NOT DESIGNATED FOR PUBLICATION

No. 125,007

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

GERRIAN J. GREEN,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; BRUCE C. BROWN, judge. Opinion filed April 28, 2023. Affirmed.

Michael P. Whalen, of Law Office of Michael P. Whalen, of Wichita, for appellant.

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

Before GREEN, P.J., GARDNER, J., and PATRICK D. MCANANY, S.J.

PER CURIAM: Gerrian J. Green appeals the district court's denial of his K.S.A. 60-1507 motion. He argues that the district court erred by finding that his trial counsel was not ineffective for failing to call child witnesses. Finding no error, we affirm.

Factual and Procedural Background

In 2014, a jury convicted Green of aggravated criminal sodomy, criminal sodomy (as an alternate charge to aggravated criminal sodomy), and sexual exploitation of a

child. At sentencing, per the State's request, the district court vacated the conviction for aggravated criminal sodomy and sentenced Green for the alternative conviction of criminal sodomy and sexual exploitation of a child. *State v. Green*, No. 111,790, 2015 WL 5927026, at *2 (Kan. App. 2015) (unpublished opinion). Because Green had two prior qualifying sex offenses, a special sentencing rule applied, and the district court sentenced him to life in prison without the possibility of parole on the remaining two convictions. 2015 WL 5927026, at *2.

We find it unnecessary to recite in detail the facts leading to Green's conviction. We summarize them instead. Green thought that T.A. was his daughter, and she thought he was her father. She sometimes went to Green's house to visit him. He was living with his girlfriend, P.L., and their three children—D.L., 11, C.L., 8, and J.L., 5.

At trial, T.A. testified to one version of events, P.L. testified to another, and Green did not testify. T.A. said she went to spend the night at Green's house because she was mad at her mother. She and the other children played games and watched television in the living room. T.A. later went back into Green's bedroom where Green gave her some K2 to smoke, and they watched part of a movie together. She later smoked in the living room too.

T.A. later changed into her nightclothes in the bathroom and returned to the living room couch. D.L. was on another couch, and C.L. and J.L. were on a mattress on the floor. Green then engaged in illegal sexual activities with her for over ten minutes on the couch in the living room. She twice told him to stop but Green did not stop. T.A. told her mother what had happened a couple of weeks later, and she contacted the police.

P.L. testified at trial that she was pregnant and awake all night because she was in labor; she went to the hospital the next morning to deliver her child. She never smelled marijuana or K2, and T.A. never entered the bedroom she shared with Green that night.

Green's 12-year-old son, G.G., testified. Although he lived in St. Louis, Missouri, he visited his dad briefly that summer and T.A. was at the house one of those nights. He testified that no one smoked drugs and he witnessed no inappropriate activity.

Several witnesses, including P.L., a police officer, and a private investigator hired by the defense, testified to the small size of the house. The living room was 12 feet by 12-1/2 feet. A mattress on the floor would have been quite close to the couch. *Green*, 2015 WL 5927026, at *1-2.

Green appealed his convictions and sentence to this court, but our panel found no reversible error and affirmed. 2015 WL 5927026, at *7. The Kansas Supreme Court denied review. 304 Kan. 1019 (2016).

On October 25, 2018, Green filed his untimely K.S.A. 60-1507 motion. It alleged that Mark Schoenhofer (his trial counsel) was ineffective for five reasons:

(1) he failed to rehabilitate a defense witness, Green's son, G.G.;
(2) he failed to attack the victim's credibility by presenting medical evidence that P.L. did not have drugs in her system;
(3) he failed to present testimony from Green's other children who were present the night of the incident;
(4) he failed to consider hiring an expert on child-witness interview techniques; and
(5) he failed to appropriately investigate, prepare for, or challenge the testimony of the victim of a prior crime of conviction the State presented as K.S.A. 60-455 evidence.

His motion argued that manifest injustice excused its untimely filing. Yet neither the State nor the district court addressed that issue.

The district court held an evidentiary hearing on Green's motion. Both Schoenhofer and Green testified. After taking the motion under advisement, the district court denied Green's motion, finding that Green failed to meet his burden to show that trial counsel's performance was deficient and that such deficient performance prejudiced Green and deprived him of a fair trial.

Green then moved to alter or amend the district court's judgment, focusing on Schoenhofer's ineffectiveness for not calling Green's other young children as witnesses. The district court judge, who also presided over the trial, denied Green's motion to alter or amend.

Green timely appealed.

Did the District Court Err in Denying Green's K.S.A. 60-1507 Motion?

On appeal, Green argues that Schoenhofer was ineffective for not calling D.L., C.L., and J.L. to testify that they saw and heard nothing on the night of the sexual assault. Green contends that because D.L. was on a couch and C.L. and J.L. were on a mattress on the floor in the same small living room in which the incident allegedly occurred, they would have heard or seen something if anything had happened. The district court found that Schoenhofer was not ineffective because his decision not to call the children as witnesses was strategic and he had presented similar evidence through other witnesses. Green contends that no such evidence was presented at trial.

The district court held an evidentiary hearing on Green's claims of ineffective assistance of counsel. We thus review the district court's factual findings using a substantial competent evidence standard. And we review the district court's legal

conclusions based on those facts applying a de novo standard of review. See *Khalil-Alsalaami v. State*, 313 Kan. 472, 486, 486 P.3d 1216 (2021).

We analyze claims of ineffective assistance of trial counsel under the two-prong test explained in *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), adopted by our Kansas Supreme Court in *Chamberlain v. State*, 236 Kan. 650, 656-57, 694 P.2d 468 (1985). Under the first prong, the defendant must show that defense counsel's performance was deficient. Under the second, the defendant must show a reasonable probability that, absent defense counsel's unprofessional errors, the result would have been different. *Khalil-Alsalaami*, 313 Kan. at 485.

To establish deficient performance, the defendant must show that defense counsel's representation fell below an objective standard of reasonableness. Our scrutiny of counsel's performance in a claim of ineffective assistance of counsel must be highly deferential. 313 Kan. at 485. A fair assessment of counsel's performance requires that every effort be made to eliminate the distorting effects of hindsight, reconstruct the circumstances surrounding the challenged conduct, and evaluate the conduct from counsel's perspective at the time. We must strongly presume that defense counsel's conduct fell within the wide range of reasonable professional assistance; that is, the defendant must overcome the strong presumption that, under the circumstances, counsel's action might be considered sound trial strategy. 313 Kan. at 486.

Under the second prong, the defendant must show that defense counsel's deficient performance was prejudicial. To establish prejudice, the defendant must show a reasonable probability that the deficient performance affected the outcome of the proceedings, based on the totality of the evidence. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court hearing a claim of ineffective assistance of counsel must consider the totality of the evidence before the judge or jury. *Khalil-Alsalaami*, 313 Kan. at 486.

The district court observed that: "[Green] alleges Mr. Schoenhofer provided ineffective assistance of counsel during the trial by failing to put on the stand two of defendant's minor children to say that they were present on the date of the alleged incident and that they saw nothing sexual nor saw any drug use." The district court found that counsel considered calling the children, decided not to, and admitted the same information through the testimony of other witnesses. The children were 11, 8, and 5 years old at the time of the incident, and 12, 9, and 6 years old at the time of trial.

1. *Deficient Performance*

Ordinarily, "the decision of whether to call or not call a certain witness is a matter of trial strategy." *Mullins v. State*, 30 Kan. App. 2d 711, 716, 46 P.3d 1222 (2002). Yet if counsel has not obtained facts on which a decision can be made to call or not call a witness, defense counsel cannot correctly make a strategic decision against pursuing a line of investigation or questioning. 30 Kan. App. 2d at 716-17.

We thus review the reason Schoenhofer did not call the child witnesses. At the evidentiary hearing, Schoenhofer testified that calling the younger children would probably be a disaster:

> "[COUNSEL]: . . . Now, do you recall were there other—the night that [T.A.] alleged the incidents happened with Mr. Green?
>
> "[SCHOENHOFER]: Yes.
>
> "[COUNSEL]: Do you recall, were there other people in the house at that time?
>
> "[SCHOENHOFER]: Yes, there were some other children there.
>
> "[COUNSEL]: Okay. And [P.L.]?
>
> "[SCHOENHOFER]: [P.L.]?
>
> "[COUNSEL]: Yes?
>
> "[SCHOENHOFER]: Yes, yes.
>
> "[COUNSEL]: And do you recall the ages of the children that were there?

"[SCHOENHOFER]: They were young, I don't recall their ages.

"[COUNSEL]: Now, do you recall whether or not they gave statements to the police?

"[SCHOENHOFER]: I don't recall what the statements were, but I have a recollection that statements were taken, but I don't recall what those statements were. I'm sorry.

"[COUNSEL]: That's okay. Now, did you ever intend to get their statement or try and get their statements in at trial?

"[SCHOENHOFER]: We talked about that and I recall that we were kickin' around, we were thinkin' that maybe we would call them. And [Green] and I, at defense table, talked about it, do we want to call 'em, and for the most part [Green] left that up to me. I told him I had issues with it because of their age and seeing how [G.G.] was on the—and he was 11 at the time, I recall, how he was doing on the witness stand, I felt that it would probably be a disaster calling the little kids.

"And quite frankly, I felt like we had enough corroborating evidence with those witnesses that were called that we could establish that this was a very small environment, this room was tiny and with all these people in this room if something had been—something as crazy as what was alleged actually took place, somebody would have seen that. And with [P.L.] walking the hallways, because she was sick, she was uncomfortable, she was, you know, in labor, she would have seen something happening. It just didn't make sense to me to call the children, so we didn't.

"[COUNSEL]: Even if they made statements that they had seen nothing happen?

"[SCHOENHOFER]: It was a decision that we had made. Here's the other problem with that, though, is that we had [G.G.] saying that they were in their own room and every—and other witnesses saying that they were asleep at the time, so you know, whether they did or didn't see it, wasn't so much as them watching as others had gathered, which was that they were asleep and one witness saying that they were in their own room.

"[COUNSEL]: So even if they were asleep, they could have testified I was asleep, nothing bothered me, nothing disturbed me, correct?

"[SCHOENHOFER]: Certainly, yeah, yeah, you know.

"[COUNSEL]: And you don't recall attempting to bring in their testimony through detective—is it Huhman?

"[SCHOENHOFER]: I don't remember whether I did or not. I'm sorry."

On cross-examination, Schoenhofer further explained that Green's two youngest children would be too susceptible to persuasion through cross-examination:

"[THE STATE]: I want to go back to the other minor children that were in the household. These minor children, did you state were younger than [G.G.]?

"[SCHOENHOFER]: Yeah, that's my recollection, they were quite a bit younger. There was [D.L.], [C.L.] and [J.L.], who they called knucklehead, and I think he was the youngest.

"[THE STATE]: And he would have been about—the youngest would have been about five?

"[SCHOENHOFER]: I think so, I don't know for sure, I don't recall.

"[THE STATE]: And [C.L.], she would have been a bit older, but she also was a non-verbal autistic child?

"[SCHOENHOFER]: Yes, that was the other problem that we had was that she had difficulty communicating.

"[THE STATE]: And then the older boy would have been about 11?

"[SCHOENHOFER]: Well—

"[THE STATE]: Maybe younger?

"[SCHOENHOFER]: [G.G.] was 11, so I don't know how old [D.L.]—[D.L.], yeah, I don't know how old he was.

"[THE STATE]: Okay. But he would have been younger than [G.G.]?

"[SCHOENHOFER]: I believe so, yes.

"[THE STATE]: Right, understood.

"[SCHOENHOFER]: And I might say, [G.G.]—and I'm sorry I keep mentioning his name, I know it's delicate right now because Mr. Green lost him, but was a great kid, he was a—he was just super, but he was not like calling an adult on the witness stand.

"[THE STATE]: Understood.

"[SCHOENHOFER]: He could be controlled a little bit. And I knew these other children would even be more susceptible to that kind of persuasion through cross-examination.

"[THE STATE]: And specifically, and you say cross-examination, the State's cross-examination?

"[SCHOENHOFER]: That's correct.

"[THE STATE]: Where the State's attorney could ask leading questions?

"[SCHOENHOFER]: Correct.

"[THE STATE]: Okay. And you were concerned that those children would ultimately retract or maybe even impeach themselves through that cross-examination?

"[SCHOENHOFER]: I just saw a mess, that's what, in my mind, was going to be a mess. These kids would, you know, struggle to get the testimony out that we'd want and then I would have to try to do my best to, you know, get 'em back on track after cross-examination. And I think the jury would probably be unimpressed with everything.

"[THE STATE]: I see."

True, Green contradicted this testimony in part, saying that he and Schoenhofer never discussed having his children testify. But when we review a record for substantial evidence, it is of no consequence that there may have been contradictory evidence which, if believed by the trial court, would have compelled entirely different findings of fact. *Bicknell v. Kansas Dep't of Revenue*, 315 Kan. 451, 505, 509 P.3d 1211 (2022). The judge assessed the credibility of Schoenhofer and Green and weighed the competing evidence in arriving at his findings. It is not the proper function of this court to reassess witness credibility or reweigh the conflicting evidence. 315 Kan. at 505.

The evidence presented at the evidentiary hearing shows that Schoenhofer considered calling the other children as witnesses, then made a reasoned decision not to do so. The 9-year-old girl was autistic and was either non-verbal or had trouble communicating. The other child was 6. Schoenhofer put on the testimony of [G.G.], who was 11, and thought that calling the two younger children and [D.L.] would be "a disaster" because they would be susceptible to persuasion through cross-examination and rehabilitating them would be too difficult. The record that the district court credited reflects that this was a trial strategy within Schoenhofer's discretion to decide. See *Thompson v. State*, 293 Kan. 704, 718-19, 270 P.3d 1089 (2011) (district court makes credibility determination in 1507 evidentiary hearing).

And Schoenhofer admitted some other evidence that children were in the small living room at the time of the incident, but they did not witness any drug use or sexual activity that night. T.A. testified that the kids never asked about a smell from the K2 nor did anyone smoke it in front of them. T.A. also testified that the children did not seem to notice the sexual activity occurring and did not ask any questions about it.

The detective corroborated this evidence at trial. He had spoken with two of the children and Lewis during his investigation.

> "[SCHOENHOFER]: All right. So you had [D.L.] in the room and [J.L.] in the room, you have [T.A.] in the room, and then at some point [G.G.] comes in the room, all of them, in this small living room, correct?
>
> "[DETECTIVE]: Yes.
>
> "[SCHOENHOFER]: And she says that she's smoking K2, followed up with [illegal sexual activity] correct?
>
> "[DETECTIVE]: Yes.
>
> "[SCHOENHOFER]: And she's the only one that saw this or heard it or witnessed it, correct?
>
> "[DETECTIVE]: Yes.
>
> "[SCHOENHOFER]: And by the way, [P.L.] is just right around the corner in the other room, correct?
>
> "[DETECTIVE]: Yes."

Other evidence of the children's lack of questions was admitted.

> "[SCHOENHOFER]: Are 12-year-olds inquisitive?
>
> "[DETECTIVE]: Can be, yes.
>
> "[SCHOENHOFER]: They ask questions?
>
> "[DETECTIVE]: Some do.
>
> "[SCHOENHOFER]: They like to—they like to think that they are older than they are sometimes, don't they?
>
> "[DETECTIVE]: Some of them, yes.

"[SCHOENHOFER]: And while all of this stuff that [T.A.] said happened in front of a 12-year-old, . . . what—was what? What did you find out?

"[DETECTIVE]: The best we could figure out is he probably fell asleep.

"[SCHOENHOFER]: Probably?

"[DETECTIVE]: Yes."

P.L. also testified at trial that she did not smell or see any drug use and did not witness any sexual activity. And P.L. testified that the kids are the type of kids who would have come and told her if they had seen something amiss, and she was not informed or aware of any drug use or sexual activity on the night of the incident.

The evidence admitted at trial provides substantial competent evidence supporting the district court's factual finding that Schoenhofer "was able to place this information in front of the jury without the need to call the two other minor children without subjecting them to the cross-examination by the State's attorney." The jury was informed that the people in the home that night, including the children, did not witness any drug use or sexual activity, supporting Green's theory of defense. Schoenhofer provided effective assistance to Green.

2. *Prejudice*

Even if we assume, without deciding, that Green's trial counsel was deficient for failing to call the child witnesses at trial, Green fails to show how this deficient performance prejudiced him. Neither child was called to testify at the evidentiary hearing to say what their trial testimony would have been. Nor was any proffer made of what they would have testified to at trial or at the evidentiary hearing. And even if we were to accept Green's statements in his motion as a proffer, the motion concedes that this testimony would have merely been corroborating evidence. Schoenhofer's failure to call the children as witnesses does not undermine our confidence in the outcome of the jury

trial, especially because they would not be testifying to new information. We find no prejudice.

Green did not receive ineffective assistance from his counsel at trial. The district court thus properly denied his K.S.A. 60-1507 motion and his motion to alter or amend.

Affirmed.