasonable person would have arrived at the same outcome. *State v. Jolly*, 301 Kan. 313, 325, 342 P.3d 935 (2015).

Buchhorn failed to preserve her objections to the admissibility of Dr. Mitchell's testimony.

Buchhorn challenges the admissibility of Dr. Mitchell's testimony under K.S.A. 60-456, which codifies the test for admissibility of expert opinion set forth in *Daubert*, 509 U.S. 579. *Daubert* established a "gatekeeper" function for trial courts, which requires the court to assess the reasoning and methodology underlying a proposed expert's opinion and determine whether it is scientifically valid and applicable to the particular set of facts involved in the case. The purpose of the *Daubert* analysis is to "'determine at the outset . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.'" *Goebel v. Denver and Rio Grande Western R.R. Co.*, 215 F.3d 1083, 1087 (10th Cir. 2000) (citing *Daubert*, 509 U.S. at 592). In this respect, Buchhorn argues the district court's decision to admit Dr. Mitchell's testimony at trial created a freestanding error of such gravity that it requires reversal of her conviction.

The problem with Buchhorn's challenge is it is untimely. Buchhorn never objected to the admissibility of Dr. Mitchell's opinions, including his methodology and conclusions, until her posttrial motion. The purpose of the gatekeeper function in K.S.A. 2020 Supp. 60-456 and under *Daubert* is lost once the evidence at issue has passed through the gate. Indeed, K.S.A. 2020 Supp. 60-457(b) recognizes the importance of timing in this area by allowing the court to hold a pretrial hearing to determine whether a witness qualifies as an expert and whether the witness' testimony satisfies the requirements of K.S.A. 2020 Supp. 60-456(b). Buchhorn's challenge to Dr. Mitchell's testimony falls within the provisions of K.S.A. 2020 Supp. 60-456(b), yet she did not object to Dr. Mitchell's testimony before or during the trial.

Until the Kansas Legislature codified the *Daubert* test in K.S.A. 2014 Supp. 60-456 through K.S.A. 2014 Supp. 60-458, Kansas courts applied the *Frye* test to the

admission of scientific expert testimony. *In re Care & Treatment of Jimenez*, No, 115,297, 2017 WL 1035505, at *3 (Kan. App. 2017) (unpublished opinion). Kansas courts routinely rejected challenges to scientific evidence under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) absent a timely and specific objection at trial. *State v. Ordway*, 261 Kan. 776, 801, 934 P.2d 94 (1997); *Ohlmeier v. Jones*, 51 Kan. App. 2d 1014, 1019, 360 P.3d 447 (2015). Further, K.S.A. 60-404 prohibits setting aside a verdict or reversing a decision because of the erroneous admission of evidence without a timely and specific objection.

The State appropriately notes our Supreme Court strictly adheres to the contemporaneous objection rule. See, e.g., *State v. Solis*, 305 Kan. 55, 62-63, 378 P.3d 532 (2016). It also correctly points out the purpose of this rule "is not fulfilled when the objection is first raised after the trial has been completed." *State v. Cook*, 286 Kan. 1098, 1109, 191 P.3d 294 (2008). Certainly, the purpose of the *Daubert* test is not fulfilled when the objection is first raised well after the jury has already heard and considered the allegedly suspect testimony in rendering its verdict. We find Buchhorn has failed to properly preserve her objection to the admissibility of Dr. Mitchell's testimony and decline to overturn the trial court's denial of Buchhorn's motion on that basis.

Buchhorn's trial counsel was ineffective and prejudiced her right to a fair trial.

The Sixth Amendment to the United States Constitution guarantees an accused the right to have assistance of counsel for his or her defense. *Miller v. State*, 298 Kan. 921, 929, 318 P.3d 155 (2014). The Fourteenth Amendment to the United States Constitution applies this right to state proceedings. The guarantee includes not only the presence of counsel but counsel's effective assistance as well. *Sola-Morales v. State*, 300 Kan. 875, 882, 335 P.3d 1162 (2014) (relying on *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 [1984]). The purpose of the effective assistance guarantee

is to ensure the accused receives a fair trial. *State v. Galaviz*, 296 Kan. 168, 174, 291 P.3d 62 (2012).

An allegation of ineffective assistance of counsel presents both questions of fact and law. When the trial court conducts a full evidentiary hearing on the claim, we must determine whether the court's findings are supported by substantial competent evidence and whether the court's factual findings support their legal conclusions. The standard of review when evaluating the court's legal conclusions is de novo. *Fuller v. State*, 303 Kan. 478, 485, 363 P.3d 373 (2015).

The Kansas Supreme Court recently recounted the two-prong test for analyzing ineffective assistance of counsel claims in *Khalil-Alsalaami v. State*, 313 Kan. 472, 485-86, 486 P.3d 1216 (2021):

> "'*Strickland* established a two-prong test for determining if a criminal defendant's Sixth Amendment right to effective assistance of counsel has been violated by an attorney's performance. 466 U.S. at 687-96. Kansas courts adopted this test in *Chamberlain* [*v. State*], 236 Kan. [650,] 656-57[, 694 P.2d 468 (1985)]. Under the first prong, a defendant must demonstrate that counsel's performance was deficient. 236 Kan. at 656. If so, the court moves to the second prong and determines whether there is a reasonable probability that, without counsel's unprofessional errors, the result would have been different. *Strickland*, 466 U.S. at 694.' *State v. Betancourt*, 301 Kan. 282, 306, 342 P.3d 916 (2015).
>
> "To establish deficient performance under the first prong, 'the defendant must show that counsel's representation fell below an objective standard of reasonableness.' *Strickland*, 466 U.S. at 688. Courts must remain mindful that their scrutiny of an attorney's past performance is highly deferential and viewed contextually, free from the distorting effects of hindsight:
>
> > "'Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess

> counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. 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. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. [Citations omitted.]' 466 U.S. at 689.
>
> "Under *Strickland*'s second prong, defendants must show the deficient performance of counsel was prejudicial. To do so, defendant must establish with reasonable probability that the deficient performance affected the outcome of the proceedings, based on the totality of the evidence. *Edgar v. State*, 294 Kan. 828, 838, 283 P.3d 152 (2012). '"A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury."' 294 Kan. at 838."

Although the above principles should guide our decision, they are not mechanical rules. In fact, the ultimate focus must be on the defendant's right to fundamental fairness in the proceeding. "In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Strickland*, 466 U.S. at 696. The Kansas Supreme Court has long recognized that a criminal defendant "is entitled to a fair trial but not a perfect one." *State v. Cruz*, 297 Kan. 1048, 1075, 307 P.3d 199 (2013)

1. *Buchhorn's trial counsel was deficient in failing to investigate Dr. Mitchell's depolarization theory.*

Buchhorn's lawyers argue that her trial counsel's handling of Dr. Mitchell's testimony and the overall matter of expert testimony on the cause of death fell below the constitutional standard of adequate representation and deprived her of a fair trial. In other words, had the trial lawyers sufficiently prepared, they could have excluded Dr. Mitchell's testimony altogether or so undermined its credibility in the eyes of the jurors that the jury would have been left with at least a reasonable doubt about Buchhorn's guilt. We agree and reverse on this basis.

Under the circumstances, Buchhorn's trial counsel's conduct was objectively unreasonable. There is no question Dr. Mitchell's depolarization theory was central to the State's case. It was the linchpin that tied Buchhorn to O.O.'s death. This observation is not hindsight; it stems from information counsel knew before trial. Yet Buchhorn's counsel admit they did not independently research or investigate his theory.

If Buchhorn's counsel had inquired into Dr. Mitchell's theory at the preliminary hearing, studied it on their own, or properly explored it with their expert, they most likely would have discovered evidence to assist in a more effective cross-examination of Dr. Mitchell at trial and to better prepare Dr. Wigren to address Dr. Mitchell's opinions. Further, any of these investigative options could have prompted them to realize they needed to engage additional experts to attack Dr. Mitchell's theory or at least ensure Dr. Wigren addressed it at trial. For instance, if they had questioned Dr. Mitchell about the scientific basis for his theory, they would most likely have learned the "statistics" on which he relied were flimsy and his medical literature provided tenuous support, at best. This evidence would have been powerful on cross-examination, particularly since the matter hinged on the credibility of both sides' expert theories.

Although counsel's "[s]trategic choices based on a thorough investigation of the law and facts are virtually unchallengeable," when determining an ineffective assistance of counsel claim, uninformed decisions are not similarly protected. *Flynn v. State*, 281 Kan. 1154, Syl. ¶ 5, 136 P.3d 909 (2006); *Mullins v. State*, 30 Kan. App. 2d 711, 716-17, 46 P.3d 1222 (2002). Here, trial counsel lacked sufficient information to make an informed decision about how to address Dr. Mitchell's depolarization theory. Their failure to investigate this theory at or after the preliminary hearing, or explore it with their medical expert, bars any characterization of their deficiencies as "trial strategy."

Professor Craig testified, "To be able to say that the choices counsel made at trial were strategic, they have to be based on a thorough investigation. And part of that thorough investigation would be researching the issue, developing your experts, making sure your experts had all of the information that they might need." Her point is well taken. Buchhorn's counsel did not investigate Dr. Mitchell's theory on their own, with Dr. Mitchell (through examination at the preliminary hearing or trial), with Dr. Wigren, or with any other expert or consultant. They did not develop any expert testimony to address this theory, nor did they procure any information to provide Dr. Wigren about the factual or scientific basis for Dr. Mitchell's theory or on which to cross-examine Dr. Mitchell. It cannot be said that Buchhorn's counsel made an informed decision not to present testimony that was never discussed or evidence they never sought.

Buchhorn's trial counsel had never met Dr. Wigren or worked with him in the past. They admitted he was difficult to get ahold of. While they claim they "took direction from" him on medical issues, Dr. Wigren testified they never brought up depolarization with him. Trial counsel claim they asked him about it but admit he did not answer their questions and, instead, discussed an alternate theory. If their expert was unavailable or evasive, it was up to counsel to get the necessary answers or replace or supplement that expert. Morrison's admission that he did not ask Dr. Wigren about depolarization at trial *because he did not know what he would say* is telling.

At best, counsel relied exclusively upon an expert with whom they had no relationship, was difficult to get ahold of, and evaded answering questions about the State's key theory of the case. At worst, counsel did not address this key theory with Dr. Wigren until trial had begun and, even then, did not ask him to express his opinions on this theory once he told them what those opinions were—and most particularly after the State opened the door in cross-examining Dr. Wigren.

The trial court erred in finding it was reasonable for Buchhorn's counsel to rely upon Dr. Wigren to define the medical issues they needed to address. The ultimate control of a case rests with the lawyers and not the expert witnesses. It is incumbent upon the lawyers to define clearly for the experts the scope of their assigned tasks. Here, the communication channel broke down. The lawyers expected Dr. Wigren to tell them everything they needed to know about O.O.'s death and Dr. Mitchell's theory on causation. Dr. Wigren, however, apparently understood his engagement far more narrowly and offered an expert opinion on the skull fracture and possible causes of death rather than a critique of Dr. Mitchell's theory.

There is a difference between relying on an expert and scapegoating one. Here, counsel blamed Dr. Wigren for not telling them (1) Dr. Mitchell's depolarization theory had no medical basis or support in the medical community, (2) they needed to hire other experts to address depolarization, and (3) they should file a *Daubert* motion to exclude Dr. Mitchell's theory. Yet the record reveals they did not explore these issues with Dr. Wigren. It was unreasonable for counsel to expect Dr. Wigren to provide this guidance when they failed to request it.

Just like counsel cannot be said to have made an informed decision when they lacked the information needed to make the decision, they cannot be said to have relied on an expert for advice they never sought (or, according to them, did not receive when requested). Even if we accept the concept that counsel's reliance on their medical expert

to take the lead and suggest legal strategy was reasonable, counsel still cannot shirk their professional responsibilities onto an unfamiliar, retained expert without giving that expert the necessary tools to shoulder those responsibilities. Dr. Wigren testified he did not realize depolarization was a significant issue in the case, and he was not given the preliminary hearing transcript where Dr. Mitchell discussed it. It is difficult to imagine when Dr. Wigren was supposed to provide this pretrial advice when counsel admit the first time they substantively discussed depolarization with him was during their mid-trial meeting.

Both parties cite *Wilson v. Sirmons*, 536 F.3d 1064 (10th Cir. 2008), in support of their respective positions, and we agree it is pertinent. In *Wilson*, the court considered whether "trial counsel was ineffective because of his poor investigation in preparation for the sentencing phase and his failure to put on relevant mitigating evidence at trial." 536 F.3d at 1083. While the trial counsel in *Wilson* interviewed witnesses to testify as to Wilson's character, trial counsel failed to interview Wilson's family members and therefore failed to gather a complete narrative of Wilson's life. In its analysis, the court determined "the question is not whether counsel did *something*; counsel must conduct a full investigation and pursue reasonable leads when they become evident." 536 F.3d at 1084.

Wilson recognized that "in many situations, the expert will know better than counsel what evidence is pertinent to mental health diagnoses and will be more equipped to determine what avenues of investigation are likely to result in fruitful information." 536 F.3d at 1089. But *Wilson* took this further to find that while trial counsel should be able to rely on their expert to a degree, trial counsel "may not simply hire an expert and then abandon all further responsibility [to investigate]." 536 F.3d at 1089. Ultimately, the court in *Wilson* found that trial counsel's preparation fell below acceptable standards and was therefore deficient. 536 F.3d at 1089.

Buchhorn's trial counsel was similarly deficient. Once they hired Dr. Wigren, their duty to investigate the State's main theory did not end there. They failed to utilize his expertise to address depolarization, either with them or the jury. They also pursued no information about the factual or medical basis for Dr. Mitchell's theory. Instead, they simply hired Dr. Wigren without providing him the necessary information and guidance to make the decisions on which they were apparently relying on him to make.

Buchhorn also relies on *Robinson v. State*, 56 Kan. App. 2d 211, 428 P.3d 225 (2018), to argue her trial counsel could not blame Dr. Wigren for their failure to fully investigate Dr. Mitchell's theory. In *Robinson*, Frank Robinson was convicted of aggravated arson and felony murder based on the testimony of the government's fire investigator, Agent Douglas Monty. The trial court found Robinson's trial counsel was ineffective for failing to properly investigate "a most important aspect of this case—fire cause and origin expert opinions" and for failing to present sufficient expert testimony to refute claims made by the State's fire investigators. 56 Kan. App. 2d at 227. Robinson's attorney did not hire an arson expert to testify at trial, and he only consulted with an "'arson investigation-type expert, cause and origin person'" less than two weeks before trial. 56 Kan. App. 2d at 216. After that person proved unhelpful, Robinson's attorney conducted no further investigation and then did not talk to another expert.

In affirming the trial court's decision, this court noted the importance of thoroughly investigating both the facts and expert opinions to prepare a proper defense. See 56 Kan. App. 2d at 227-30. As in *Robinson*, Buchhorn's counsel did not properly investigate the central issue in her case, which was Dr. Mitchell's theory on cause of death. And, also like *Robinson*, if Buchhorn's counsel had properly investigated Dr. Mitchell's expert opinions, they would have been able to undermine those opinions far more effectively. This court's description of *Robinson*'s counsel's failings is just as apt here. By failing to independently investigate Dr. Mitchell's theory and by failing to marshal expert evidence to directly challenge that theory, Buchhorn's counsel entered

"battle with the State unarmed and unequipped with the expertise [Buchhorn] needed for a defense." 56 Kan. App. 2d at 227.

As in *Robinson*, Buchhorn's counsel may have acted reasonably when they first hired Dr. Wigren to contest the timing of O.O.'s skull fracture. Still, just as the expert in *Robinson* was not qualified to refute the most important issue of the case, Dr. Wigren was not a neurological expert who could fully refute Dr. Mitchell's theory of instant death caused by the depolarization of nerves from blunt force trauma. And, like in *Robinson*, Buchhorn's counsel failed to make a comprehensive investigation of Dr. Mitchell's medical opinions, thus failing to equip Buchhorn with what she needed for a proper defense. It was not a reasonable strategy that led counsel to decline to investigate Dr. Mitchell's theory, but, rather, lack of thoroughness and preparation. See *Kenley v. Armontrout*, 937 F.2d 1298, 1308 (8th Cir. 1991).

2. *Buchhorn's trial counsel was deficient in failing to present responsive expert testimony at trial.*

Buchhorn also claims her counsel was ineffective for failing to directly challenge Dr. Mitchell's depolarization theory with expert testimony. She presented examples of such testimony at the posttrial hearing, in the form of Dr. Kessler and Dr. Ng. These highly qualified medical professionals testified that Dr. Mitchell's depolarization theory had no support in science or the medical community, and that the facts of the case did not support his theory on O.O.'s cause of death. Such evidence would have severely undermined Dr. Mitchell's credibility and the State's theory of the case.

In deciding Buchhorn's counsel was not ineffective for failing to engage such experts, the trial court relied on the considerable experience of trial counsel. She found it reasonable for counsel to rely upon Dr. Wigren to tell them if they needed additional experts. While it is true that the decision whether to call a particular witness rests within

the sound discretion of trial counsel, this decision must be an "*informed, tactical*" one. *United States v. Holder*, 410 F.3d 651, 655 (10th Cir. 2005). Here Buchhorn's trial counsel failed to provide a "valid strategic reason" for simply relying on Dr. Wigren to tell them whether they needed more experts. See *Robinson*, 56 Kan. App. 2d at 228. As explained above, counsel's decision to blindly rely on Dr. Wigren was uninformed and objectively unreasonable.

Professor Craig testified that Buchhorn's counsel could not effectively cross-examine Dr. Mitchell without proper experts. She also testified trial counsel did not adequately challenge the State's theory of O.O.'s cause of death. While she acknowledged that counsel hired Dr. Wigren, a forensic pathologist, she still believed a neurologist was necessary to testify in this case. Indeed, even Dr. Mitchell admitted in the preliminary hearing that a neuropathologist may disagree with some of his medical findings.

Trial counsel admitted the only time they specifically discussed other experts with Dr. Wigren was when he flew in on the Sunday after trial had begun, the night before he testified. While counsel fault Dr. Wigren for not bringing the need for other experts to their attention earlier, they fail to acknowledge their responsibility to directly address this issue with him. It was counsel's duty to ensure their expert addressed all necessary issues, particularly since they conducted no independent investigation on their own. Rather than making an informed decision on the expert testimony required to counter Dr. Mitchell's theory, counsel simply abrogated their responsibility to Dr. Wigren, a witness with whom they had never worked, had never met, and who they complained was difficult to get ahold of.

Under *Wilson*, once counsel knew Dr. Mitchell's theory on cause of death from the preliminary hearing, they had an obligation to properly investigate that theory. Further, under *Robinson*, Buchhorn's counsel should have hired an expert who could properly refute the most important issue of the case—Dr. Mitchell's theory on depolarization of

nerves. Buchhorn's counsel's performance fell "below an objective standard of reasonableness, considering all the circumstances." See *Bledsoe v. State*, 283 Kan. 81, 90, 150 P.3d 868 (2007). Trial counsel's failure to use expert testimony to challenge the validity of Dr. Mitchell's theory and to explain how Dr. Mitchell's theory was false or not credible was objectively unreasonable.

Using the *Strickland* analysis, Buchhorn must establish her counsel's actions were deficient under the totality of the circumstances. *Bledsoe*, 283 Kan. at 90; see *Strickland*, 466 U.S. at 687. Here, that burden is met.

3. Trial counsel's deficient performance prejudiced Buchhorn's right to a fair trial.

As we have said, under the *Strickland* test for ineffective assistance of counsel, Buchhorn must establish that her counsel's objectively unreasonable performance caused her material prejudice. To establish prejudice, Buchhorn must show a reasonable probability that her counsel's deficient performance affected the outcome of the proceedings, based on the totality of the evidence. A reasonable probability here is a probability sufficient to undermine confidence in the outcome. *Khalil-Alsalaami*, 313 Kan. at 485.

As in *Mullins*, 30 Kan. App. 2d at 717, the trial court did not analyze the prejudice prong of the *Strickland* test. Instead, its analysis stopped after finding counsel was not ineffective. We analyze this prong based on the facts in the record before us, just as this court did in *Mullins*.

There was no physical evidence tying Buchhorn to the death, which meant the trial turned on credibility between the prosecution and defense witnesses. The State built its case on the expert testimony given by Dr. Mitchell. This makes an investigation into Dr. Mitchell's theory on cause of death the most important aspect of Buchhorn's defense.

Buchhorn's counsel had a duty to investigate Dr. Mitchell's theory to give her the most effective defense. See *McHenry v. State*, 39 Kan. App. 2d 117, 123, 177 P.3d 981 (2008). Their failure to investigate the State's main theory meant they were unprepared to fulfill that fundamental constitutional obligation.

In *Mullins*, this court found trial attorneys' failure to consult or procure an expert was objectively unreasonable because there was no showing of strategic reasons for that failure. *Mullins* also found that "[h]ad trial counsel procured the services of an available expert . . . the jury would have been presented with relatively strong evidence to potentially undermine the allegations . . . ." 30 Kan. App. 2d at 717. This court also held that "because trial counsel failed to present . . . such available expert testimony, the jury heard only the victim's unchallenged allegations." 30 Kan. App. 2d at 718.

Just like in *Mullins*, Buchhorn's counsel could have undermined Dr. Mitchell's theory with information they could have discovered at the preliminary hearing, from their own independent investigation, and from properly managed experts (including Dr. Wigren). If counsel had directly challenged Dr. Mitchell's theory, such as by presenting testimony from Dr. Kessler or Dr. Ng (or both), or if Dr. Wigren had directly addressed it, there is a reasonable probability the jury would have found Buchhorn not guilty. The State's entire theory of guilt relied on Dr. Mitchell's opinion that the death was immediate, yet trial counsel did not directly challenge that theory.

Trial counsel's failure to independently investigate Dr. Mitchell's theory also left them unprepared to challenge the credibility of that theory on cross-examination. "'While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.'" *United States v. Cronic*, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). Buchhorn could have entered the trial armed with direct evidence to impeach Dr. Mitchell's theory on the cause of death and the State's entire theory of guilt. Instead, trial counsel was

unprepared to test the validity of Dr. Mitchell's theory, despite counsel's admission that Dr. Mitchell's opinions were key to the State's case.

When setting forth the very test we apply today, the United States Supreme Court pointed out, "a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." *Strickland*, 466 U.S. at 685. Dr. Mitchell's depolarization theory was not subjected to effective or even fully formed adversarial testing. If the jury did not believe that theory, there is nothing left in the State's case against Buchhorn, just like in *Robinson*. It was Dr. Mitchell's opinion that O.O.'s death was instantaneous that tied the death to Buchhorn, as the last person who admitted having contact with O.O. If that opinion was impeached, a finding of guilt becomes highly questionable. See *Robinson*, 56 Kan. App. 2d at 229.

Based on the totality of the circumstances, we are not confident the outcome would have remained unchanged if the jury had been apprised of all the information Buchhorn's counsel could have presented to impeach Dr. Mitchell's opinions.

Trial court remarks during voir dire

Since the errors we have identified above prejudiced Buchhorn, we need not consider any of her other allegations. See *State v. Stinson*, 43 Kan. App. 2d 468, 469, 227 P.3d 11 (2010) (finding that because court was reversing and remanding for new trial, remaining argument on ineffective assistance of counsel was moot). However, there is one matter we feel compelled to address, even though we do not base our decision upon it.

Buchhorn also took issue in her posttrial motion with the trial court's remarks at the close of jury orientation. She reprises those concerns on appeal. The court told the jury panel:

> "Okay. Anybody ever been at Thanksgiving dinner and your crotchety old uncle says, 'I just don't understand why the defendants have all the rights and victims have none?' Anybody ever heard anybody made those statements? I see people smiling and won't admit it, but they have heard it. Anybody know why we are set up that way? Well, because the people who wrote our Constitution were criminals. They had been charged with treason; and if they had been found guilty, they would have been hanged to death, and they wrote our Constitution in a way that they would have wanted to be protected when they went to trial."

Buchhorn's trial counsel did not object to these remarks. Her new counsel argued these remarks were factually inaccurate and constituted judicial misconduct, denying Buchhorn a fair trial. The district court did not address this argument in its order.

Frankly, we fail to see the purpose of these remarks, which neither assist the prospective jurors in understanding what will be expected of them if they are chosen to serve nor impart to them some legal principle applicable to the criminal justice process. And Buchhorn is absolutely correct that such remarks vitiate the importance of the constitutional protections afforded an accused (and, indeed, all citizens). At the outset of the trial, the district court told the prospective jurors that Buchhorn, as a criminal defendant, had all kinds of rights and O.O., the victim, had none. We see no productive value in unfavorably contrasting persons accused of crimes with victims of crimes, particularly since it risks providing the jury an improper analytical framework to process the evidence admitted at trial. In short, the trial judge's remarks were imprudent and should not have been made.

In closing, we hearken back to the sage observations made by the *Robinson* court. 56 Kan. App. 2d at 212. It is not an easy decision to grant a new trial to someone who has been convicted of killing another human being. But more important than the severity of the crime is the fundamental principle of American law—all accused must receive a fair trial, even those accused of killing a child. That legal principle has guided our decision to order a new trial for Carrody M. Buchhorn.

Reversed and remanded.

Appendix B

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CLERK OF THE DOUGLAS COUNTY DISTRICT COURT
CASE NUMBER: 2017-CR-000385

IN THE DISTRICT COURT OF DOUGLAS COUNTY, KANSAS
SEVENTH JUDCIAL DISTRICT

STATE OF KANSAS

Plaintiff,

vs 2017-CR-385

Division 2

CARRODY M BUCHHORN

Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL OR NEW TRIAL

Findings of Fact and Conclusions of Law

Oliver Ortiz was a healthy, active nine month old boy who attended daycare in Eudora, Kansas. On a September morning, Oliver's father left him in the care of Gina Brunton, Oliver's daycare provider. On that same day, the defendant, Carrody Buchhorn, was working at the daycare, where she had been employed for about two years.

Oliver's parents testified he was particularly happy that day, and as they were leaving, it was the first time Oliver waved good-bye to them. When Oliver arrived at the daycare he had no bruises, bumps or injuries. Brunton, who owned and operated the daycare, confirmed Oliver was cheerful all morning and she saw no indication he was in discomfort or pain. He drank his bottle, ate his lunch, and went down for a nap with minimal fuss. Neither Ms. Brunton nor Ms. Buchhorn observed any injuries to Oliver that day. Oliver had no chronic illnesses, and his pediatrician testified Oliver was normal as far as his growth and development. Oliver had no significant medical concerns.

From approximately 12:30 to 3:00 p.m., the defendant was alone with Oliver. She put him down for his nap at approximately 12:30. At 3:00 p.m., when it was time to wake Oliver to

get him ready to leave with his father, the defendant said she went to Oliver's bed and found him unresponsive. She performed infant CPR and called 911. The first responders continued with CPR and rushed Oliver to the hospital where he died. Ms. Buchhorn admitted she was the sole caretaker of Oliver from 12:30 to 3:00 p.m., but denies having any knowledge as to the cause of Oliver's injuries.

An autopsy was performed by Dr. Erik Mitchell. Dr. Mitchell found a small bruise on Oliver's hairline, abrasions on his ear, bruising and bleeding in the abdominal cavity, a liver tear, multiple bruises to the back of the head and scalp, damaged tissue, a blood clot on the surface of the dura and a significant skull fracture. The skull fracture, abrasions and bruising all appeared recent, as there was no evidence the skull fracture had started to heal. Dr. Mitchell testified he found no brain swelling and testified the internal injuries to the abdominal cavity and liver tear may have been from the CPR. Dr. Mitchell's conclusion was Oliver died from blunt force trauma, releasing energy that affects the base of the brain, and causes temporary cessation of the electrical function of the base of the brain. Such force could not have been accidental and the effects of the injury would have been immediately apparent to Oliver's caretakers. He ruled the death a homicide.

The jury heard evidence the defendant was frustrated with Oliver's fussiness, and his "pissy" behavior. She was unhappy with how she was treated by Gina Brunton and felt she was carrying far too much of the load at the daycare center. The day before Oliver's death, she sent very ugly text messages to a friend expressing her frustration with Gina Brunton.

The defense presented evidence from Dr. Carl Wigren, a forensic pathologist from California, who testified the skull fracture was healing, which indicated to him this was an injury that could have occurred two to seven days before the child's death. Dr. Wigren testified the

skull fracture could not have occurred on the day Oliver died based upon evidence of healing.

After a lengthy trial, the jury convicted Ms. Buchhorn of second degree murder. Before sentencing, Ms. Buchhorn fired her attorneys and hired new counsel, who have filed a motion for a judgment of acquittal, or in the alternative, for a new trial.

The Court will reference additional facts as they relate to the legal conclusions.

Conclusions of Law

The defense arguments for acquittal or a new trial have many headings and sub-headings, however, the argument is simply this: the defense attorneys were ineffective for not keeping out Dr. Mitchell's testimony through a *Daubert* hearing and the defense hired the wrong expert.

Defense Counsel Were Not Ineffective for Failing to Request a *Daubert* Hearing

Dr. Mitchell is a forensic pathologist with forty years of experience in his field. He has been recognized as an expert in a number of states and has testified as an expert in Kansas cases. He has performed over 12,000 autopsies, has testified in hundreds, if not thousands of cases. No court has ever found him not qualified to testify as an expert in his field. Dr. Mitchell has extensive experience in child-death cases, has sat on the Kansas Child Death Review Board and attended continuing education in child death cases.

Paul Morrison and Veronica Dersch, retained counsel for the defendant, were faced with these facts. Mr. Morrison testified he did not believe he would win a *Daubert* challenge to Dr. Mitchell's testimony, and his strategy was to present the testimony of his expert to refute Dr. Mitchell's conclusion, and through cross-examination, to show Dr. Mitchell as a sloppy and overworked pathologist who failed to follow standard protocol in the autopsy of a child. Mr. Morrison argued to the jury that Dr. Mitchell's admission that he averages over 400 autopsies a

year, which is nearly double the recommended number to perform, created doubt as to Dr. Mitchell's thoroughness. Mr. Morrison pointed out, through effective cross-examination, that Dr. Mitchell failed to bring the correct file to the preliminary hearing. Dr. Mitchell failed to order x-rays, which is standard procedure when a child has died from injuries. Additionally, Mr. Morrison argued the video of the autopsy showed a pathologist acting in a buffoonish manner and speculating on a number of theories of death.

Mr. Morrison testified he made a number of inquiries among criminal trial counsel for recommendations of a qualified pathologist to review the autopsy and determine if there was an alternate conclusion to be drawn. Dr. Carl Wigren was recommended. Dr. Wigren reviewed the video of the autopsy, photographs of Oliver, pictures taken during the autopsy, and slides of tissue taken from the autopsy. Dr. Wigren testified skull fractures are common in children and adults, and often, with no outward symptoms. He believed the goose-egg on Oliver's forehead had been there for a couple of days. He also testified he found early signs of pneumonia in Oliver's lungs. He told the jury he did not know why Oliver died. He believed the skull fracture had been present for a few days and finally reached a critical point. The primary point made by Dr. Wigren was that he saw healing to the fracture. He testified signs of healing take days to be seen, therefore, the injury to Oliver did not occur on the day he died when he was in the care of the defendant. In fact, according to Dr. Wigren, the injuries could have occurred two to seven days earlier.

The defendant brought two experts to testify at the hearings on the motions for judgment of acquittal or, in the alternative, for a new trial. Dr. Sudha Kessler and Dr. Ng are both highly qualified and highly respected pediatric neurologists with 18 and 20 years of experience

respectively. Neither expert is trained in the area of forensic pathology. Neither expert watched the video of the autopsy, saw the photographs, nor read Oliver's pediatric medical records.

Dr. Kessler testified she handles ten child death cases each year. In those cases where a child has died from brain damage, the child has lived for hours after the injury and, in those cases, there is swelling or hemorrhaging to the brain.

Neither expert was able to opine about the cause of Oliver's death. The purpose of their testimony was to argue Dr. Mitchell's conclusion that Oliver's death had no neurological basis, i.e. that Oliver died as a consequence of blunt force trauma releasing energy that affects the base of the brain and causes temporary cessation of the electrical function of the base of the brain. Dr. Mitchell testified the amount of force required to cause death could not have been accidental and the effects of the injury would have been immediately apparent to Oliver's caretaker; therefore, the death was a homicide. At the hearing on post-trial motions, Dr. Mitchell testified the skull fracture impacted the medulla, a critical part of the brain that helps regulate heartrate, breath, and awareness. He agreed that as a rule, most head-trauma cases include observable injury to the brain itself; however, he believed there was a rapid loss of blood pressure, and Oliver died of a concussive injury to the brain causing immediate death. The lack of brain swelling or apparent injury correlated to the fact Oliver did not have a prolonged period of survival after the injury. Dr. Mitchell testified he has observed two other cases in which concussive injury to the brain stem resulted in immediate death and neither victim had significant injury to the brain. Dr. Mitchell compared his conclusions to what happens when a person suffers a concussion. A concussion is a functional alteration of the brain without visible anatomic findings; however, the medical community agrees a concussion can cause significant injury to a person. Also, a person who dies from epilepsy does not have any changes to the brain. Additionally, literature relied

upon by Dr. Mitchell recognizes that head trauma to children most often results in immediate symptoms.

The post-trial hearing was the *Daubert* hearing. In reviewing the rules for ineffective assistance of counsel, the case of *State v. Davis,* 277 Kan. 309, 314-15, 85 P.3d 1164, 1169-70 (2004) provides guidance:

> "Before counsel's assistance is determined to be so defective as to require reversal of a conviction, the defendant must establish two things. First, the defendant must establish that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel's performance was less than that guaranteed to the defendant by the Sixth Amendment to the United States Constitution. Second, the defendant must establish that the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial."
>
> "Judicial scrutiny of counsel's performance in a claim of ineffective assistance of counsel must be highly deferential, and 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. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."
>
> "With regard to the required showing of prejudice to the defendant in a claim of ineffective assistance of counsel, the proper standard requires the defendant to show 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. In a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury."
>
> "Both the performance and prejudice prongs of the ineffective assistance of counsel inquiry remain mixed questions of law and fact on appeal. Where the trial court has made findings of fact and conclusions of law, an appellate court determines whether the decision reached by the trial court follows as a matter of law from the facts stated as its basis, and also whether the facts so stated have substantial support in the evidence." *State v. Orr,* 262 Kan. 312, Syl. ¶¶ 1, 2, 3, 4, 940 P.2d 42 (1997).

Was trial counsel ineffective for not requesting a *Daubert* hearing to refute the defense claim that Dr. Mitchell relied upon "junk science" and there was no scientific basis for his conclusion as to the cause of death? The *Daubert* case is now codified in K.S.A. 60-456, which requires the court to make "two fundamental decisions:" 1) that the expert is qualified by knowledge, skill, experience, training or education to render an opinion; and (2) that the expert testimony is reliable and relevant and will assist the trier of fact. *Smart v. BNSF Railway Co.*, 52 Kan. App. 2d 486 (2016). There is no doubt Dr. Mitchell is qualified by knowledge, skill, experience, training and education to render an opinion on the cause of death. The defendant argues his testimony was not reliable.

Defendant's experts disagreed with Dr. Mitchell's conclusions and were adamant Dr. Mitchell's theory of death had no scientific basis, as determined by their own experience and research, as well as a literature review each performed for this matter. However, under *Daubert,* the focus on the inquiry is not on the conclusions generated by the expert, but rather on the principles and methodology the expert used in formulating the opinion. *Daubert v. Merrell Dow Pharm.,* 509 U.S. 579, 595, 113 S.Ct. 2786 (1993); *Smart v. BNSF Railway Co.,* 52 Kan. App. 2d 486, 495, 369 P.3d 966 (2016). Here, the experts provided by the defendant disagreed with Dr. Mitchell's ultimate conclusion and theory of death, but they could not (and arguably were not qualified) to speak to his methodology or experience. In fact, there were no allegations that Dr. Mitchell performed the autopsy incorrectly or that he lacked the qualification to determine a cause of death. Instead, the defendant ultimately challenges Dr. Mitchell's conclusion.

In *Lundeen v. Lentell*, 397 P.3d 453 (Kan. Ct. App. 2017), the Kansas Court of Appeals noted that plaintiff did not need to prove the expert was "indisputably correct or even that his theory is 'generally accepted by the scientific community.'" Instead, the Court stated the expert

merely needed to show that the method used in reaching his opinions was scientifically sound and was based on the facts of the case. The Court then stressed the job of "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" as the traditional means of attacking evidence. In *Tamraz v. Lincoln Elec. Co.,* 620 F.3d 665, 681-82 (6th Cir. 2010), the federal court frowned upon the argument made by the defendant in this case, finding that "case law teaches that *Daubert's* role of ensuring that the courtroom door remains closed to junk science is not served by excluding medical expert testimony that is supported by extensive relevant medical experience. Such exclusion is rarely justified in cases involving medical experts."

Based upon the facts of this case and the supporting case law, if Mr. Morrison and Ms. Dersch had requested a *Daubert* hearing, they would have lost their motion to exclude the testimony of Dr. Mitchell. A defendant cannot argue ineffective assistance of counsel for failing to file a motion upon which the defense would not have prevailed. *Delozier v. Summons,* 531 F. 3d 1306, (10th Cir. 2008), cert. denied, 129 S.Ct 2058(2009). Also, as stated in *Davis,* "... the defendant must show a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." The defendant has failed to show error on the part of Mr. Morrison and Ms. Dersch in not asking for a *Daubert* hearing.

Defense Counsel Was Not Ineffective in Hiring Dr. Carl Wigren

In *Mullins v. State,* 30 Kan. App. 2d 711, rev. denied 274 Kan. 1113 (2002), the Kansas Court of Appeals stated "...the decision to call or not call a certain witness is a matter of trial strategy." In *Mullins,* counsel failed to investigate or call an expert to illustrate the flaws of interviewing children in sexual abuse cases. Counsel was found to be ineffective. Obviously, a claim of trial strategy does not absolve the trial court of looking at whether the strategy was

reasonable, however, the facts support a reasonable strategy on the part of Mr. Morrison and Ms. Dersch.

Mr. Morrison and Ms. Dersch were effective. As previously stated, they searched for an expert, consulted with the expert, and hired the expert who directly contradicted the State's theory of the case. Dr. Wigren had access to the autopsy video, Dr. Mitchell's report, and the slides. His only disagreement with Dr. Mitchell was the timing of the injuries. In addition to looking at all the information Dr. Mitchell had, Dr. Wigren also consulted a pediatric pulmonary pathologist and a pediatric neurologist.

Attorneys are not medical experts. Mr. Morrison and Ms. Dersch hired a highly recommended forensic pathologist who believed Oliver's injuries pre-dated the time he was in the defendant's care at daycare. They relied upon their expert and his knowledge. If the jury had relied upon the testimony of Dr. Wigren, the verdict would have been not guilty. As stated in *State v. Davis*, the reviewing court must make every effort be made to eliminate the distorting effects of hindsight.

The defendant called Professor Alice Craig from the University of Kansas. Professor Craig has 23 years of legal experience and her current position at the University is handling post-conviction cases challenging counsel's effectiveness. The Court respects Professor Craig and finds she is qualified as an expert witness. However, Professor Craig's testimony supporting the defendant's argument of ineffectiveness of counsel is premised upon this Court striking Dr. Mitchell's testimony after a *Daubert* hearing. This Court has determined it would not strike Dr. Mitchell's testimony. Additionally, Professor Craig testified Mr. Morrison and Ms. Dersch were ineffective because they did not find a better expert. Once again, that premise is based upon hindsight and gives no deference to the testimony of Mr. Morrison and Ms. Dersch that

they put considerable effort into finding the appropriate expert and to the amount of time they spent consulting with their expert.

It is also important to look at the expertise Mr. Morrison and Ms. Dersch brought to the trial. Paul Morrison has forty years of experience as a trial attorney. He has tried approximately 150 jury trials. He has experience as the Johnson County District Attorney and as the Kansas Attorney General. Mr. Morrison has witnessed hundreds of autopsies, has been part of the investigation into numerous homicide cases and has prepared those cases for trial in consultation with forensic pathologists.

Veronica Dersch has practiced law for sixteen years, has tried five or six homicide cases and been involved in approximately fifty homicide investigations, in addition to attending autopsies and reviewing child abuse cases. Her trial practice has included prosecution and criminal defense.

Mr. Morrison and Ms. Dersch testified this case was their number one priority for two years. Their involvement in the case began before charges were filed. They strongly urged the District Attorney's Office not to file charges, pointing out the circumstantial nature of the case. At the preliminary hearing, Mr. Morrison vigorously cross-examined Dr. Mitchell's methods and conclusions from the autopsy. Mr. Morrison made an impassioned plea on the part of his client for a dismissal at the conclusion of the preliminary hearing. He argued the case was based solely on circumstantial evidence and Dr. Mitchell's failure to bring the correct file, to remember whether or not x-rays were ordered (they were not), and his buffoonish comments at the autopsy were sufficient for the Court to dismiss the case. The Court denied the request for a dismissal; however, it was clear Mr. Morrison and Ms. Dersch were very prepared for the hearing and had

formulated a potentially winning trial strategy. The Court observed nothing that was ineffective on the part of the counsel at that early stage.

At the trial, it was apparent to the Court that counsel had worked closely with the defendant. There was an excellent rapport between the defendant and her counsel, particularly with Ms. Dersch. When defendant arrived for the jury trial, it was also apparent to the Court that counsel had worked with their client to make sure she presented to the jury in the best possible light. Her clothing was designed to conceal her multiple tattoos. She had a new and fashionable hair style. She was also an excellent witness. She knew to "just answer the question." She knew not to volunteer information. She did not argue with the prosecution, nor did she present an angry, defensive, or hostile manner. She appeared comfortable under direct and cross-examination. This rarely happens without counsel spending considerable time with a client.

Based upon the facts of this case, Mr. Morrison and Ms. Dersch were not ineffective. Even with the benefit of hindsight, it is speculative that a different defense expert would have persuaded the jury to reach a different conclusion.

Defense Counsel Were Not Ineffective in Failing to Redact a Statement

The defendant claims counsel was ineffective for failing to redact the defendant's statement to Detective Jamie Lawson. During one of several interviews with the defendant, Det. Lawson stated to the defendant that her statements were inconsistent with Dr. Mitchell's report. The trial Court believes the interview lasted at least an hour if not more. The detective told the defendant Dr. Mitchell was an experienced and highly respected forensic pathologist. This comment took up less than two or three minutes of the entire interview. The State played the interview in its case in chief. However, the State did not comment upon Det. Lawson's assessment of the credibility of Dr. Mitchell's conclusions, nor did the State reference the

comments in closing arguments. Defendant argues this comment upon the credibility of Dr. Mitchell was an error, trial counsel was ineffective for not having that statement redacted, and this Court should grant defendant a new trial.

During the three or more days of evidence presented by the defendant on the motions for acquittal or for a new trial, no evidence or argument was presented on this issue. Rather than consider it abandoned, the Court will address the issue.

In *State v. Elnicki*, 279 Kan. 47, 105 P.3d 1222(2005), during an interview with Mr. Elnicki, law enforcement officers accused Elnicki of lying, using such phraseology as "a flat out lie," "you're sitting here bullshitting me," "you're weaving a web of fucking lies, man." Additionally, in closing argument, the prosecutor compounded the issue by characterizing defendant's statements to the police as "yarns," "fairy tales," "fabrications;" and as a "tall tale" and "spin." To top that off, in closing argument, the prosecution then vouched for the credibility of the victim.

In *Elnicki*, the Kansas Supreme Court started with the premise that the district court has no discretion to allow a witness to express an opinion on the credibility of another witness. (p.53-54). *Elnicki* was reversed and remanded for a new trial, not based solely upon the actions of the law enforcement officers, but based upon the compounding of the error by the prosecutor. The Supreme Court called their ruling "...a close call...." (at p. 67).

Det. Lawson's statements to defendant concerning Dr. Mitchell's credibility should not have been played to the jury, however, a two-minute conversation woven within nearly seven days of evidence does not require a reversal. Det. Lawson's statements are more akin to the statements made by detectives in the case of *State v. Becker*, 296 P.3d 1140 (Kan. Ct. App. 2013). The detective confronted the defendant with a change in his story. This was not

considered error. In *Miller v. State,* 240 P.3d 628(Kan.App. 2010, unpublished), the defendant gave three different versions of the events that led to the death of the victim. In the second interview, the detective told the defendant, "you're not telling the truth, you're wasting my time...I don't understand why you're not telling me the truth...it's not even close to being the truth."

Defendant's third interview produced a written statement from the defendant with a third version of the events. The jury was shown the un-redacted video of the second interview and provided the defendant's written statement. Defendant argued ineffective assistance of counsel for failure to have the video redacted. The Kansas Court of Appeals found no error. First, the Court found the defendant abandoned the version of the events as told in the video. Second, the prosecutor did not comment upon the defendant's credibility in closing arguments. When combining these two factors, the appellate court held the video would not have changed the outcome of the trial: therefore, counsel was not ineffective.

In the video viewed by the jury in this matter, Det. Lawson did not call the defendant a liar. He did not swear at her and was only mildly confrontational. At no point in the trial nor in closing arguments did the prosecution highlight or call the jury's attention to Det. Lawson's statements. This case is more akin to *Becker* and *Miller* and does not come close to the egregiousness of the statements made by law enforcement and the prosecutor in *Elnicki.*

The Kansas Supreme Court has recognized repeatedly that a defendant is "entitled to a fair trial but not a perfect one, for there are no perfect trials." *State v. Cruz,* 297 Kan. 1048, 1075 (2013); *Appleby v. State,* 318 P.3d 1019 (Kan. Ct. App. 2014) *unpublished opinion.*

The defendant may not have had a perfect trial, but it was a fair trial. Considering the volume of evidence gathered and presented, it is not surprising defense counsel may have missed

this small reference to the credibility of another witness. This does not make them ineffective. The detective's comments are not egregious enough to warrant a new trial because the court does not find, even "... with the benefit of hindsight..." the jury would have reached a different result but for the detective's comments. *Sola-Morales v. State,* 300 Kan. 875, 882 (2014).

Was Counsel Ineffective for Failure to Impeach Dr. Mitchell?

Defense argues trial counsel should have impeached Dr. Mitchell through cross-examination of accusations of misconduct reported in the case of *Rivas v. Fischer,* 780 F. 3d 529 (2d. Cir. 2015). The case arises from a murder trial and re-trial in 1989 and 1993. There were allegations of misconduct on the part of Dr. Mitchell. He subsequently resigned from his position as a coroner in New York. Dr. Mitchell denies there was any misconduct on his part. The allegations are thirty years old and Dr. Mitchell was cleared of any wrongdoing. *Rivas*, 780 F. 3d @536, n.7.

In *Pabst v. State*, 287 Kan. 1, 18, 192 P. 3d 630(2008), defendant argued his trial counsel was ineffective for failing to cross-examine Dr. Mitchell about allegations he had improperly harvested and donated body parts while he was the coroner in New York. These are the allegations considered in *Rivas*. The Supreme Court rejected the argument, stating: "We question whether such cross-examination would have been proper and cannot fault defense counsel for declining to attempt to impeach Dr. Mitchell with collateral, irrelevant claims from the media." 287 Kan. @19.

Mr. Morrison's cross-examination of Dr. Mitchell was not collateral or irrelevant or based upon allegations occurring 25-30 years ago. Mr. Morrison's forceful cross-examination went directly to the heart of this case. He cross-examined Dr. Mitchell on the number of autopsies he performed each year, and had Dr. Mitchell agree with him that he exceeded the

"industry" standard for the number of autopsies that should be conducted yearly. This line of cross-examination was corroborated by the defense expert, Dr. Wigren. Mr. Morrison cross-examined Dr. Mitchell on his failure to follow protocol in the investigation of the death of a child, i.e., to order x-rays of the child. He cross-examined Dr. Mitchell on his memory lapses, the rarity of skill fractures in children and the lack of observable brain injury. Mr. Morrison's cross-examination was not ineffective.

The Verdict Was Not Based Upon Inference Stacking

Defendant claims that the state inappropriately based its case on stacking inferences, permitting the jury to reach an improper decision. Like the *Williams* case cited by defendant, the case against defendant was purely circumstantial. "[A] conviction of even the gravest offense can be based entirely on circumstantial evidence." *State v. Banks,* 306 Kan. 854, 858 (2017). The Kansas Supreme Court has held that there is no difference in the probative value between circumstantial and direct evidence. *State v. Evans,* 275 Kan. 95, 105, 62 P. 3d 220 (2003). The fact-finder may "draw justifiable inferences from proven circumstances and established facts." *State v. Williams,* 229 Kan. 646, 648-49 (1981). To be clear, each circumstance must be proved and cannot be inferred or presumed from other circumstances. *Id.* at 649, *citing* 1 Wharton's Criminal Evidence §91, pp. 150-51 (13th ed. 1972).

In the *Williams* case, the prosecution implied the defendant was present at the scene, but there was no evidence, circumstantial or otherwise, that the defendant was ever at the scene. In this case, however, there is evidence that Defendant was alone with the child for over two hours. There is also evidence that Oliver was happy and healthy when he arrived and was dead after being alone with the Defendant. True, there was no obvious motive, but that doesn't discredit the other circumstantial evidence available in this case.

Forensic Pathologists Are Allowed to Determine the Manner of Death

Defendant questions the appropriateness of Dr. Mitchell's testimony that described the death as murder, confirmed the indifference to human life present in the case, and involved a demonstration by stepping on a doll's head. Kansas courts have permitted coroners or forensic pathologists to testify on the manner of death, whether it be suicide, accident, or homicide. See *State v. Dixon,* 279 Kan. 563, 617 (2005); *State v. Collier,* 340 P.3d 1235 (Kan. Ct. App. 2014) *unpublished opinion.*

The prosecution charged defendant with 2nd degree murder under K.S.A. 21-5403(2), which states that 2nd degree murder is unintentional but reckless under circumstances manifesting extreme indifference to the value of human life. During trial, Dr. Mitchell testified explicitly regarding the indifference to human life exhibited in this case. K.S.A. 60-456(d) permits experts to provide an opinion on an ultimate issue, but only insofar as the testimony aids the fact finder in understanding technical facts. *State v. Brice,* 276 Kan. 758, 775 (2003). In *Brice*, the Kansas Supreme Court agreed with a lower court's decision to exclude expert testimony on the degree of bodily harm present in the case because the facts provided to the jury were all they needed to know, based on their normal experiences and qualifications. *Id.* In this case, Dr. Mitchell described defendant stepping violently on the child's head, which caused near immediate death. It seems to go without saying that this indicates a reckless indifference to the value of human life. However, the choice to exclude or admit evidence is an abuse of discretion standard and it's unclear how this, standing alone, would have altered the outcome of the case against Defendant.

Finally, demonstrative evidence, including "photographs used to prove the manner of death and the violent nature of the crime," are relevant and admissible. *State v. Cavaness,* 278

Kan. 469, 477 (2004), *quoting State v. Parker,* 277 Kan. 838, Syl. ¶ 5 (2004). Here, Dr. Mitchell stepped on the doll's head to show how he thought the child died, This aligns with other types of demonstrative evidence and, alone, should not have been excluded.

Conclusion

Defendant is not entitled to a new trial because counsel were not ineffective. Dr. Mitchell's testimony meets the *Daubert* standard, and none of the other errors warrant a new trial.

Dated this 18th day of October, 2019.

District Judge

cc: C. J. Rieg
Kate Butler
William Skepnek
Kevin Babbitt

No. 19-122252-A

IN THE SUPREME COURT OF THE STATE OF KANSAS

STATE OF KANSAS,
Plaintiff-Appellee/Petitioner,

v.

CARRODY M. BUCHHORN
Defendant-Appellant/Respondent.

RESPONSE TO PETITION FOR REVIEW

Petition for Review from the Kansas Court of Appeals
Memorandum Opinion No. 122,252

Appeal from the District Court of Douglas County, Kansas
Honorable Sally D. Pokorny, District Judge
District Court Case No. 2017CR385

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Table of Contents

Introduction

Relevant to the State's Petition for Review, the Court of Appeals made three findings, each based upon well-established law and uncontroverted facts: (i) Mrs. Buchhorn's trial counsel was deficient in failing to investigate Dr. Mitchell's depolarization theory (Op. pp. 16-21.); (ii) Mrs. Buchhorn's trial counsel was deficient in failing to present responsive expert testimony at trial (Op. pp. 21-23.); and, as a result, (iii) trial counsel's deficient performance prejudiced Mrs. Buchhorn's right to a fair trial. (Op. pp. 23-25.) The State's Petition for Review sidesteps these unchallengeable findings and instead claims that the Court of Appeals reweighed evidence and misapplied *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The State is wrong.

First, the Court of Appeals never reweighed any evidence because there was no evidence to reweigh. Mrs. Buchhorn's trial counsel admitted it failed to investigate or present any expert testimony regarding Dr. Mitchell's depolarization theory, "the State's entire theory of guilt." (Op. p. 24.) That is the basis for the Court of Appeals' reversal. (Op. pp. 24-25.) ("Buchhorn could have entered the trial armed with direct evidence to impeach Dr. Mitchell's theory on the cause of death and State's entire theory of guilt. Instead, trial counsel was unprepared to test the validity of Dr. Mitchell's theory, despite counsel's admission that Dr. Mitchell's opinions were key to the State's case").

Second, the State's arguments surrounding *Strickland* are equally misplaced. *Strickland* is merely about effective cross-examination. The Court of Appeals could not misapply *Strickland* because Mrs. Buchhorn's trial counsel failed to cross examine Dr.

Mitchell on his depolarization theory at all. (Op. p. 17.) The State now argues that the Court of Appeals' opinion heightens the *Strickland* standard by requiring counsel to "know better than their qualified medical expert about his field of expertise." (Petition for Review, p. 14.) But, as the Court of Appeals correctly noted, it was unreasonable for Mrs. Buchhorn's trial counsel to point the finger at an expert for failing to advise on the State's key theory when the attorneys failed to request that opinion. (Op. p. 18.) Simply put, "there is a difference between relying on an expert and scapegoating one." (Op. p. 18.) Here, the State's Petition for Review makes another run at scapegoating an expert in order to convict an innocent woman based solely on junk science that her trial counsel failed to challenge, or even investigate. Kansas law, as the Court of Appeals points out, requires more. Accordingly, the Court should deny the State's Petition for Review.

Response to Statement of Facts

The State's Statement of Facts is selective, erroneous, and improperly argumentative. The Court of Appeals' opinion provides a sufficiently complete statement of facts to address the Petition for Review and accurately sets forth the relevant facts. Additionally, the State's suggestion, for the first time on appeal, that counsel for Mrs. Buchhorn created false testimony from Dr. Wigren must be called what it is: unfounded, unsupported, and directly controverted by the record. (R. Vol. pp. 57 – 59, 72 [Dr. Wigren "agree[d] with all of those statements there. Otherwise, I would not have signed…"].)

Correction to State's Framing of Procedure History

The State miscasts the Court of Appeals' Opinion. Mrs. Buchhorn presented four issues. Concerning Issue I, the Court of Appeals held that the admissibility of Dr. Mitchell's opinion under K.S.A. § 60-456 was waived by trial counsel's failure to make a timely objection. (Op. pp. 12-13.) On Issue II, the Court of Appeals found that because Mrs. Buchhorn's trial counsel's performance was deficient and prejudiced her right to a fair trial, it reversed the conviction and remanded for new trial. (Op. pp. 13-25.) But the Court of Appeals declined to rule on Issues III and IV. (Op. p. 11.) Nevertheless, the Court of Appeals felt compelled to comment on the trial court's "imprudent" remarks during voir dire, as described in Issue III. (Op. pp. 25-26.)

Response to Issue for Review

I. There Is No Valid Purpose to Grant Further Review.

Further review by this Court is discretionary. Rule 8.03(g)(2). When determining discretionary review, this Court considers several factors, including "(1) [t]he general importance of the question presented; (2) the existence of a conflict between the decision sought to be reviewed and a prior decision of the supreme court, or of another panel of the court of appeals; (3) the need for exercising the supreme court's supervisory authority; and (4) the final or interlocutory character of the judgment, order or ruling sought to be reviewed." K.S.A. § 20-3018(b). None of these factors weigh in favor of this Court granting the State's request. The Court of Appeals panel (composed of Justices Atcheson, Hill, and Cline), in its 27-page *per curiam* Opinion, correctly applied controlling judicial precedent from this Court and the United States Supreme Court to the facts at issue. There is no

conflict, and the Court of Appeals' Opinion aligns with *Robinson v. State*, 56 Kan. App. 2d 211, 428 P.3d 225, *rev. denied* 309 Kan. 1349 (2018).

The Court of Appeals' holding is limited to a finding that Mrs. Buchhorn's conviction is reversed and remanded for a new trial. (Op. pp. 1-2.) The Court of Appeals did not make broad conclusions of law that could possibly generate the effects Petitioner posits, nor is the Opinion designated for publication. (Op. p. 1.) This Court's Rules restrict the application of unpublished opinions to the "law of the case, res judicata, and collateral estoppel," disfavor their citation, and limit their use to persuasive authority on issue not addressed in a published opinion from the Kansas Court of Appeals. Rule 7.04(g)(2)(A)-(B). Therefore, the State's claims of this Opinion's impact on Kansas law are vastly overstated.

II. The Court of Appeals Did Not Reweigh Evidence.

The State argues that the Court of Appeals erred in its ruling on Issue II by improperly reweighing the evidence. To support its claim, the State focuses on a single testimonial dispute in the record. The resolution of that dispute was unnecessary to both the District Court and the Court of Appeals; it was never addressed or resolved by either court. Tellingly, how the State believes an unaddressed and also immaterial testimonial dispute is a reweighing of evidence is never explained.

The testimonial dispute, in short, is that Mrs. Buchhorn's trial counsel claimed that before trial, he repeatedly asked Dr. Wigren to investigate "depolarization." (Op. p. 9.) Trial counsel said Dr. Wigren ignored the issue until their meeting on the night before Dr.

Wigren appeared to testify at trial. (Op. p. 9.) Trial counsel testified that at that meeting, Dr. Wigren said, for the first time, that the State's depolarization cause of death theory was nonsense. (Op. p. 9.)

In conflict with this, Dr. Wigren testified that he was never told about depolarization. (Op. p. 6.) But, Dr. Wigren said, if trial counsel had told him about depolarization, he would have told trial counsel that other experts were required, and that depolarization was nonsense. (Op. p. 6.)

Although Mrs. Buchhorn's trial counsel never asked Dr. Wigren about depolarization, the State did on cross-examination. (Op. p. 10.) The State stopped Dr. Wigren from explaining his answer, but the Court told Mrs. Buchhorn's trial counsel that he could ask on re-direct. (Op. p. 10.) Trial counsel never did so. (Op. p. 10.) Dr. Wigren testified post-verdict that if trial counsel asked on re-direct, Dr. Wigren would have testified that depolarization was nonsense and that children do not die from head trauma without injuries to their brains. (Op. p. 10.)

But this entire issue is a red herring. The Court of Appeals never decided who was telling the truth because it does not matter. Either trial counsel never asked Dr. Wigren about depolarization, or Dr. Wigren never responded to trial counsel's questions. The Court of Appeals decided that in *either* scenario, trial counsel's deficient performance prejudiced Mrs. Buchhorn's right to a fair trial:

> "Just like counsel cannot be said to have made an informed decision when they lacked the information needed to make the decision, they cannot be said to have relied on an expert for advice they never sought (or, according to them, did not receive when requested)….It is difficult to imagine when Dr.

> Wigren was supposed to provide this pretrial advice when counsel admit the first time they substantively discussed depolarization with him was during their mid-trial meeting." (Op. pp. 18-19.)

There is simply no merit to the claim that the Court of Appeals reweighed any evidence. Consequently, the Petition for Review should be denied.

III. The Court of Appeals Did Not Misapply *Strickland.*

The State's argument that the Court of Appeals misapplied *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1974) is nothing more than quibbling about what "reasonableness" requires "under prevailing professional norms." Despite citing two different United States Supreme Court opinions and five Federal appeals decisions (none from the Tenth Circuit), the State avoids any analysis of how the Court of Appeals misapplied *Strickland*. That is not to say that there are no Tenth Circuit, or even Kansas, cases analyzing and applying *Strickland*. There are – and the State knows it.

For example, the State cited *Wilson v. Sirmons*, 536 F.3d 1064 (10th Cir. 2008) to the Court of Appeals. (Op. p. 19.) ("Both parties cite *Wilson*…and we agree it is pertinent"). But after the Court of Appeals determined *Wilson* supported Mrs. Buchhorn, the State suddenly avoids drawing this Court's attention to this authority. Nor does the State mention *Robinson v. State*, 56 Kan. App. 2d 211, 428 P.3d 225, *rev. denied* 309 Kan. 1349 (2018), despite the Court of Appeals' extensive analysis of this authority over which this Court denied review. Any serious argument that the Court of Appeals misapplied *Strickland* necessarily requires analysis of both *Wilson* and *Robinson*. Its absence from the State's Petition for Review says more than anything Mrs. Buchhorn could argue.

The State also eschews the *only* witness in the record (Professor Craig) who testified about "prevailing professional norms." The Court of Appeals relied upon Professor Craig in its analysis of *Strickland*. (Op. p. 17.) Again, the State's avoidance of the record exposes the weakness of the State's Petition. Petitions for Review are not treasure hunts for the Court, and the State cannot bury its head in the sand to everything in the record that directly undercut its arguments and hope the Court will not discover its omissions.

The Petition for Review finally crescendos to a list of "horribles" the State claims will result if review is not granted. As addressed *supra* at I., this unpublished Opinion *cannot* change Kansas law. Moreover, the Opinion itself aligns with not only *Strickland* and *Wilson*, but also *Robinson*, a 2018 published case for which this Court also refused to grant review. There is simply no support for the State's fear mongering about this Opinion.

The Court of Appeals' Opinion is not novel. It simply requires, pursuant to *Strickland*, *Wilson*, and *Robinson*, that an attorney ask its expert witness about the State's theory of guilt. This standard is already built into K.S.A. § 60-456(b). The attorney must understand the "reliable principles and methods" and "facts or date" that have been "reliably applied" to reach an expert opinion. *Id.* This is the bare minimum. This is the failure of Mrs. Buchhorn's trial counsel, as identified by the Court of Appeals. (Op. p. 25.) Consequently, the Petition for Review should be denied.

Conclusion

Based on the foregoing, the State's Petition for Review should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify a copy of the foregoing was served electronically on September 17, 2021, via Notice of Electronic Filing and via e-mail, which are deemed acceptable forms of service pursuant to K.S.A. § 60-205 and Supreme Court Rule 1.11, on the following counsel of record:

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No. 19-122252-A

IN THE SUPREME COURT OF THE STATE OF KANSAS

STATE OF KANSAS,
Plaintiff-Appellee/Petitioner,

v.

CARRODY M. BUCHHORN
Defendant-Appellant/Respondent.

APPENDIX TO RESPONSE TO PETITION FOR REVIEW

State v. Buchhorn, No. 122,252, 2021 WL 3578032 (Kan. Ct. App. Aug. 13, 2021)

NOT DESIGNATED FOR PUBLICATION

No. 122,252

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

CARRODY M. BUCHHORN,
Appellant.

MEMORANDUM OPINION

Appeal from Douglas District Court; SALLY D. POKORNY, judge. Opinion filed August 13, 2021. Reversed and remanded.

William J. Skepnek, of The Skepnek Law Firm, P.A., of Lawrence, *Keynen J. (K.J.) Wall*, *Quentin M. Templeton*, and *Russell J. Keller*, of Forbes Law Group, LLC, of Overland Park, *Stephan L. Skepnek*, of The Sader Law Firm, of Kansas City, Missouri, and *Kevin Babbit*, of Fagan & Emert, LLC, of Lawrence, for appellant.

Emma C. Halling, assistant district attorney, *Kate Duncan Butler*, assistant district attorney, *Charles E. Branson*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before ATCHESON, P.J., HILL and CLINE, JJ.

PER CURIAM: This matter involves a child who died unexpectedly at the home daycare where Carrody M. Buchhorn worked. Buchhorn was the last person who admitted having contact with the child. After the Douglas County coroner ruled the child's death was instantaneous and caused by a blow to the head, a jury convicted Buchhorn of second-degree murder. We reverse Buchhorn's conviction and remand for a

new trial because her trial counsel's constitutionally deficient performance prejudiced her right to a fair trial.

FACTS

Nine-month-old O.O. was found unresponsive in a Eudora daycare crib, following an afternoon nap. The owner called 911, while Buchhorn performed CPR on O.O. Despite Buchhorn's and first responders' efforts to resuscitate the baby, O.O. did not survive.

During the investigation of O.O.'s death, police interviewed Buchhorn twice. She waived privilege in both interviews and consistently denied harming O.O. Buchhorn, a mother of two grown children, had no history of abuse or violence and no prior criminal history.

The Douglas County coroner, Dr. Erik Mitchell, performed the autopsy on O.O. Dr. Mitchell's autopsy revealed that O.O. had suffered a significant skull fracture but no brain swelling. Dr. Mitchell deduced that O.O. died instantly following a blow to the head, which he claimed released mechanical energy into the base of the brain causing "temporary cessation of function at the base of the brain" or "depolarization of neurons." He suspected that O.O. was stepped on.

Since Buchhorn was the last person who admitted having contact with O.O., the State charged her with first-degree murder and in the alternative, second-degree murder, a felonious, unintentional, but reckless killing of a human being. Buchhorn retained law partners Paul Morrison and Veronica Dersch to represent her.

Dr. Mitchell testified about his "depolarization theory" on O.O.'s cause of death at the preliminary hearing. He said he believed, "going on statistics," that O.O. died

instantaneously due to "a direct effect on depolarization of neurons at the area of the base of the brain, upper spinal cord manila, [which] interferes with the ability to breathe, and that leads to death." He concluded O.O. had no "anatomic deformity or no anatomic reason to be dead other than the physical injury, and that this physical injury will release energy into the area that is critical for survival at the base of the brain."

Buchhorn's trial counsel did not elicit information about the foundation of Dr. Mitchell's depolarization theory or challenge it at the preliminary hearing. Her counsel did not ask Dr. Mitchell about the statistics on which he relied to develop his theory, nor did they ask Dr. Mitchell to identify any medical literature which may support or address this theory.

At trial, Dr. Mitchell recounted his opinion on O.O.'s cause of death. He again noted that O.O. had a skull fracture with little brain swelling, which caused him to conclude not much time had passed between the trauma and death. Dr. Mitchell said a skull fracture is not inherently fatal but becomes fatal if energy is transferred to the brain. He also testified that if someone were with O.O. when the injury occurred, that person would immediately recognize something was wrong with O.O. and that O.O. needed immediate care. Buchhorn's trial counsel raised no objections to Dr. Mitchell's testimony regarding his depolarization theory.

In addition to Dr. Mitchell's testimony, the State also admitted electronic messages from Buchhorn sent shortly before O.O.'s death, complaining about her low pay and disparaging the attitude of the daycare owner.

Buchhorn's trial counsel retained a forensic pathologist, Dr. Carl Wigren, to testify at trial. Dr. Wigren resided in Seattle, Washington, and was referred to them by another expert who was not taking any new cases. Dr. Wigren did not address Dr. Mitchell's depolarization theory in his testimony. Instead, he alternatively interpreted O.O.'s

injuries. Dr. Wigren testified that he believed O.O.'s skull fracture showed signs of healing from an injury that was a few days to a week old. When asked if he knew what killed O.O., Dr. Wigren said, "I honestly don't."

The State relied heavily on Dr. Mitchell's opinion on O.O.'s cause of death in closing arguments. Because Dr. Mitchell contended that death by depolarization is nearly instant, the State repeatedly argued this theory implicated Buchhorn, as the last person to care for the child. The State also argued Dr. Mitchell was more credible than Dr. Wigren, noting his opinions were more reliable because of his "impressive" professional experience. Buchhorn's counsel argued the State presented only circumstantial evidence.

The jury deliberated for two days before returning a verdict of guilty on the lesser charge of second-degree, reckless murder.

After the verdict, Buchhorn hired new counsel and moved for a new trial. Among other issues, Buchhorn challenged the admissibility of Dr. Mitchell's depolarization theory under the *Daubert* standard for expert opinion testimony and raised several ineffective assistance of counsel claims, including (1) trial counsel failed to investigate Dr. Mitchell's testimony, (2) trial counsel failed to file an appropriate *Daubert* motion, and (3) trial counsel failed to present responsive expert testimony at trial. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

Several witnesses testified at the subsequent evidentiary hearing. Dr. Mitchell also produced materials for this hearing, after the jury trial, that he contended supported his theory of depolarization.

Failure to challenge depolarization theory

Dr. Sudha Kessler, a licensed physician and board-certified pediatric neurologist, testified for Buchhorn. She practiced pediatric neurology at the University of Pennsylvania Children's Hospital in Philadelphia, and she had extensive experience treating pediatric brain injuries and assessing the effect of head trauma. Dr. Kessler testified she investigated causes of death as a quality review panel member.

Dr. Kessler evaluated Dr. Mitchell's depolarization theory and found it to be unreliable. She testified that some energy, such as electrical or electromagnetic, can impact the signals of the brain cells, but not kinetic or mechanical energy, such as a force from a blow to the head. Dr. Kessler was "not aware of any circumstances in which mechanical energy directly translates into electrical change in the brain." Dr. Kessler had never heard or read about a brain death with no evidence of brain injury.

Dr. Kessler reviewed texts, published studies, and other sources of medical research, but she found no support for the proposition that mechanical energy can depolarize, interfere with, or disrupt the brain cells or nerves and cause instant death, without causing injury to the brain. Dr. Kessler also reviewed the literature Dr. Mitchell produced posttrial and testified she did not believe it supported Dr. Mitchell's theory. Dr. Kessler further noted:

> "[Dr. Mitchell's theory is] just fantastical, because it's not something I have ever been taught, not something I teach, not something—just not consistent. It's not consistent with the medical literature because there is no literature on magical disruption of the brain that causes death and that doesn't exist. In addition to looking though my own textbooks, looking through the two database searches I did, I was so taken aback by all this that I . . . [asked] my colleagues if they have heard of this idea; and honestly, most of the time, the response that I got was laughter."

Dr. Yu-Tze Ng, the Chief of Neurology at Children's Hospital in San Antonio and a tenured pediatrics professor at Baylor College of Medicine in Houston, also testified for Buchhorn. Dr. Ng testified he does not like using the term "depolarization" because that is something that happens normally. Dr. Ng also said he believed Dr. Mitchell was trying to imply a sudden cessation of the whole brain. Dr. Ng stated:

> "[W]hether it's from depolarization, which is some function, [a sudden cessation of the whole brain], is just not possible without any evidence that there was some brain injury that would persist short of completely beheading the patient or cutting, disconnecting the upper brain stem, the medulla and all those brain parts to the spinal cord. I just can't fathom how a patient would have died with no evidence whatsoever [of brain injury]."

Dr. Ng testified that Dr. Mitchell's theory diverged from medical science. Dr. Ng said the articles Dr. Mitchell provided to support his theory actually contradicted Dr. Mitchell's claims. Dr. Ng stated that he did not know how O.O. died but, based on the evidence, O.O. did not die from a brain injury.

Dr. Wigren also testified at the posttrial hearing. He stated he did not know Dr. Mitchell would present his theory of depolarization or that the theory would be such a pivotal part of the argument in this case. Dr. Wigren said that in all his communications with Buchhorn's trial counsel, including during the trial, they never asked him to address Dr. Mitchell's opinion.

Dr. Wigren testified that if trial counsel had asked about the viability of Dr. Mitchell's theory, he would have written a supplemental report and recommended trial counsel consult with a neurologist. He also stated he had never heard this theory expressed and had been unable to find any authoritative medical literature to support it.

Dr. Mitchell testified for the State at the posttrial hearing. He admitted O.O.'s case was the exception, rather than the rule, because most head trauma cases included

observable injury. When asked about the statistics on which he relied to support his theory, Dr. Mitchell testified he was thinking of the transfer of energy to the brain which occurs in all brain injuries. He admitted he would probably change how he used the word statistics in his testimony. He also testified that his use of the word statistics was him trying to convey a likelihood, not to suggest he had actual statistical information, and that "it was a poor choice of words in retrospect."

Dr. Mitchell testified he had observed two cases in which immediate death occurred after a concussive injury to the brain stem, and, in both cases, neither victim had any sign of significant brain injury. He testified one of those cases occurred in 1980, during his residency in North Carolina, and the other occurred in the early 1980s or 1990s in New York. He had no records on these cases and had made no effort to find them. Dr. Mitchell testified that he had done about 12,000 autopsies during his nearly 40-year career. He admitted on cross-examination that 2 cases out of 12,000 is "a very small number."

When asked about the posttrial materials he supplied and relied on to support his theory of depolarization, Dr. Mitchell admitted his materials did not provide any studies of people who died after suffering blunt force trauma in which there was no evidence of injury to the brain. He acknowledged that much of the literature he had provided dealt with general neurological principles and not the exact issue of instantaneous death from concussive force.

Alice Craig, a professor at the University of Kansas School of Law and attorney at the Paul E. Wilson Project for Innocence & Post-Conviction Remedies, also testified for Buchhorn at the posttrial hearing. She testified that for trial counsel to fully understand and challenge evidence, he or she must independently research the issues and consult with experts if necessary. Craig also stated that given the complicated nature of cases involving a brain injury, counsel would at least need to hire a forensic pathologist and

may also need to hire a radiologist, biomechanical engineer, neuropathologist, or neurologist.

Craig testified she believed Buchhorn's trial counsel failed to provide objectively reasonable representation. Craig contended counsel violated the professional standard of care by failing to file a pretrial *Daubert* motion to exclude Dr. Mitchell's testimony and discover the scientific and factual basis for his depolarization theory. She testified Dr. Mitchell's preliminary hearing testimony raised enough questions about the science behind O.O.'s cause of death and the basis for Dr. Mitchell's theory that counsel should have filed a *Daubert* motion to challenge the validity of his theory.

Craig also testified that Buchhorn's counsel could not effectively cross-examine Dr. Mitchell or exclude his testimony without the right experts. She said counsel did not adequately challenge the State's theory of O.O.'s cause of death. Craig acknowledged that counsel hired Dr. Wigren, a forensic pathologist, but still believed a neurologist was necessary to testify in this case. Craig additionally criticized counsel's failure to ask Dr. Wigren specifically about Dr. Mitchell's theory that the blunt force injury interrupted and depolarized O.O.'s nerves.

Both Morrison and Dersch testified at the hearing. Morrison admitted Dr. Mitchell's testimony was "very important" and agreed they needed to challenge his depolarization theory. Yet, Buchhorn's trial counsel did not independently research or investigate Dr. Mitchell's depolarization theory. Instead, they relied on Dr. Wigren to define the medical issues they needed to address.

Morrison admitted they did not consult with or talk to any experts other than Dr. Wigren. Morrison testified he was "comfortable that [Dr.] Wigren could handle it," and "we took our direction from him." On the other hand, Morrison testified both he and his

co-counsel were frustrated with how difficult it was to get ahold of Dr. Wigren and how busy he was. Neither Morrison nor Dersch had ever worked with Dr. Wigren before.

Morrison admitted he never considered filing a *Daubert* motion and, in fact, both he and Dersch admitted they had never filed a *Daubert* motion in any of their cases. Morrison testified they relied on Dr. Wigren to tell them if they needed to file a *Daubert* motion. When asked if he regretted not filing a *Daubert* motion, Morrison said, "Yes." Dersch testified that, in hindsight, filing a *Daubert* motion would have been a good idea. She also testified they made no strategic decision to forgo filing a *Daubert* motion but, instead, she never considered it. She said it never came up in their discussions.

When asked about Dr. Wigren's testimony that trial counsel never asked him to address Dr. Mitchell's theory, Morrison stated that he had asked Dr. Wigren about Dr. Mitchell's theory, but Dr. Wigren never responded and instead focused on the age of O.O.'s skull fracture. Morrison admitted they never asked Dr. Wigren for something they could use to cross-examine Dr. Mitchell about his theory on cause of death.

The first time trial counsel met Dr. Wigren was when he flew in on the Sunday after trial had begun, the night before he testified. During this meeting, Dr. Wigren asked counsel if they had hired a biomechanical engineer to testify. Morrison responded by saying, "'It's a little late, Doc.'" Morrison and Dersch both testified the first time Dr. Wigren discussed the reliability or general acceptability of Dr. Mitchell's theory was during this meeting. They said he told them he did not believe Dr. Mitchell's theory, basically calling it nonsense. Despite this knowledge, they never asked Dr. Wigren to express any opinions on Dr. Mitchell's depolarization theory at trial. Morrison's explanation for not doing so was that he was uncertain what Dr. Wigren might say.

Besides failing to challenge Dr. Mitchell's depolarization theory, with both a *Daubert* motion and expert testimony, Buchhorn also pointed out her trial counsel failed

to elicit explanatory testimony from Dr. Wigren at trial, after his responses to the State's cross-examination suggested he agreed with Dr. Mitchell's depolarization theory. Buchhorn's new counsel pointed to the following exchange between Dr. Wigren and the State:

> "Q. [State's attorney C.J. Reig:] Would you agree that a child could suffer physical violence to their head that would change the electroconductivity to the brain and they would stop breathing? Yes or no.
> "A. [Dr. Wigren:] Yes, with an explanation.
> "Q So—thank you. The answer is yes.
> "A. With explanation.
> "Q. That's what—your client can come and ask questions if they want to.
> "MS. RIEG: Do you agree, Judge?
> "THE COURT: Well, I was going to tell the doctor that there can be a redirect to explain or expand on that."

Trial counsel's redirect of Dr. Wigren was very brief and did not address this issue. Thus, Dr. Wigren was never allowed to give the jury his explanation of the qualification to his answer.

Buchhorn's new counsel asked Dr. Wigren to provide this explanation at the evidentiary hearing on their posttrial motions. Dr. Wigren testified that while physical violence can change the electroconductivity of the brain and stop breathing, the impact in those situations is more violent than a skull fracture and this "very violent impact" would cause perceptible injury to the brain. The example he provided of this phenomenon was "crushing head injuries like in an occupational accident."

The trial court denied Buchhorn's motion for a new trial. It found Buchhorn's counsel was not ineffective for failing to request a *Daubert* hearing because the court held it would have denied a *Daubert* motion to exclude Dr. Mitchell's testimony. The

court found Buchhorn's counsel was not ineffective in hiring Dr. Wigren because the court found counsel appropriately relied on Dr. Wigren's expertise and knowledge. The court noted Dr. Wigren's theory on cause of death directly contradicted the State's theory. The court discounted Craig's testimony because the court found it depended on the incorrect assumption that trial counsel would be able to exclude Dr. Mitchell's testimony. The court found Craig improperly based her testimony on hindsight. The court also relied heavily upon the considerable expertise of trial counsel. The court pointed out they were very prepared, appeared to have formulated a potentially winning strategy, and appeared to have spent considerable time with their client. The court rejected Buchhorn's other claims and sentenced her to 123 months' imprisonment.

ANALYSIS

On appeal, Buchhorn argues the trial court abused its discretion when it denied her posttrial motion because (1) Dr. Mitchell's testimony was unreliable and should have been excluded under K.S.A. 60-456(b) and (2) Buchhorn's trial counsel was ineffective and prejudiced her right to a fair trial. Buchhorn has raised other grounds for reversing her conviction, which we need not address because we reverse her conviction for ineffective assistance of trial counsel.

The trial court may grant a new trial when it is "required in the interest of justice." K.S.A 2020 Supp. 22-3501(1). We review this decision for an abuse of discretion. Generally, a trial court abuses its discretion when its decision is found to be arbitrary, fanciful, or unreasonable, or based on an error of fact or law. *State v. Ashley*, 306 Kan. 642, 650, 396 P.3d 92 (2017). The decision must be such that no reasonable person would have arrived at the same outcome. *State v. Jolly*, 301 Kan. 313, 325, 342 P.3d 935 (2015).

Buchhorn failed to preserve her objections to the admissibility of Dr. Mitchell's testimony.

Buchhorn challenges the admissibility of Dr. Mitchell's testimony under K.S.A. 60-456, which codifies the test for admissibility of expert opinion set forth in *Daubert*, 509 U.S. 579. *Daubert* established a "gatekeeper" function for trial courts, which requires the court to assess the reasoning and methodology underlying a proposed expert's opinion and determine whether it is scientifically valid and applicable to the particular set of facts involved in the case. The purpose of the *Daubert* analysis is to "'determine at the outset . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.'" *Goebel v. Denver and Rio Grande Western R.R. Co.*, 215 F.3d 1083, 1087 (10th Cir. 2000) (citing *Daubert*, 509 U.S. at 592). In this respect, Buchhorn argues the district court's decision to admit Dr. Mitchell's testimony at trial created a freestanding error of such gravity that it requires reversal of her conviction.

The problem with Buchhorn's challenge is it is untimely. Buchhorn never objected to the admissibility of Dr. Mitchell's opinions, including his methodology and conclusions, until her posttrial motion. The purpose of the gatekeeper function in K.S.A. 2020 Supp. 60-456 and under *Daubert* is lost once the evidence at issue has passed through the gate. Indeed, K.S.A. 2020 Supp. 60-457(b) recognizes the importance of timing in this area by allowing the court to hold a pretrial hearing to determine whether a witness qualifies as an expert and whether the witness' testimony satisfies the requirements of K.S.A. 2020 Supp. 60-456(b). Buchhorn's challenge to Dr. Mitchell's testimony falls within the provisions of K.S.A. 2020 Supp. 60-456(b), yet she did not object to Dr. Mitchell's testimony before or during the trial.

Until the Kansas Legislature codified the *Daubert* test in K.S.A. 2014 Supp. 60-456 through K.S.A. 2014 Supp. 60-458, Kansas courts applied the *Frye* test to the

admission of scientific expert testimony. *In re Care & Treatment of Jimenez*, No, 115,297, 2017 WL 1035505, at *3 (Kan. App. 2017) (unpublished opinion). Kansas courts routinely rejected challenges to scientific evidence under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) absent a timely and specific objection at trial. *State v. Ordway*, 261 Kan. 776, 801, 934 P.2d 94 (1997); *Ohlmeier v. Jones*, 51 Kan. App. 2d 1014, 1019, 360 P.3d 447 (2015). Further, K.S.A. 60-404 prohibits setting aside a verdict or reversing a decision because of the erroneous admission of evidence without a timely and specific objection.

The State appropriately notes our Supreme Court strictly adheres to the contemporaneous objection rule. See, e.g., *State v. Solis*, 305 Kan. 55, 62-63, 378 P.3d 532 (2016). It also correctly points out the purpose of this rule "is not fulfilled when the objection is first raised after the trial has been completed." *State v. Cook*, 286 Kan. 1098, 1109, 191 P.3d 294 (2008). Certainly, the purpose of the *Daubert* test is not fulfilled when the objection is first raised well after the jury has already heard and considered the allegedly suspect testimony in rendering its verdict. We find Buchhorn has failed to properly preserve her objection to the admissibility of Dr. Mitchell's testimony and decline to overturn the trial court's denial of Buchhorn's motion on that basis.

Buchhorn's trial counsel was ineffective and prejudiced her right to a fair trial.

The Sixth Amendment to the United States Constitution guarantees an accused the right to have assistance of counsel for his or her defense. *Miller v. State*, 298 Kan. 921, 929, 318 P.3d 155 (2014). The Fourteenth Amendment to the United States Constitution applies this right to state proceedings. The guarantee includes not only the presence of counsel but counsel's effective assistance as well. *Sola-Morales v. State*, 300 Kan. 875, 882, 335 P.3d 1162 (2014) (relying on *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 [1984]). The purpose of the effective assistance guarantee

is to ensure the accused receives a fair trial. *State v. Galaviz*, 296 Kan. 168, 174, 291 P.3d 62 (2012).

An allegation of ineffective assistance of counsel presents both questions of fact and law. When the trial court conducts a full evidentiary hearing on the claim, we must determine whether the court's findings are supported by substantial competent evidence and whether the court's factual findings support their legal conclusions. The standard of review when evaluating the court's legal conclusions is de novo. *Fuller v. State*, 303 Kan. 478, 485, 363 P.3d 373 (2015).

The Kansas Supreme Court recently recounted the two-prong test for analyzing ineffective assistance of counsel claims in *Khalil-Alsalaami v. State*, 313 Kan. 472, 485-86, 486 P.3d 1216 (2021):

> "'*Strickland* established a two-prong test for determining if a criminal defendant's Sixth Amendment right to effective assistance of counsel has been violated by an attorney's performance. 466 U.S. at 687-96. Kansas courts adopted this test in *Chamberlain* [*v. State*], 236 Kan. [650,] 656-57[, 694 P.2d 468 (1985)]. Under the first prong, a defendant must demonstrate that counsel's performance was deficient. 236 Kan. at 656. If so, the court moves to the second prong and determines whether there is a reasonable probability that, without counsel's unprofessional errors, the result would have been different. *Strickland*, 466 U.S. at 694.' *State v. Betancourt*, 301 Kan. 282, 306, 342 P.3d 916 (2015).
>
> "To establish deficient performance under the first prong, 'the defendant must show that counsel's representation fell below an objective standard of reasonableness.' *Strickland*, 466 U.S. at 688. Courts must remain mindful that their scrutiny of an attorney's past performance is highly deferential and viewed contextually, free from the distorting effects of hindsight:
>
> > "'Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess

> counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. 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. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. [Citations omitted.]' 466 U.S. at 689.
>
> "Under *Strickland*'s second prong, defendants must show the deficient performance of counsel was prejudicial. To do so, defendant must establish with reasonable probability that the deficient performance affected the outcome of the proceedings, based on the totality of the evidence. *Edgar v. State*, 294 Kan. 828, 838, 283 P.3d 152 (2012). '"A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury."' 294 Kan. at 838."

Although the above principles should guide our decision, they are not mechanical rules. In fact, the ultimate focus must be on the defendant's right to fundamental fairness in the proceeding. "In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Strickland*, 466 U.S. at 696. The Kansas Supreme Court has long recognized that a criminal defendant "is entitled to a fair trial but not a perfect one." *State v. Cruz*, 297 Kan. 1048, 1075, 307 P.3d 199 (2013)

1. *Buchhorn's trial counsel was deficient in failing to investigate Dr. Mitchell's depolarization theory.*

Buchhorn's lawyers argue that her trial counsel's handling of Dr. Mitchell's testimony and the overall matter of expert testimony on the cause of death fell below the constitutional standard of adequate representation and deprived her of a fair trial. In other words, had the trial lawyers sufficiently prepared, they could have excluded Dr. Mitchell's testimony altogether or so undermined its credibility in the eyes of the jurors that the jury would have been left with at least a reasonable doubt about Buchhorn's guilt. We agree and reverse on this basis.

Under the circumstances, Buchhorn's trial counsel's conduct was objectively unreasonable. There is no question Dr. Mitchell's depolarization theory was central to the State's case. It was the linchpin that tied Buchhorn to O.O.'s death. This observation is not hindsight; it stems from information counsel knew before trial. Yet Buchhorn's counsel admit they did not independently research or investigate his theory.

If Buchhorn's counsel had inquired into Dr. Mitchell's theory at the preliminary hearing, studied it on their own, or properly explored it with their expert, they most likely would have discovered evidence to assist in a more effective cross-examination of Dr. Mitchell at trial and to better prepare Dr. Wigren to address Dr. Mitchell's opinions. Further, any of these investigative options could have prompted them to realize they needed to engage additional experts to attack Dr. Mitchell's theory or at least ensure Dr. Wigren addressed it at trial. For instance, if they had questioned Dr. Mitchell about the scientific basis for his theory, they would most likely have learned the "statistics" on which he relied were flimsy and his medical literature provided tenuous support, at best. This evidence would have been powerful on cross-examination, particularly since the matter hinged on the credibility of both sides' expert theories.

Although counsel's "[s]trategic choices based on a thorough investigation of the law and facts are virtually unchallengeable," when determining an ineffective assistance of counsel claim, uninformed decisions are not similarly protected. *Flynn v. State*, 281 Kan. 1154, Syl. ¶ 5, 136 P.3d 909 (2006); *Mullins v. State*, 30 Kan. App. 2d 711, 716-17, 46 P.3d 1222 (2002). Here, trial counsel lacked sufficient information to make an informed decision about how to address Dr. Mitchell's depolarization theory. Their failure to investigate this theory at or after the preliminary hearing, or explore it with their medical expert, bars any characterization of their deficiencies as "trial strategy."

Professor Craig testified, "To be able to say that the choices counsel made at trial were strategic, they have to be based on a thorough investigation. And part of that thorough investigation would be researching the issue, developing your experts, making sure your experts had all of the information that they might need." Her point is well taken. Buchhorn's counsel did not investigate Dr. Mitchell's theory on their own, with Dr. Mitchell (through examination at the preliminary hearing or trial), with Dr. Wigren, or with any other expert or consultant. They did not develop any expert testimony to address this theory, nor did they procure any information to provide Dr. Wigren about the factual or scientific basis for Dr. Mitchell's theory or on which to cross-examine Dr. Mitchell. It cannot be said that Buchhorn's counsel made an informed decision not to present testimony that was never discussed or evidence they never sought.

Buchhorn's trial counsel had never met Dr. Wigren or worked with him in the past. They admitted he was difficult to get ahold of. While they claim they "took direction from" him on medical issues, Dr. Wigren testified they never brought up depolarization with him. Trial counsel claim they asked him about it but admit he did not answer their questions and, instead, discussed an alternate theory. If their expert was unavailable or evasive, it was up to counsel to get the necessary answers or replace or supplement that expert. Morrison's admission that he did not ask Dr. Wigren about depolarization at trial *because he did not know what he would say* is telling.

At best, counsel relied exclusively upon an expert with whom they had no relationship, was difficult to get ahold of, and evaded answering questions about the State's key theory of the case. At worst, counsel did not address this key theory with Dr. Wigren until trial had begun and, even then, did not ask him to express his opinions on this theory once he told them what those opinions were—and most particularly after the State opened the door in cross-examining Dr. Wigren.

The trial court erred in finding it was reasonable for Buchhorn's counsel to rely upon Dr. Wigren to define the medical issues they needed to address. The ultimate control of a case rests with the lawyers and not the expert witnesses. It is incumbent upon the lawyers to define clearly for the experts the scope of their assigned tasks. Here, the communication channel broke down. The lawyers expected Dr. Wigren to tell them everything they needed to know about O.O.'s death and Dr. Mitchell's theory on causation. Dr. Wigren, however, apparently understood his engagement far more narrowly and offered an expert opinion on the skull fracture and possible causes of death rather than a critique of Dr. Mitchell's theory.

There is a difference between relying on an expert and scapegoating one. Here, counsel blamed Dr. Wigren for not telling them (1) Dr. Mitchell's depolarization theory had no medical basis or support in the medical community, (2) they needed to hire other experts to address depolarization, and (3) they should file a *Daubert* motion to exclude Dr. Mitchell's theory. Yet the record reveals they did not explore these issues with Dr. Wigren. It was unreasonable for counsel to expect Dr. Wigren to provide this guidance when they failed to request it.

Just like counsel cannot be said to have made an informed decision when they lacked the information needed to make the decision, they cannot be said to have relied on an expert for advice they never sought (or, according to them, did not receive when requested). Even if we accept the concept that counsel's reliance on their medical expert

to take the lead and suggest legal strategy was reasonable, counsel still cannot shirk their professional responsibilities onto an unfamiliar, retained expert without giving that expert the necessary tools to shoulder those responsibilities. Dr. Wigren testified he did not realize depolarization was a significant issue in the case, and he was not given the preliminary hearing transcript where Dr. Mitchell discussed it. It is difficult to imagine when Dr. Wigren was supposed to provide this pretrial advice when counsel admit the first time they substantively discussed depolarization with him was during their mid-trial meeting.

Both parties cite *Wilson v. Sirmons*, 536 F.3d 1064 (10th Cir. 2008), in support of their respective positions, and we agree it is pertinent. In *Wilson*, the court considered whether "trial counsel was ineffective because of his poor investigation in preparation for the sentencing phase and his failure to put on relevant mitigating evidence at trial." 536 F.3d at 1083. While the trial counsel in *Wilson* interviewed witnesses to testify as to Wilson's character, trial counsel failed to interview Wilson's family members and therefore failed to gather a complete narrative of Wilson's life. In its analysis, the court determined "the question is not whether counsel did *something*; counsel must conduct a full investigation and pursue reasonable leads when they become evident." 536 F.3d at 1084.

Wilson recognized that "in many situations, the expert will know better than counsel what evidence is pertinent to mental health diagnoses and will be more equipped to determine what avenues of investigation are likely to result in fruitful information." 536 F.3d at 1089. But *Wilson* took this further to find that while trial counsel should be able to rely on their expert to a degree, trial counsel "may not simply hire an expert and then abandon all further responsibility [to investigate]." 536 F.3d at 1089. Ultimately, the court in *Wilson* found that trial counsel's preparation fell below acceptable standards and was therefore deficient. 536 F.3d at 1089.

Buchhorn's trial counsel was similarly deficient. Once they hired Dr. Wigren, their duty to investigate the State's main theory did not end there. They failed to utilize his expertise to address depolarization, either with them or the jury. They also pursued no information about the factual or medical basis for Dr. Mitchell's theory. Instead, they simply hired Dr. Wigren without providing him the necessary information and guidance to make the decisions on which they were apparently relying on him to make.

Buchhorn also relies on *Robinson v. State*, 56 Kan. App. 2d 211, 428 P.3d 225 (2018), to argue her trial counsel could not blame Dr. Wigren for their failure to fully investigate Dr. Mitchell's theory. In *Robinson*, Frank Robinson was convicted of aggravated arson and felony murder based on the testimony of the government's fire investigator, Agent Douglas Monty. The trial court found Robinson's trial counsel was ineffective for failing to properly investigate "a most important aspect of this case—fire cause and origin expert opinions" and for failing to present sufficient expert testimony to refute claims made by the State's fire investigators. 56 Kan. App. 2d at 227. Robinson's attorney did not hire an arson expert to testify at trial, and he only consulted with an "'arson investigation-type expert, cause and origin person'" less than two weeks before trial. 56 Kan. App. 2d at 216. After that person proved unhelpful, Robinson's attorney conducted no further investigation and then did not talk to another expert.

In affirming the trial court's decision, this court noted the importance of thoroughly investigating both the facts and expert opinions to prepare a proper defense. See 56 Kan. App. 2d at 227-30. As in *Robinson*, Buchhorn's counsel did not properly investigate the central issue in her case, which was Dr. Mitchell's theory on cause of death. And, also like *Robinson*, if Buchhorn's counsel had properly investigated Dr. Mitchell's expert opinions, they would have been able to undermine those opinions far more effectively. This court's description of *Robinson*'s counsel's failings is just as apt here. By failing to independently investigate Dr. Mitchell's theory and by failing to marshal expert evidence to directly challenge that theory, Buchhorn's counsel entered

"battle with the State unarmed and unequipped with the expertise [Buchhorn] needed for a defense." 56 Kan. App. 2d at 227.

As in *Robinson*, Buchhorn's counsel may have acted reasonably when they first hired Dr. Wigren to contest the timing of O.O.'s skull fracture. Still, just as the expert in *Robinson* was not qualified to refute the most important issue of the case, Dr. Wigren was not a neurological expert who could fully refute Dr. Mitchell's theory of instant death caused by the depolarization of nerves from blunt force trauma. And, like in *Robinson*, Buchhorn's counsel failed to make a comprehensive investigation of Dr. Mitchell's medical opinions, thus failing to equip Buchhorn with what she needed for a proper defense. It was not a reasonable strategy that led counsel to decline to investigate Dr. Mitchell's theory, but, rather, lack of thoroughness and preparation. See *Kenley v. Armontrout*, 937 F.2d 1298, 1308 (8th Cir. 1991).

2. *Buchhorn's trial counsel was deficient in failing to present responsive expert testimony at trial.*

Buchhorn also claims her counsel was ineffective for failing to directly challenge Dr. Mitchell's depolarization theory with expert testimony. She presented examples of such testimony at the posttrial hearing, in the form of Dr. Kessler and Dr. Ng. These highly qualified medical professionals testified that Dr. Mitchell's depolarization theory had no support in science or the medical community, and that the facts of the case did not support his theory on O.O.'s cause of death. Such evidence would have severely undermined Dr. Mitchell's credibility and the State's theory of the case.

In deciding Buchhorn's counsel was not ineffective for failing to engage such experts, the trial court relied on the considerable experience of trial counsel. She found it reasonable for counsel to rely upon Dr. Wigren to tell them if they needed additional experts. While it is true that the decision whether to call a particular witness rests within

the sound discretion of trial counsel, this decision must be an "*informed, tactical*" one. *United States v. Holder*, 410 F.3d 651, 655 (10th Cir. 2005). Here Buchhorn's trial counsel failed to provide a "valid strategic reason" for simply relying on Dr. Wigren to tell them whether they needed more experts. See *Robinson*, 56 Kan. App. 2d at 228. As explained above, counsel's decision to blindly rely on Dr. Wigren was uninformed and objectively unreasonable.

Professor Craig testified that Buchhorn's counsel could not effectively cross-examine Dr. Mitchell without proper experts. She also testified trial counsel did not adequately challenge the State's theory of O.O.'s cause of death. While she acknowledged that counsel hired Dr. Wigren, a forensic pathologist, she still believed a neurologist was necessary to testify in this case. Indeed, even Dr. Mitchell admitted in the preliminary hearing that a neuropathologist may disagree with some of his medical findings.

Trial counsel admitted the only time they specifically discussed other experts with Dr. Wigren was when he flew in on the Sunday after trial had begun, the night before he testified. While counsel fault Dr. Wigren for not bringing the need for other experts to their attention earlier, they fail to acknowledge their responsibility to directly address this issue with him. It was counsel's duty to ensure their expert addressed all necessary issues, particularly since they conducted no independent investigation on their own. Rather than making an informed decision on the expert testimony required to counter Dr. Mitchell's theory, counsel simply abrogated their responsibility to Dr. Wigren, a witness with whom they had never worked, had never met, and who they complained was difficult to get ahold of.

Under *Wilson*, once counsel knew Dr. Mitchell's theory on cause of death from the preliminary hearing, they had an obligation to properly investigate that theory. Further, under *Robinson*, Buchhorn's counsel should have hired an expert who could properly refute the most important issue of the case—Dr. Mitchell's theory on depolarization of

nerves. Buchhorn's counsel's performance fell "below an objective standard of reasonableness, considering all the circumstances." See *Bledsoe v. State*, 283 Kan. 81, 90, 150 P.3d 868 (2007). Trial counsel's failure to use expert testimony to challenge the validity of Dr. Mitchell's theory and to explain how Dr. Mitchell's theory was false or not credible was objectively unreasonable.

Using the *Strickland* analysis, Buchhorn must establish her counsel's actions were deficient under the totality of the circumstances. *Bledsoe*, 283 Kan. at 90; see *Strickland*, 466 U.S. at 687. Here, that burden is met.

3. Trial counsel's deficient performance prejudiced Buchhorn's right to a fair trial.

As we have said, under the *Strickland* test for ineffective assistance of counsel, Buchhorn must establish that her counsel's objectively unreasonable performance caused her material prejudice. To establish prejudice, Buchhorn must show a reasonable probability that her counsel's deficient performance affected the outcome of the proceedings, based on the totality of the evidence. A reasonable probability here is a probability sufficient to undermine confidence in the outcome. *Khalil-Alsalaami*, 313 Kan. at 485.

As in *Mullins*, 30 Kan. App. 2d at 717, the trial court did not analyze the prejudice prong of the *Strickland* test. Instead, its analysis stopped after finding counsel was not ineffective. We analyze this prong based on the facts in the record before us, just as this court did in *Mullins*.

There was no physical evidence tying Buchhorn to the death, which meant the trial turned on credibility between the prosecution and defense witnesses. The State built its case on the expert testimony given by Dr. Mitchell. This makes an investigation into Dr. Mitchell's theory on cause of death the most important aspect of Buchhorn's defense.

Buchhorn's counsel had a duty to investigate Dr. Mitchell's theory to give her the most effective defense. See *McHenry v. State*, 39 Kan. App. 2d 117, 123, 177 P.3d 981 (2008). Their failure to investigate the State's main theory meant they were unprepared to fulfill that fundamental constitutional obligation.

In *Mullins*, this court found trial attorneys' failure to consult or procure an expert was objectively unreasonable because there was no showing of strategic reasons for that failure. *Mullins* also found that "[h]ad trial counsel procured the services of an available expert . . . the jury would have been presented with relatively strong evidence to potentially undermine the allegations . . . ." 30 Kan. App. 2d at 717. This court also held that "because trial counsel failed to present . . . such available expert testimony, the jury heard only the victim's unchallenged allegations." 30 Kan. App. 2d at 718.

Just like in *Mullins*, Buchhorn's counsel could have undermined Dr. Mitchell's theory with information they could have discovered at the preliminary hearing, from their own independent investigation, and from properly managed experts (including Dr. Wigren). If counsel had directly challenged Dr. Mitchell's theory, such as by presenting testimony from Dr. Kessler or Dr. Ng (or both), or if Dr. Wigren had directly addressed it, there is a reasonable probability the jury would have found Buchhorn not guilty. The State's entire theory of guilt relied on Dr. Mitchell's opinion that the death was immediate, yet trial counsel did not directly challenge that theory.

Trial counsel's failure to independently investigate Dr. Mitchell's theory also left them unprepared to challenge the credibility of that theory on cross-examination. "'While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.'" *United States v. Cronic*, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). Buchhorn could have entered the trial armed with direct evidence to impeach Dr. Mitchell's theory on the cause of death and the State's entire theory of guilt. Instead, trial counsel was

unprepared to test the validity of Dr. Mitchell's theory, despite counsel's admission that Dr. Mitchell's opinions were key to the State's case.

When setting forth the very test we apply today, the United States Supreme Court pointed out, "a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." *Strickland*, 466 U.S. at 685. Dr. Mitchell's depolarization theory was not subjected to effective or even fully formed adversarial testing. If the jury did not believe that theory, there is nothing left in the State's case against Buchhorn, just like in *Robinson*. It was Dr. Mitchell's opinion that O.O.'s death was instantaneous that tied the death to Buchhorn, as the last person who admitted having contact with O.O. If that opinion was impeached, a finding of guilt becomes highly questionable. See *Robinson*, 56 Kan. App. 2d at 229.

Based on the totality of the circumstances, we are not confident the outcome would have remained unchanged if the jury had been apprised of all the information Buchhorn's counsel could have presented to impeach Dr. Mitchell's opinions.

Trial court remarks during voir dire

Since the errors we have identified above prejudiced Buchhorn, we need not consider any of her other allegations. See *State v. Stinson*, 43 Kan. App. 2d 468, 469, 227 P.3d 11 (2010) (finding that because court was reversing and remanding for new trial, remaining argument on ineffective assistance of counsel was moot). However, there is one matter we feel compelled to address, even though we do not base our decision upon it.

Buchhorn also took issue in her posttrial motion with the trial court's remarks at the close of jury orientation. She reprises those concerns on appeal. The court told the jury panel:

> "Okay. Anybody ever been at Thanksgiving dinner and your crotchety old uncle says, 'I just don't understand why the defendants have all the rights and victims have none?' Anybody ever heard anybody made those statements? I see people smiling and won't admit it, but they have heard it. Anybody know why we are set up that way? Well, because the people who wrote our Constitution were criminals. They had been charged with treason; and if they had been found guilty, they would have been hanged to death, and they wrote our Constitution in a way that they would have wanted to be protected when they went to trial."

Buchhorn's trial counsel did not object to these remarks. Her new counsel argued these remarks were factually inaccurate and constituted judicial misconduct, denying Buchhorn a fair trial. The district court did not address this argument in its order.

Frankly, we fail to see the purpose of these remarks, which neither assist the prospective jurors in understanding what will be expected of them if they are chosen to serve nor impart to them some legal principle applicable to the criminal justice process. And Buchhorn is absolutely correct that such remarks vitiate the importance of the constitutional protections afforded an accused (and, indeed, all citizens). At the outset of the trial, the district court told the prospective jurors that Buchhorn, as a criminal defendant, had all kinds of rights and O.O., the victim, had none. We see no productive value in unfavorably contrasting persons accused of crimes with victims of crimes, particularly since it risks providing the jury an improper analytical framework to process the evidence admitted at trial. In short, the trial judge's remarks were imprudent and should not have been made.

In closing, we hearken back to the sage observations made by the *Robinson* court. 56 Kan. App. 2d at 212. It is not an easy decision to grant a new trial to someone who has been convicted of killing another human being. But more important than the severity of the crime is the fundamental principle of American law—all accused must receive a fair trial, even those accused of killing a child. That legal principle has guided our decision to order a new trial for Carrody M. Buchhorn.

Reversed and remanded.

No. 19-122252-A

IN THE SUPREME COURT OF THE STATE OF KANSAS

STATE OF KANSAS,
Plaintiff-Appellee/Petitioner,

v.

CARRODY M. BUCHHORN
Defendant-Appellant/Respondent.

CONDITIONAL CROSS-PETITION FOR REVIEW

Petition for Review from the Kansas Court of Appeals
Memorandum Opinion No. 122,252

Appeal from the District Court of Douglas County, Kansas
Honorable Sally D. Pokorny, District Judge
District Court Case No. 2017CR385

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Prayer for Review

Mrs. Buchhorn petitions the Kansas Supreme Court, pursuant to Supreme Court Rule 8.03(c), for a Conditional Cross-Petition for Review in order to review the Court of Appeals' decision refusing to consider and reverse the District Court's finding that Dr. Mitchell's depolarization theory was admissible as scientific knowledge pursuant to K.S.A. § 60-456(b).

Date of Decision

The Court of Appeals issued its decision on August 13, 2021.

Statement of the Issue for Conditional Review

Mrs. Buchhorn seeks conditional review of the following issue decided by the Court of Appeals:

I. WHETHER THE COURT OF APPEALS ERRED BY NOT CONSIDERING AND REVERSING THE DISTRICT COURT'S ABUSE OF DISCRETION IN CONCLUDING THAT DR. MITCHELL'S EXPERT OPINION WAS RELIABLE UNDER K.S.A. 60-456(B).

Statement of Additional Relevant Facts

Pursuant to Supreme Court Rule 8.03(a)(4)(D), this section includes a statement of only those relevant facts that were not included or not correctly stated in the opinion.

1. Mrs. Buchhorn's Motion for New Trial, challenging the admissibility of Dr. Mitchell's "depolarization" theory, was made as part of her claim for relief under K.S.A. § 60-1507. (R. Vol. I, pp. 130, 132.)

2. Mrs. Buchhorn filed a motion objecting to any use of Dr. Mitchell's depolarization theory during her sentencing. (R. Vol. I, 127.)

3. In its order denying Mrs. Buchhorn's Motion for New Trial, the District Court expressed that it intended to conduct, and actually had conducted, a *Daubert* hearing post-trial. (R. Vol. II, p. 69 ["The post-trial hearing was the *Daubert* hearing"]).

4. As a result of this post-trial *Daubert* hearing, the District Court specifically found that Dr. Mitchell's depolarization theory was admissible under K.S.A. § 60-456(b). (R. Vol. II, p. 71.)

Argument and Authority

I. The Court of Appeals Erred by Not Considering and Reversing the District Court's Abuse of Discretion in Concluding that Dr. Mitchell's Expert Opinion was Reliable Under K.S.A. § 60-456(b).

The Court of Appeals refused to consider whether the District Court erred in finding that Dr. Mitchell's Expert Opinion was reliable under K.S.A. § 60-456(b). To reach this conclusion, the Court of Appeals held that Mrs. Buchhorn's trial counsel failed to preserve the issue for appeal by timely objecting prior to its admission to the jury. (Op. p. 13.) However, Mrs. Buchhorn's post-trial counsel objected (Op. p. 12.) *before* the District Court denied a request for new trial (R. Vol. I, pp. 130, 132.) *or* sentenced Mrs. Buchhorn (R. Vol. I, p. 127.). Upon these objections, the District Court conducted a post-trial *Daubert* hearing. (R. Vol. II, p. 71.) Thus, whether Dr. Mitchell's depolarization theory was admissible under K.S.A. § 60-456(b) was expressly and fully litigated, a complete record was developed concerning admissibility, and the District Court expressly considered and determined the testimony was admissible under K.S.A. § 60-456(b).

The District Court conducted these post-trial hearings after a jury verdict was received, but before Mrs. Buchhorn was sentenced or convicted of any crime. (R. Vol. II, p. 88.) Not only did the District Court err in finding post-trial that Dr. Mitchell's depolarization theory was admissible under *Daubert*, it also erred by continuing to rely on Dr. Mitchell despite his post-trial testimony that he previously testified falsely to the District Court and changed his previous testimony. (Op. pp., 6-7.) If granting the State's Petition for Review, the Court should take this opportunity to unequivocally hold that Kansas courts cannot accept or rely – at any time – upon demonstrably false evidence.

Conclusion

Should the Court accept review in this matter, it should review and reverse the decision of the Court of Appeals declining to review the District Court's decision that Dr. Mitchell's "depolarization" theory passed muster under *Daubert* and K.S.A. § 60-456(b).

Respectfully submitted,

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ATTORNEYS FOR MRS. BUCHHORN

CERTIFICATE OF SERVICE

I certify a copy of the foregoing was served electronically on September 17, 2021, via Notice of Electronic Filing and via e-mail, which are deemed acceptable forms of service pursuant to K.S.A. § 60-205 and Supreme Court Rule 1.11, on the following counsel of record:

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No. 19-122252-A

IN THE SUPREME COURT OF THE STATE OF KANSAS

STATE OF KANSAS,
Plaintiff-Appellee/Petitioner,

v.

CARRODY M. BUCHHORN
Defendant-Appellant/Respondent.

APPENDIX TO
CONDITIONAL CROSS-PETITION FOR REVIEW

State v. Buchhorn, No. 122,252, 2021 WL 3578032 (Kan. Ct. App. Aug. 13, 2021)

NOT DESIGNATED FOR PUBLICATION

No. 122,252

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

CARRODY M. BUCHHORN,
Appellant.

MEMORANDUM OPINION

Appeal from Douglas District Court; SALLY D. POKORNY, judge. Opinion filed August 13, 2021. Reversed and remanded.

William J. Skepnek, of The Skepnek Law Firm, P.A., of Lawrence, *Keynen J. (K.J.) Wall*, *Quentin M. Templeton*, and *Russell J. Keller*, of Forbes Law Group, LLC, of Overland Park, *Stephan L. Skepnek*, of The Sader Law Firm, of Kansas City, Missouri, and *Kevin Babbit*, of Fagan & Emert, LLC, of Lawrence, for appellant.

Emma C. Halling, assistant district attorney, *Kate Duncan Butler*, assistant district attorney, *Charles E. Branson*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before ATCHESON, P.J., HILL and CLINE, JJ.

PER CURIAM: This matter involves a child who died unexpectedly at the home daycare where Carrody M. Buchhorn worked. Buchhorn was the last person who admitted having contact with the child. After the Douglas County coroner ruled the child's death was instantaneous and caused by a blow to the head, a jury convicted Buchhorn of second-degree murder. We reverse Buchhorn's conviction and remand for a

new trial because her trial counsel's constitutionally deficient performance prejudiced her right to a fair trial.

FACTS

Nine-month-old O.O. was found unresponsive in a Eudora daycare crib, following an afternoon nap. The owner called 911, while Buchhorn performed CPR on O.O. Despite Buchhorn's and first responders' efforts to resuscitate the baby, O.O. did not survive.

During the investigation of O.O.'s death, police interviewed Buchhorn twice. She waived privilege in both interviews and consistently denied harming O.O. Buchhorn, a mother of two grown children, had no history of abuse or violence and no prior criminal history.

The Douglas County coroner, Dr. Erik Mitchell, performed the autopsy on O.O. Dr. Mitchell's autopsy revealed that O.O. had suffered a significant skull fracture but no brain swelling. Dr. Mitchell deduced that O.O. died instantly following a blow to the head, which he claimed released mechanical energy into the base of the brain causing "temporary cessation of function at the base of the brain" or "depolarization of neurons." He suspected that O.O. was stepped on.

Since Buchhorn was the last person who admitted having contact with O.O., the State charged her with first-degree murder and in the alternative, second-degree murder, a felonious, unintentional, but reckless killing of a human being. Buchhorn retained law partners Paul Morrison and Veronica Dersch to represent her.

Dr. Mitchell testified about his "depolarization theory" on O.O.'s cause of death at the preliminary hearing. He said he believed, "going on statistics," that O.O. died

instantaneously due to "a direct effect on depolarization of neurons at the area of the base of the brain, upper spinal cord manila, [which] interferes with the ability to breathe, and that leads to death." He concluded O.O. had no "anatomic deformity or no anatomic reason to be dead other than the physical injury, and that this physical injury will release energy into the area that is critical for survival at the base of the brain."

Buchhorn's trial counsel did not elicit information about the foundation of Dr. Mitchell's depolarization theory or challenge it at the preliminary hearing. Her counsel did not ask Dr. Mitchell about the statistics on which he relied to develop his theory, nor did they ask Dr. Mitchell to identify any medical literature which may support or address this theory.

At trial, Dr. Mitchell recounted his opinion on O.O.'s cause of death. He again noted that O.O. had a skull fracture with little brain swelling, which caused him to conclude not much time had passed between the trauma and death. Dr. Mitchell said a skull fracture is not inherently fatal but becomes fatal if energy is transferred to the brain. He also testified that if someone were with O.O. when the injury occurred, that person would immediately recognize something was wrong with O.O. and that O.O. needed immediate care. Buchhorn's trial counsel raised no objections to Dr. Mitchell's testimony regarding his depolarization theory.

In addition to Dr. Mitchell's testimony, the State also admitted electronic messages from Buchhorn sent shortly before O.O.'s death, complaining about her low pay and disparaging the attitude of the daycare owner.

Buchhorn's trial counsel retained a forensic pathologist, Dr. Carl Wigren, to testify at trial. Dr. Wigren resided in Seattle, Washington, and was referred to them by another expert who was not taking any new cases. Dr. Wigren did not address Dr. Mitchell's depolarization theory in his testimony. Instead, he alternatively interpreted O.O.'s

injuries. Dr. Wigren testified that he believed O.O.'s skull fracture showed signs of healing from an injury that was a few days to a week old. When asked if he knew what killed O.O., Dr. Wigren said, "I honestly don't."

The State relied heavily on Dr. Mitchell's opinion on O.O.'s cause of death in closing arguments. Because Dr. Mitchell contended that death by depolarization is nearly instant, the State repeatedly argued this theory implicated Buchhorn, as the last person to care for the child. The State also argued Dr. Mitchell was more credible than Dr. Wigren, noting his opinions were more reliable because of his "impressive" professional experience. Buchhorn's counsel argued the State presented only circumstantial evidence.

The jury deliberated for two days before returning a verdict of guilty on the lesser charge of second-degree, reckless murder.

After the verdict, Buchhorn hired new counsel and moved for a new trial. Among other issues, Buchhorn challenged the admissibility of Dr. Mitchell's depolarization theory under the *Daubert* standard for expert opinion testimony and raised several ineffective assistance of counsel claims, including (1) trial counsel failed to investigate Dr. Mitchell's testimony, (2) trial counsel failed to file an appropriate *Daubert* motion, and (3) trial counsel failed to present responsive expert testimony at trial. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

Several witnesses testified at the subsequent evidentiary hearing. Dr. Mitchell also produced materials for this hearing, after the jury trial, that he contended supported his theory of depolarization.

Failure to challenge depolarization theory

Dr. Sudha Kessler, a licensed physician and board-certified pediatric neurologist, testified for Buchhorn. She practiced pediatric neurology at the University of Pennsylvania Children's Hospital in Philadelphia, and she had extensive experience treating pediatric brain injuries and assessing the effect of head trauma. Dr. Kessler testified she investigated causes of death as a quality review panel member.

Dr. Kessler evaluated Dr. Mitchell's depolarization theory and found it to be unreliable. She testified that some energy, such as electrical or electromagnetic, can impact the signals of the brain cells, but not kinetic or mechanical energy, such as a force from a blow to the head. Dr. Kessler was "not aware of any circumstances in which mechanical energy directly translates into electrical change in the brain." Dr. Kessler had never heard or read about a brain death with no evidence of brain injury.

Dr. Kessler reviewed texts, published studies, and other sources of medical research, but she found no support for the proposition that mechanical energy can depolarize, interfere with, or disrupt the brain cells or nerves and cause instant death, without causing injury to the brain. Dr. Kessler also reviewed the literature Dr. Mitchell produced posttrial and testified she did not believe it supported Dr. Mitchell's theory. Dr. Kessler further noted:

> "[Dr. Mitchell's theory is] just fantastical, because it's not something I have ever been taught, not something I teach, not something—just not consistent. It's not consistent with the medical literature because there is no literature on magical disruption of the brain that causes death and that doesn't exist. In addition to looking though my own textbooks, looking through the two database searches I did, I was so taken aback by all this that I . . . [asked] my colleagues if they have heard of this idea; and honestly, most of the time, the response that I got was laughter."

Dr. Yu-Tze Ng, the Chief of Neurology at Children's Hospital in San Antonio and a tenured pediatrics professor at Baylor College of Medicine in Houston, also testified for Buchhorn. Dr. Ng testified he does not like using the term "depolarization" because that is something that happens normally. Dr. Ng also said he believed Dr. Mitchell was trying to imply a sudden cessation of the whole brain. Dr. Ng stated:

> "[W]hether it's from depolarization, which is some function, [a sudden cessation of the whole brain], is just not possible without any evidence that there was some brain injury that would persist short of completely beheading the patient or cutting, disconnecting the upper brain stem, the medulla and all those brain parts to the spinal cord. I just can't fathom how a patient would have died with no evidence whatsoever [of brain injury]."

Dr. Ng testified that Dr. Mitchell's theory diverged from medical science. Dr. Ng said the articles Dr. Mitchell provided to support his theory actually contradicted Dr. Mitchell's claims. Dr. Ng stated that he did not know how O.O. died but, based on the evidence, O.O. did not die from a brain injury.

Dr. Wigren also testified at the posttrial hearing. He stated he did not know Dr. Mitchell would present his theory of depolarization or that the theory would be such a pivotal part of the argument in this case. Dr. Wigren said that in all his communications with Buchhorn's trial counsel, including during the trial, they never asked him to address Dr. Mitchell's opinion.

Dr. Wigren testified that if trial counsel had asked about the viability of Dr. Mitchell's theory, he would have written a supplemental report and recommended trial counsel consult with a neurologist. He also stated he had never heard this theory expressed and had been unable to find any authoritative medical literature to support it.

Dr. Mitchell testified for the State at the posttrial hearing. He admitted O.O.'s case was the exception, rather than the rule, because most head trauma cases included

observable injury. When asked about the statistics on which he relied to support his theory, Dr. Mitchell testified he was thinking of the transfer of energy to the brain which occurs in all brain injuries. He admitted he would probably change how he used the word statistics in his testimony. He also testified that his use of the word statistics was him trying to convey a likelihood, not to suggest he had actual statistical information, and that "it was a poor choice of words in retrospect."

Dr. Mitchell testified he had observed two cases in which immediate death occurred after a concussive injury to the brain stem, and, in both cases, neither victim had any sign of significant brain injury. He testified one of those cases occurred in 1980, during his residency in North Carolina, and the other occurred in the early 1980s or 1990s in New York. He had no records on these cases and had made no effort to find them. Dr. Mitchell testified that he had done about 12,000 autopsies during his nearly 40-year career. He admitted on cross-examination that 2 cases out of 12,000 is "a very small number."

When asked about the posttrial materials he supplied and relied on to support his theory of depolarization, Dr. Mitchell admitted his materials did not provide any studies of people who died after suffering blunt force trauma in which there was no evidence of injury to the brain. He acknowledged that much of the literature he had provided dealt with general neurological principles and not the exact issue of instantaneous death from concussive force.

Alice Craig, a professor at the University of Kansas School of Law and attorney at the Paul E. Wilson Project for Innocence & Post-Conviction Remedies, also testified for Buchhorn at the posttrial hearing. She testified that for trial counsel to fully understand and challenge evidence, he or she must independently research the issues and consult with experts if necessary. Craig also stated that given the complicated nature of cases involving a brain injury, counsel would at least need to hire a forensic pathologist and

may also need to hire a radiologist, biomechanical engineer, neuropathologist, or neurologist.

Craig testified she believed Buchhorn's trial counsel failed to provide objectively reasonable representation. Craig contended counsel violated the professional standard of care by failing to file a pretrial *Daubert* motion to exclude Dr. Mitchell's testimony and discover the scientific and factual basis for his depolarization theory. She testified Dr. Mitchell's preliminary hearing testimony raised enough questions about the science behind O.O.'s cause of death and the basis for Dr. Mitchell's theory that counsel should have filed a *Daubert* motion to challenge the validity of his theory.

Craig also testified that Buchhorn's counsel could not effectively cross-examine Dr. Mitchell or exclude his testimony without the right experts. She said counsel did not adequately challenge the State's theory of O.O.'s cause of death. Craig acknowledged that counsel hired Dr. Wigren, a forensic pathologist, but still believed a neurologist was necessary to testify in this case. Craig additionally criticized counsel's failure to ask Dr. Wigren specifically about Dr. Mitchell's theory that the blunt force injury interrupted and depolarized O.O.'s nerves.

Both Morrison and Dersch testified at the hearing. Morrison admitted Dr. Mitchell's testimony was "very important" and agreed they needed to challenge his depolarization theory. Yet, Buchhorn's trial counsel did not independently research or investigate Dr. Mitchell's depolarization theory. Instead, they relied on Dr. Wigren to define the medical issues they needed to address.

Morrison admitted they did not consult with or talk to any experts other than Dr. Wigren. Morrison testified he was "comfortable that [Dr.] Wigren could handle it," and "we took our direction from him." On the other hand, Morrison testified both he and his

co-counsel were frustrated with how difficult it was to get ahold of Dr. Wigren and how busy he was. Neither Morrison nor Dersch had ever worked with Dr. Wigren before.

Morrison admitted he never considered filing a *Daubert* motion and, in fact, both he and Dersch admitted they had never filed a *Daubert* motion in any of their cases. Morrison testified they relied on Dr. Wigren to tell them if they needed to file a *Daubert* motion. When asked if he regretted not filing a *Daubert* motion, Morrison said, "Yes." Dersch testified that, in hindsight, filing a *Daubert* motion would have been a good idea. She also testified they made no strategic decision to forgo filing a *Daubert* motion but, instead, she never considered it. She said it never came up in their discussions.

When asked about Dr. Wigren's testimony that trial counsel never asked him to address Dr. Mitchell's theory, Morrison stated that he had asked Dr. Wigren about Dr. Mitchell's theory, but Dr. Wigren never responded and instead focused on the age of O.O.'s skull fracture. Morrison admitted they never asked Dr. Wigren for something they could use to cross-examine Dr. Mitchell about his theory on cause of death.

The first time trial counsel met Dr. Wigren was when he flew in on the Sunday after trial had begun, the night before he testified. During this meeting, Dr. Wigren asked counsel if they had hired a biomechanical engineer to testify. Morrison responded by saying, "'It's a little late, Doc.'" Morrison and Dersch both testified the first time Dr. Wigren discussed the reliability or general acceptability of Dr. Mitchell's theory was during this meeting. They said he told them he did not believe Dr. Mitchell's theory, basically calling it nonsense. Despite this knowledge, they never asked Dr. Wigren to express any opinions on Dr. Mitchell's depolarization theory at trial. Morrison's explanation for not doing so was that he was uncertain what Dr. Wigren might say.

Besides failing to challenge Dr. Mitchell's depolarization theory, with both a *Daubert* motion and expert testimony, Buchhorn also pointed out her trial counsel failed

to elicit explanatory testimony from Dr. Wigren at trial, after his responses to the State's cross-examination suggested he agreed with Dr. Mitchell's depolarization theory. Buchhorn's new counsel pointed to the following exchange between Dr. Wigren and the State:

> "Q. [State's attorney C.J. Reig:] Would you agree that a child could suffer physical violence to their head that would change the electroconductivity to the brain and they would stop breathing? Yes or no.
> "A. [Dr. Wigren:] Yes, with an explanation.
> "Q So—thank you. The answer is yes.
> "A. With explanation.
> "Q. That's what—your client can come and ask questions if they want to.
> "MS. RIEG: Do you agree, Judge?
> "THE COURT: Well, I was going to tell the doctor that there can be a redirect to explain or expand on that."

Trial counsel's redirect of Dr. Wigren was very brief and did not address this issue. Thus, Dr. Wigren was never allowed to give the jury his explanation of the qualification to his answer.

Buchhorn's new counsel asked Dr. Wigren to provide this explanation at the evidentiary hearing on their posttrial motions. Dr. Wigren testified that while physical violence can change the electroconductivity of the brain and stop breathing, the impact in those situations is more violent than a skull fracture and this "very violent impact" would cause perceptible injury to the brain. The example he provided of this phenomenon was "crushing head injuries like in an occupational accident."

The trial court denied Buchhorn's motion for a new trial. It found Buchhorn's counsel was not ineffective for failing to request a *Daubert* hearing because the court held it would have denied a *Daubert* motion to exclude Dr. Mitchell's testimony. The

court found Buchhorn's counsel was not ineffective in hiring Dr. Wigren because the court found counsel appropriately relied on Dr. Wigren's expertise and knowledge. The court noted Dr. Wigren's theory on cause of death directly contradicted the State's theory. The court discounted Craig's testimony because the court found it depended on the incorrect assumption that trial counsel would be able to exclude Dr. Mitchell's testimony. The court found Craig improperly based her testimony on hindsight. The court also relied heavily upon the considerable expertise of trial counsel. The court pointed out they were very prepared, appeared to have formulated a potentially winning strategy, and appeared to have spent considerable time with their client. The court rejected Buchhorn's other claims and sentenced her to 123 months' imprisonment.

ANALYSIS

On appeal, Buchhorn argues the trial court abused its discretion when it denied her posttrial motion because (1) Dr. Mitchell's testimony was unreliable and should have been excluded under K.S.A. 60-456(b) and (2) Buchhorn's trial counsel was ineffective and prejudiced her right to a fair trial. Buchhorn has raised other grounds for reversing her conviction, which we need not address because we reverse her conviction for ineffective assistance of trial counsel.

The trial court may grant a new trial when it is "required in the interest of justice." K.S.A 2020 Supp. 22-3501(1). We review this decision for an abuse of discretion. Generally, a trial court abuses its discretion when its decision is found to be arbitrary, fanciful, or unreasonable, or based on an error of fact or law. *State v. Ashley*, 306 Kan. 642, 650, 396 P.3d 92 (2017). The decision must be such that no reasonable person would have arrived at the same outcome. *State v. Jolly*, 301 Kan. 313, 325, 342 P.3d 935 (2015).

Buchhorn failed to preserve her objections to the admissibility of Dr. Mitchell's testimony.

Buchhorn challenges the admissibility of Dr. Mitchell's testimony under K.S.A. 60-456, which codifies the test for admissibility of expert opinion set forth in *Daubert*, 509 U.S. 579. *Daubert* established a "gatekeeper" function for trial courts, which requires the court to assess the reasoning and methodology underlying a proposed expert's opinion and determine whether it is scientifically valid and applicable to the particular set of facts involved in the case. The purpose of the *Daubert* analysis is to "'determine at the outset . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.'" *Goebel v. Denver and Rio Grande Western R.R. Co.*, 215 F.3d 1083, 1087 (10th Cir. 2000) (citing *Daubert*, 509 U.S. at 592). In this respect, Buchhorn argues the district court's decision to admit Dr. Mitchell's testimony at trial created a freestanding error of such gravity that it requires reversal of her conviction.

The problem with Buchhorn's challenge is it is untimely. Buchhorn never objected to the admissibility of Dr. Mitchell's opinions, including his methodology and conclusions, until her posttrial motion. The purpose of the gatekeeper function in K.S.A. 2020 Supp. 60-456 and under *Daubert* is lost once the evidence at issue has passed through the gate. Indeed, K.S.A. 2020 Supp. 60-457(b) recognizes the importance of timing in this area by allowing the court to hold a pretrial hearing to determine whether a witness qualifies as an expert and whether the witness' testimony satisfies the requirements of K.S.A. 2020 Supp. 60-456(b). Buchhorn's challenge to Dr. Mitchell's testimony falls within the provisions of K.S.A. 2020 Supp. 60-456(b), yet she did not object to Dr. Mitchell's testimony before or during the trial.

Until the Kansas Legislature codified the *Daubert* test in K.S.A. 2014 Supp. 60-456 through K.S.A. 2014 Supp. 60-458, Kansas courts applied the *Frye* test to the

admission of scientific expert testimony. *In re Care & Treatment of Jimenez*, No, 115,297, 2017 WL 1035505, at *3 (Kan. App. 2017) (unpublished opinion). Kansas courts routinely rejected challenges to scientific evidence under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) absent a timely and specific objection at trial. *State v. Ordway*, 261 Kan. 776, 801, 934 P.2d 94 (1997); *Ohlmeier v. Jones*, 51 Kan. App. 2d 1014, 1019, 360 P.3d 447 (2015). Further, K.S.A. 60-404 prohibits setting aside a verdict or reversing a decision because of the erroneous admission of evidence without a timely and specific objection.

The State appropriately notes our Supreme Court strictly adheres to the contemporaneous objection rule. See, e.g., *State v. Solis*, 305 Kan. 55, 62-63, 378 P.3d 532 (2016). It also correctly points out the purpose of this rule "is not fulfilled when the objection is first raised after the trial has been completed." *State v. Cook*, 286 Kan. 1098, 1109, 191 P.3d 294 (2008). Certainly, the purpose of the *Daubert* test is not fulfilled when the objection is first raised well after the jury has already heard and considered the allegedly suspect testimony in rendering its verdict. We find Buchhorn has failed to properly preserve her objection to the admissibility of Dr. Mitchell's testimony and decline to overturn the trial court's denial of Buchhorn's motion on that basis.

Buchhorn's trial counsel was ineffective and prejudiced her right to a fair trial.

The Sixth Amendment to the United States Constitution guarantees an accused the right to have assistance of counsel for his or her defense. *Miller v. State*, 298 Kan. 921, 929, 318 P.3d 155 (2014). The Fourteenth Amendment to the United States Constitution applies this right to state proceedings. The guarantee includes not only the presence of counsel but counsel's effective assistance as well. *Sola-Morales v. State*, 300 Kan. 875, 882, 335 P.3d 1162 (2014) (relying on *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 [1984]). The purpose of the effective assistance guarantee

is to ensure the accused receives a fair trial. *State v. Galaviz*, 296 Kan. 168, 174, 291 P.3d 62 (2012).

An allegation of ineffective assistance of counsel presents both questions of fact and law. When the trial court conducts a full evidentiary hearing on the claim, we must determine whether the court's findings are supported by substantial competent evidence and whether the court's factual findings support their legal conclusions. The standard of review when evaluating the court's legal conclusions is de novo. *Fuller v. State*, 303 Kan. 478, 485, 363 P.3d 373 (2015).

The Kansas Supreme Court recently recounted the two-prong test for analyzing ineffective assistance of counsel claims in *Khalil-Alsalaami v. State*, 313 Kan. 472, 485-86, 486 P.3d 1216 (2021):

> "'*Strickland* established a two-prong test for determining if a criminal defendant's Sixth Amendment right to effective assistance of counsel has been violated by an attorney's performance. 466 U.S. at 687-96. Kansas courts adopted this test in *Chamberlain* [*v. State*], 236 Kan. [650,] 656-57[, 694 P.2d 468 (1985)]. Under the first prong, a defendant must demonstrate that counsel's performance was deficient. 236 Kan. at 656. If so, the court moves to the second prong and determines whether there is a reasonable probability that, without counsel's unprofessional errors, the result would have been different. *Strickland*, 466 U.S. at 694.' *State v. Betancourt*, 301 Kan. 282, 306, 342 P.3d 916 (2015).
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> "To establish deficient performance under the first prong, 'the defendant must show that counsel's representation fell below an objective standard of reasonableness.' *Strickland*, 466 U.S. at 688. Courts must remain mindful that their scrutiny of an attorney's past performance is highly deferential and viewed contextually, free from the distorting effects of hindsight:
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> > "'Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess

> counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. 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. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. [Citations omitted.]' 466 U.S. at 689.
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> "Under *Strickland*'s second prong, defendants must show the deficient performance of counsel was prejudicial. To do so, defendant must establish with reasonable probability that the deficient performance affected the outcome of the proceedings, based on the totality of the evidence. *Edgar v. State*, 294 Kan. 828, 838, 283 P.3d 152 (2012). '"A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury."' 294 Kan. at 838."

Although the above principles should guide our decision, they are not mechanical rules. In fact, the ultimate focus must be on the defendant's right to fundamental fairness in the proceeding. "In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Strickland*, 466 U.S. at 696. The Kansas Supreme Court has long recognized that a criminal defendant "is entitled to a fair trial but not a perfect one." *State v. Cruz*, 297 Kan. 1048, 1075, 307 P.3d 199 (2013)

1. *Buchhorn's trial counsel was deficient in failing to investigate Dr. Mitchell's depolarization theory.*

Buchhorn's lawyers argue that her trial counsel's handling of Dr. Mitchell's testimony and the overall matter of expert testimony on the cause of death fell below the constitutional standard of adequate representation and deprived her of a fair trial. In other words, had the trial lawyers sufficiently prepared, they could have excluded Dr. Mitchell's testimony altogether or so undermined its credibility in the eyes of the jurors that the jury would have been left with at least a reasonable doubt about Buchhorn's guilt. We agree and reverse on this basis.

Under the circumstances, Buchhorn's trial counsel's conduct was objectively unreasonable. There is no question Dr. Mitchell's depolarization theory was central to the State's case. It was the linchpin that tied Buchhorn to O.O.'s death. This observation is not hindsight; it stems from information counsel knew before trial. Yet Buchhorn's counsel admit they did not independently research or investigate his theory.

If Buchhorn's counsel had inquired into Dr. Mitchell's theory at the preliminary hearing, studied it on their own, or properly explored it with their expert, they most likely would have discovered evidence to assist in a more effective cross-examination of Dr. Mitchell at trial and to better prepare Dr. Wigren to address Dr. Mitchell's opinions. Further, any of these investigative options could have prompted them to realize they needed to engage additional experts to attack Dr. Mitchell's theory or at least ensure Dr. Wigren addressed it at trial. For instance, if they had questioned Dr. Mitchell about the scientific basis for his theory, they would most likely have learned the "statistics" on which he relied were flimsy and his medical literature provided tenuous support, at best. This evidence would have been powerful on cross-examination, particularly since the matter hinged on the credibility of both sides' expert theories.

Although counsel's "[s]trategic choices based on a thorough investigation of the law and facts are virtually unchallengeable," when determining an ineffective assistance of counsel claim, uninformed decisions are not similarly protected. *Flynn v. State*, 281 Kan. 1154, Syl. ¶ 5, 136 P.3d 909 (2006); *Mullins v. State*, 30 Kan. App. 2d 711, 716-17, 46 P.3d 1222 (2002). Here, trial counsel lacked sufficient information to make an informed decision about how to address Dr. Mitchell's depolarization theory. Their failure to investigate this theory at or after the preliminary hearing, or explore it with their medical expert, bars any characterization of their deficiencies as "trial strategy."

Professor Craig testified, "To be able to say that the choices counsel made at trial were strategic, they have to be based on a thorough investigation. And part of that thorough investigation would be researching the issue, developing your experts, making sure your experts had all of the information that they might need." Her point is well taken. Buchhorn's counsel did not investigate Dr. Mitchell's theory on their own, with Dr. Mitchell (through examination at the preliminary hearing or trial), with Dr. Wigren, or with any other expert or consultant. They did not develop any expert testimony to address this theory, nor did they procure any information to provide Dr. Wigren about the factual or scientific basis for Dr. Mitchell's theory or on which to cross-examine Dr. Mitchell. It cannot be said that Buchhorn's counsel made an informed decision not to present testimony that was never discussed or evidence they never sought.

Buchhorn's trial counsel had never met Dr. Wigren or worked with him in the past. They admitted he was difficult to get ahold of. While they claim they "took direction from" him on medical issues, Dr. Wigren testified they never brought up depolarization with him. Trial counsel claim they asked him about it but admit he did not answer their questions and, instead, discussed an alternate theory. If their expert was unavailable or evasive, it was up to counsel to get the necessary answers or replace or supplement that expert. Morrison's admission that he did not ask Dr. Wigren about depolarization at trial *because he did not know what he would say* is telling.

At best, counsel relied exclusively upon an expert with whom they had no relationship, was difficult to get ahold of, and evaded answering questions about the State's key theory of the case. At worst, counsel did not address this key theory with Dr. Wigren until trial had begun and, even then, did not ask him to express his opinions on this theory once he told them what those opinions were—and most particularly after the State opened the door in cross-examining Dr. Wigren.

The trial court erred in finding it was reasonable for Buchhorn's counsel to rely upon Dr. Wigren to define the medical issues they needed to address. The ultimate control of a case rests with the lawyers and not the expert witnesses. It is incumbent upon the lawyers to define clearly for the experts the scope of their assigned tasks. Here, the communication channel broke down. The lawyers expected Dr. Wigren to tell them everything they needed to know about O.O.'s death and Dr. Mitchell's theory on causation. Dr. Wigren, however, apparently understood his engagement far more narrowly and offered an expert opinion on the skull fracture and possible causes of death rather than a critique of Dr. Mitchell's theory.

There is a difference between relying on an expert and scapegoating one. Here, counsel blamed Dr. Wigren for not telling them (1) Dr. Mitchell's depolarization theory had no medical basis or support in the medical community, (2) they needed to hire other experts to address depolarization, and (3) they should file a *Daubert* motion to exclude Dr. Mitchell's theory. Yet the record reveals they did not explore these issues with Dr. Wigren. It was unreasonable for counsel to expect Dr. Wigren to provide this guidance when they failed to request it.

Just like counsel cannot be said to have made an informed decision when they lacked the information needed to make the decision, they cannot be said to have relied on an expert for advice they never sought (or, according to them, did not receive when requested). Even if we accept the concept that counsel's reliance on their medical expert

to take the lead and suggest legal strategy was reasonable, counsel still cannot shirk their professional responsibilities onto an unfamiliar, retained expert without giving that expert the necessary tools to shoulder those responsibilities. Dr. Wigren testified he did not realize depolarization was a significant issue in the case, and he was not given the preliminary hearing transcript where Dr. Mitchell discussed it. It is difficult to imagine when Dr. Wigren was supposed to provide this pretrial advice when counsel admit the first time they substantively discussed depolarization with him was during their mid-trial meeting.

Both parties cite *Wilson v. Sirmons*, 536 F.3d 1064 (10th Cir. 2008), in support of their respective positions, and we agree it is pertinent. In *Wilson*, the court considered whether "trial counsel was ineffective because of his poor investigation in preparation for the sentencing phase and his failure to put on relevant mitigating evidence at trial." 536 F.3d at 1083. While the trial counsel in *Wilson* interviewed witnesses to testify as to Wilson's character, trial counsel failed to interview Wilson's family members and therefore failed to gather a complete narrative of Wilson's life. In its analysis, the court determined "the question is not whether counsel did *something*; counsel must conduct a full investigation and pursue reasonable leads when they become evident." 536 F.3d at 1084.

Wilson recognized that "in many situations, the expert will know better than counsel what evidence is pertinent to mental health diagnoses and will be more equipped to determine what avenues of investigation are likely to result in fruitful information." 536 F.3d at 1089. But *Wilson* took this further to find that while trial counsel should be able to rely on their expert to a degree, trial counsel "may not simply hire an expert and then abandon all further responsibility [to investigate]." 536 F.3d at 1089. Ultimately, the court in *Wilson* found that trial counsel's preparation fell below acceptable standards and was therefore deficient. 536 F.3d at 1089.

Buchhorn's trial counsel was similarly deficient. Once they hired Dr. Wigren, their duty to investigate the State's main theory did not end there. They failed to utilize his expertise to address depolarization, either with them or the jury. They also pursued no information about the factual or medical basis for Dr. Mitchell's theory. Instead, they simply hired Dr. Wigren without providing him the necessary information and guidance to make the decisions on which they were apparently relying on him to make.

Buchhorn also relies on *Robinson v. State*, 56 Kan. App. 2d 211, 428 P.3d 225 (2018), to argue her trial counsel could not blame Dr. Wigren for their failure to fully investigate Dr. Mitchell's theory. In *Robinson*, Frank Robinson was convicted of aggravated arson and felony murder based on the testimony of the government's fire investigator, Agent Douglas Monty. The trial court found Robinson's trial counsel was ineffective for failing to properly investigate "a most important aspect of this case—fire cause and origin expert opinions" and for failing to present sufficient expert testimony to refute claims made by the State's fire investigators. 56 Kan. App. 2d at 227. Robinson's attorney did not hire an arson expert to testify at trial, and he only consulted with an "'arson investigation-type expert, cause and origin person'" less than two weeks before trial. 56 Kan. App. 2d at 216. After that person proved unhelpful, Robinson's attorney conducted no further investigation and then did not talk to another expert.

In affirming the trial court's decision, this court noted the importance of thoroughly investigating both the facts and expert opinions to prepare a proper defense. See 56 Kan. App. 2d at 227-30. As in *Robinson*, Buchhorn's counsel did not properly investigate the central issue in her case, which was Dr. Mitchell's theory on cause of death. And, also like *Robinson*, if Buchhorn's counsel had properly investigated Dr. Mitchell's expert opinions, they would have been able to undermine those opinions far more effectively. This court's description of *Robinson*'s counsel's failings is just as apt here. By failing to independently investigate Dr. Mitchell's theory and by failing to marshal expert evidence to directly challenge that theory, Buchhorn's counsel entered

"battle with the State unarmed and unequipped with the expertise [Buchhorn] needed for a defense." 56 Kan. App. 2d at 227.

As in *Robinson*, Buchhorn's counsel may have acted reasonably when they first hired Dr. Wigren to contest the timing of O.O.'s skull fracture. Still, just as the expert in *Robinson* was not qualified to refute the most important issue of the case, Dr. Wigren was not a neurological expert who could fully refute Dr. Mitchell's theory of instant death caused by the depolarization of nerves from blunt force trauma. And, like in *Robinson*, Buchhorn's counsel failed to make a comprehensive investigation of Dr. Mitchell's medical opinions, thus failing to equip Buchhorn with what she needed for a proper defense. It was not a reasonable strategy that led counsel to decline to investigate Dr. Mitchell's theory, but, rather, lack of thoroughness and preparation. See *Kenley v. Armontrout*, 937 F.2d 1298, 1308 (8th Cir. 1991).

2. *Buchhorn's trial counsel was deficient in failing to present responsive expert testimony at trial.*

Buchhorn also claims her counsel was ineffective for failing to directly challenge Dr. Mitchell's depolarization theory with expert testimony. She presented examples of such testimony at the posttrial hearing, in the form of Dr. Kessler and Dr. Ng. These highly qualified medical professionals testified that Dr. Mitchell's depolarization theory had no support in science or the medical community, and that the facts of the case did not support his theory on O.O.'s cause of death. Such evidence would have severely undermined Dr. Mitchell's credibility and the State's theory of the case.

In deciding Buchhorn's counsel was not ineffective for failing to engage such experts, the trial court relied on the considerable experience of trial counsel. She found it reasonable for counsel to rely upon Dr. Wigren to tell them if they needed additional experts. While it is true that the decision whether to call a particular witness rests within

the sound discretion of trial counsel, this decision must be an "*informed, tactical*" one. *United States v. Holder*, 410 F.3d 651, 655 (10th Cir. 2005). Here Buchhorn's trial counsel failed to provide a "valid strategic reason" for simply relying on Dr. Wigren to tell them whether they needed more experts. See *Robinson*, 56 Kan. App. 2d at 228. As explained above, counsel's decision to blindly rely on Dr. Wigren was uninformed and objectively unreasonable.

Professor Craig testified that Buchhorn's counsel could not effectively cross-examine Dr. Mitchell without proper experts. She also testified trial counsel did not adequately challenge the State's theory of O.O.'s cause of death. While she acknowledged that counsel hired Dr. Wigren, a forensic pathologist, she still believed a neurologist was necessary to testify in this case. Indeed, even Dr. Mitchell admitted in the preliminary hearing that a neuropathologist may disagree with some of his medical findings.

Trial counsel admitted the only time they specifically discussed other experts with Dr. Wigren was when he flew in on the Sunday after trial had begun, the night before he testified. While counsel fault Dr. Wigren for not bringing the need for other experts to their attention earlier, they fail to acknowledge their responsibility to directly address this issue with him. It was counsel's duty to ensure their expert addressed all necessary issues, particularly since they conducted no independent investigation on their own. Rather than making an informed decision on the expert testimony required to counter Dr. Mitchell's theory, counsel simply abrogated their responsibility to Dr. Wigren, a witness with whom they had never worked, had never met, and who they complained was difficult to get ahold of.

Under *Wilson*, once counsel knew Dr. Mitchell's theory on cause of death from the preliminary hearing, they had an obligation to properly investigate that theory. Further, under *Robinson*, Buchhorn's counsel should have hired an expert who could properly refute the most important issue of the case—Dr. Mitchell's theory on depolarization of

nerves. Buchhorn's counsel's performance fell "below an objective standard of reasonableness, considering all the circumstances." See *Bledsoe v. State*, 283 Kan. 81, 90, 150 P.3d 868 (2007). Trial counsel's failure to use expert testimony to challenge the validity of Dr. Mitchell's theory and to explain how Dr. Mitchell's theory was false or not credible was objectively unreasonable.

Using the *Strickland* analysis, Buchhorn must establish her counsel's actions were deficient under the totality of the circumstances. *Bledsoe*, 283 Kan. at 90; see *Strickland*, 466 U.S. at 687. Here, that burden is met.

3. Trial counsel's deficient performance prejudiced Buchhorn's right to a fair trial.

As we have said, under the *Strickland* test for ineffective assistance of counsel, Buchhorn must establish that her counsel's objectively unreasonable performance caused her material prejudice. To establish prejudice, Buchhorn must show a reasonable probability that her counsel's deficient performance affected the outcome of the proceedings, based on the totality of the evidence. A reasonable probability here is a probability sufficient to undermine confidence in the outcome. *Khalil-Alsalaami*, 313 Kan. at 485.

As in *Mullins*, 30 Kan. App. 2d at 717, the trial court did not analyze the prejudice prong of the *Strickland* test. Instead, its analysis stopped after finding counsel was not ineffective. We analyze this prong based on the facts in the record before us, just as this court did in *Mullins*.

There was no physical evidence tying Buchhorn to the death, which meant the trial turned on credibility between the prosecution and defense witnesses. The State built its case on the expert testimony given by Dr. Mitchell. This makes an investigation into Dr. Mitchell's theory on cause of death the most important aspect of Buchhorn's defense.

Buchhorn's counsel had a duty to investigate Dr. Mitchell's theory to give her the most effective defense. See *McHenry v. State*, 39 Kan. App. 2d 117, 123, 177 P.3d 981 (2008). Their failure to investigate the State's main theory meant they were unprepared to fulfill that fundamental constitutional obligation.

In *Mullins*, this court found trial attorneys' failure to consult or procure an expert was objectively unreasonable because there was no showing of strategic reasons for that failure. *Mullins* also found that "[h]ad trial counsel procured the services of an available expert . . . the jury would have been presented with relatively strong evidence to potentially undermine the allegations . . . ." 30 Kan. App. 2d at 717. This court also held that "because trial counsel failed to present . . . such available expert testimony, the jury heard only the victim's unchallenged allegations." 30 Kan. App. 2d at 718.

Just like in *Mullins*, Buchhorn's counsel could have undermined Dr. Mitchell's theory with information they could have discovered at the preliminary hearing, from their own independent investigation, and from properly managed experts (including Dr. Wigren). If counsel had directly challenged Dr. Mitchell's theory, such as by presenting testimony from Dr. Kessler or Dr. Ng (or both), or if Dr. Wigren had directly addressed it, there is a reasonable probability the jury would have found Buchhorn not guilty. The State's entire theory of guilt relied on Dr. Mitchell's opinion that the death was immediate, yet trial counsel did not directly challenge that theory.

Trial counsel's failure to independently investigate Dr. Mitchell's theory also left them unprepared to challenge the credibility of that theory on cross-examination. "'While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.'" *United States v. Cronic*, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). Buchhorn could have entered the trial armed with direct evidence to impeach Dr. Mitchell's theory on the cause of death and the State's entire theory of guilt. Instead, trial counsel was

unprepared to test the validity of Dr. Mitchell's theory, despite counsel's admission that Dr. Mitchell's opinions were key to the State's case.

When setting forth the very test we apply today, the United States Supreme Court pointed out, "a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." *Strickland*, 466 U.S. at 685. Dr. Mitchell's depolarization theory was not subjected to effective or even fully formed adversarial testing. If the jury did not believe that theory, there is nothing left in the State's case against Buchhorn, just like in *Robinson*. It was Dr. Mitchell's opinion that O.O.'s death was instantaneous that tied the death to Buchhorn, as the last person who admitted having contact with O.O. If that opinion was impeached, a finding of guilt becomes highly questionable. See *Robinson*, 56 Kan. App. 2d at 229.

Based on the totality of the circumstances, we are not confident the outcome would have remained unchanged if the jury had been apprised of all the information Buchhorn's counsel could have presented to impeach Dr. Mitchell's opinions.

Trial court remarks during voir dire

Since the errors we have identified above prejudiced Buchhorn, we need not consider any of her other allegations. See *State v. Stinson*, 43 Kan. App. 2d 468, 469, 227 P.3d 11 (2010) (finding that because court was reversing and remanding for new trial, remaining argument on ineffective assistance of counsel was moot). However, there is one matter we feel compelled to address, even though we do not base our decision upon it.

Buchhorn also took issue in her posttrial motion with the trial court's remarks at the close of jury orientation. She reprises those concerns on appeal. The court told the jury panel:

> "Okay. Anybody ever been at Thanksgiving dinner and your crotchety old uncle says, 'I just don't understand why the defendants have all the rights and victims have none?' Anybody ever heard anybody made those statements? I see people smiling and won't admit it, but they have heard it. Anybody know why we are set up that way? Well, because the people who wrote our Constitution were criminals. They had been charged with treason; and if they had been found guilty, they would have been hanged to death, and they wrote our Constitution in a way that they would have wanted to be protected when they went to trial."

Buchhorn's trial counsel did not object to these remarks. Her new counsel argued these remarks were factually inaccurate and constituted judicial misconduct, denying Buchhorn a fair trial. The district court did not address this argument in its order.

Frankly, we fail to see the purpose of these remarks, which neither assist the prospective jurors in understanding what will be expected of them if they are chosen to serve nor impart to them some legal principle applicable to the criminal justice process. And Buchhorn is absolutely correct that such remarks vitiate the importance of the constitutional protections afforded an accused (and, indeed, all citizens). At the outset of the trial, the district court told the prospective jurors that Buchhorn, as a criminal defendant, had all kinds of rights and O.O., the victim, had none. We see no productive value in unfavorably contrasting persons accused of crimes with victims of crimes, particularly since it risks providing the jury an improper analytical framework to process the evidence admitted at trial. In short, the trial judge's remarks were imprudent and should not have been made.

In closing, we hearken back to the sage observations made by the *Robinson* court. 56 Kan. App. 2d at 212. It is not an easy decision to grant a new trial to someone who has been convicted of killing another human being. But more important than the severity of the crime is the fundamental principle of American law—all accused must receive a fair trial, even those accused of killing a child. That legal principle has guided our decision to order a new trial for Carrody M. Buchhorn.

Reversed and remanded.