NOT DESIGNATED FOR PUBLICATION

No. 125,100

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

ANTWON D. BANKS SR.,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; BRUCE C. BROWN, judge. Opinion filed June 30, 2023. Affirmed.

Kristen B. Patty, of Wichita, for appellant.

Julie A. Koon, assistant district attorney, *Marc Bennett*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before BRUNS, P.J., CLINE and HURST, JJ.

PER CURIAM: After his murder conviction was affirmed on direct appeal, Antwon D. Banks Sr. filed a K.S.A. 60-1507 motion, alleging that he received ineffective assistance of trial counsel. Following an evidentiary hearing, the district court denied the motion, finding that trial counsel was effective. On appeal, Banks challenges the district court's denial of his motion. After a thorough review of the record, we find the district court properly denied Banks' motion because Banks has failed to show a reasonable probability the outcome of his trial would have been different but for his counsel's presumed deficient performance.

FACTS

Jury Trial

In February 2014, Banks was charged with murder in the first degree. According to the State, Banks and his ex-girlfriend broke up after a tumultuous and obsessive relationship. One evening a few days later, Banks ransacked her office at the radio station where she worked. The State contended Banks then went into the basement and wrote derogatory statements about her on the wall with a Sharpie marker. The State argued that the victim, Daniel Flores, caught Banks writing on the wall, so Banks murdered him by hitting him with a fire extinguisher. The victim was discovered the next morning.

The State called several witnesses at Banks' 2015 trial, including two employees who worked at the apartment complex where Banks lived. One of these employees testified Banks told him the day of the murder that Banks planned to break into his ex-girlfriend's office and mess with her computer.

The other employee, Kory Stiles, testified about a conversation with Banks after the incident. Stiles approached Banks after Stiles was questioned by the police about Banks. Stiles claimed Banks admitted he had "messed up" and made a "bad mistake." Stiles observed that Banks looked nervous and "was stuffin' stuff in a bag" while they talked. Stiles then told Banks he had three choices: He could either turn himself in, flee the country, or commit suicide. Soon after, Banks stabbed himself in the stomach after being pulled over by law enforcement. An EMT worker testified that Banks nodded when asked whether he stabbed himself because he thought he was going to jail.

Banks was interviewed twice by law enforcement, who described both interviews to the jury. During his first interview, which occurred the day the victim was discovered and Banks was pulled over, Banks denied being at his ex-girlfriend's office. But during

his second interview—which occurred in May 2014, after Banks asked to speak to the officers again—Banks admitted he was there. But he denied murdering Flores. Banks claimed he was simply in the wrong place at the wrong time.

Banks told the officers that he asked his new girlfriend to drive him to his ex-girlfriend's office around 7:45 on the evening of the murder. He claimed he wanted to retrieve some insurance paperwork he thought his ex kept in her office.

Banks entered the radio station through its front glass doors, which he claimed were unlocked. At some point, he went to the basement after he heard noises on the first floor, which he thought sounded like guys arguing. He claimed he saw the writing on the basement wall about his ex while he was down there. Banks said he was only in the building for 10 minutes before he got back into his new girlfriend's car, at which point they drove away. According to surveillance video evidence, however, 41 minutes passed between when Banks exited and reentered his new girlfriend's vehicle.

Banks said he returned to the station later that night to erase the writing he had seen because he thought it would look bad for him. He claimed he was alone and drove his own car. He said the lights were on in the basement during his first visit but off when he returned. Banks said he had trouble opening one of the metal double doors in the basement during his second visit. He claimed he managed to open the door slightly and slip through into the basement, but at some point he ran into a fire extinguisher hanging on a wall. He said he tripped and fell onto the ground, where he felt the handle of a fire extinguisher. Then he left. While he denied seeing Flores' body, it was found next to the metal double doors in the basement, which he claimed to have trouble opening.

One of Banks' cellmates told law enforcement Banks confessed to him that he had used a fire extinguisher to kill the victim. Information about the fire extinguisher was never released to the public.

Banks' new girlfriend testified Banks asked her to drive him to pick up his wallet from a friend's job. She waited in the car while he went inside. When Banks returned, he was out of breath and told her they needed to "get the hell up out of there." He told her two men were fighting upstairs while he was in the basement. He said he had bumped into a fire extinguisher while inside and told her he had brought the fire extinguisher out with him. She dropped Banks off at his car, which was still at her house. She then drove away because she was upset that he had brought out the fire extinguisher. She said Banks called her later and told her he discovered the men were fighting because someone had written a message on a wall "with a hangman." And he eventually told her he had asked her to drive him to his ex's office so he could read her e-mails and see if she had been e-mailing other men.

One of the officers who interviewed Banks testified about another time Banks tried to investigate his concerns about his ex's alleged infidelity. During Banks' first interview, a second cell phone Banks had in his back pocket rang. Banks reached around, broke the phone, and handed the pieces of the broken phone to the officers. He told them the broken phone was a Cricket flip phone he had purchased to try to see whether his ex was communicating with another man while she was dating Banks. Banks said he had asked the store clerk to put a Texas number in the phone and then used it to communicate with his ex, pretending he was this other man. The State admitted the pieces of this phone as a trial exhibit.

Banks did not testify at trial. His attorney tried to blame one of his ex's coworkers for the murder, pointing to the lack of DNA and blood evidence linking Banks to the crime. Ultimately, the jury found Banks guilty. The district court sentenced him to life in prison without the possibility of parole for 25 years.

Direct Appeal

Banks filed a direct appeal, claiming (1) the State failed to present sufficient evidence to support his conviction, (2) the prosecutor committed reversible error during closing argument, and (3) the district court violated his right to present a defense by excluding certain photographs. The Kansas Supreme Court affirmed his conviction, issuing its mandate in August 2017. *State v. Banks*, 306 Kan. 854, 397 P.3d 1195 (2017).

K.S.A. 60-1507 Motion

In July 2018, Banks filed a pro se K.S.A. 60-1507 motion and raised 16 ineffective assistance of counsel claims. The district court appointed counsel, who reframed Banks' arguments into 10 claims. The State agreed an evidentiary hearing was warranted on one issue: Banks' trial counsel's failure to present a handwriting expert at trial. The district court granted an evidentiary hearing to address several of Banks' claims, including the one regarding a handwriting expert.

Banks and both of his trial attorneys (Michael Brown and Lacy Gilmour) testified at the August 2021 evidentiary hearing. Banks testified that he knew his attorneys had retained a handwriting expert but learned "right before trial" that they were not going to use her. When asked whether he believed the outcome would have changed if the defense called a handwriting expert, Banks responded that it would have provided reasonable doubt and, consequently, a not guilty verdict.

Brown and Gilmour explained why they changed their minds about using the expert, Avis Odenbaugh, at trial. To begin, Brown testified about how he learned of a problem with Odenbaugh's qualifications:

> "We had the case set for trial, and I caught wind that there was a trial that she testified in as an expert witness on behalf of the defense. It didn't go well.

> "I did a little homework and I determined it was the Seacat murder trial out in Kingman County District Court. She testified. It turns out that she had no certification whatsoever as a handwriting analysis expert. I believe that came out on cross-examination. And then she also had some difficulty asking [*sic*] the questions out there. I spoke with at least one attorney who tried that case who said it blew up on him."

According to Brown, someone sent a Facebook article to him on February 11, 2015, roughly seven weeks before Banks' trial was set to begin. The article discussed Odenbaugh's certification issues. As a result of this article, Brown visited with Odenbaugh on the first day of trial, March 30, 2015, to discuss her certification. Brown then said, "I decided it was not to our advantage to call her as a witness. My fear was she'd get her head delivered in a basket to her as what occurred in Kingman County, and I advised Ms. Gilmour of the problem we had."

He also believed the State's rebuttal handwriting expert was "superior." Thus, Brown testified that he made the decision not to call Odenbaugh as a witness and communicated this decision to Gilmour. When asked why he did not secure a different expert witness, Brown testified that they "probably didn't have enough time just prior to trial." Brown also testified that he could not recall whether they tried to obtain a continuance.

Gilmour testified that Brown oversaw retaining a handwriting expert. She believed the Board of Indigents' Defense Services had used Odenbaugh as an expert witness in the past, and this made her assume she was an appropriate choice.

She also said that the decision not to call Odenbaugh occurred "during the trial." Gilmour explained that in "most circumstances" there is time to find another expert witness. But that a continuance is "not likely . . . in the middle of trial."

> "What happened is in the middle of trial I recall us being prepared to call Avis Odenbaugh, and I think she was going to be the next witness—or one of the next witnesses. And I remember having a conversation with you where you said, by the way, she's not—she's not certified; if you put her on we're—we're going to go into this.
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> "At that point I called [Brown]. I—well, first, I got on my phone and I researched just very quickly and I found an article, I think, on CNN that talked about her not—not only not being qualified but being self-taught and then also being—I think maybe she was removed or retired from the forensic certification so she had no certification.
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> "So I called [Brown] and I said we have a problem, and he said, yeah, I know about that, I was just meeting with her to see if she could be rehabilitated and it was his opinion that she could not.
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> "And so at that point I went back into the courtroom and I explained to Mr. Banks what—what had transpired, why we could not put her on. I felt like it would be more detrimental to his case by putting her on than just making the arguments, you know, that the jury could use common sense and common knowledge and experience to look at these letters and see the similarities."

Gilmour said Banks made it clear he "was ready to get it over with one way or another."

The district court ultimately denied Banks' K.S.A. 60-1507 motion. It found that Brown and Gilmour's reasoning on the issue amounted to trial strategy which is nearly unchallengeable. It noted that Banks was consulted about the issue, and he chose not to request a continuance. In its decision, the district court stated that the issue was discovered after the trial started. Lastly, it emphasized Gilmour's decision to use common sense and common knowledge to persuade the jury on the handwriting issue. Thus, the district court found Banks' claim of deficiency to be meritless.

ANALYSIS

While Banks raised several issues in his K.S.A. 60-1507 motion, the only one he raises on appeal relates to his attorneys' failure to call an expert witness at trial. And even this claim has mutated. Rather than concentrate on the mid-trial decision not to call

Odenbaugh, Banks now complains that Brown acted deficiently by not addressing his concerns about Odenbaugh's qualifications sooner. Banks admits he has shifted focus on appeal but asks us to find his argument preserved or that we consider it under one of the exceptions to the preservation rule.

First, we do not find Banks has preserved his argument for appeal. He did not address any actions he claims Brown could or should have taken upon learning Odenbaugh was not certified before the district court, so that court had no opportunity to address this issue. Instead, the issue presented to the district court was the attorneys' *mid-trial* decisions not to call Odenbaugh or request a continuance. The court found the decision not to call Odenbaugh was a sound strategic one, and Banks takes no issue with this finding. We have no ruling from the district court to review addressing Banks' attorney's *pretrial* strategy so we cannot find this issue preserved.

That said, we exercise our prudential authority to address Banks' argument under an exception to the general rule which bars new issues on appeal. As we explain, we find the district court was right to deny Banks' K.S.A. 60-1507 motion but it relied on the wrong grounds. See *State v. Phillips*, 299 Kan. 479, 493, 325 P.3d 1095 (2014) (citing the three exceptions to the preservation rule, one of them being the district court was right for the wrong reason).

To prevail, Banks must show both that his counsel's performance was deficient and that he was prejudiced by this deficient performance. To satisfy the second part of this test, Banks has the burden to show that, but for this deficiency, there is a reasonable probability the verdict would have been different. See *Khalil-Alsalaami v. State*, 313 Kan. 472, 485, 486 P.3d 1216 (2021). The district court found Banks failed to satisfy the first part of the test because it found his attorneys' performance was not deficient. We find Banks cannot satisfy the second prong of this test. That is, even if we assume

without deciding that Banks' trial counsel was deficient, he has failed to establish the result of his trial would have been different.

In the interest of expediency, we can first consider the prejudice prong of an ineffective assistance of counsel claim by assuming trial counsel's alleged errors amounted to deficient performance. *Edgar v. State*, 294 Kan. 828, 843, 283 P.3d 152 (2012) (quoting *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 80 L. Ed. 2d 674 [1984]). We thus focus our analysis on whether Banks has shown prejudice.

The thrust of Banks' argument is that Brown did not act once he learned Odenbaugh was not certified. He points out that Brown learned of concerns about Odenbaugh's certification status seven weeks before trial, yet Brown did not advise Gilmour of these concerns, contact Odenbaugh to see if she could be rehabilitated, attempt to locate another expert, or seek a continuance. He complains that Brown's "oversight, neglect or procrastination" led to their failure to call a handwriting expert at trial.

We assume without deciding that Brown's conduct was deficient. The problem is Banks does not show that he was prejudiced by this deficiency. He spends merely one paragraph in his brief addressing the prejudice issue and his argument is pure speculation.

To begin, Banks assumes Brown could have found a certified expert who shared the same opinion as their uncertified expert. He provides no basis for this assumption, nor did he call a proposed expert to offer an opinion at his K.S.A. 60-1507 hearing. As we pointed out in *Netherland v. State*, No. 124,065, 2022 WL 2904051, at *4 (Kan. App. 2022) (unpublished opinion), Banks "bears the burden of proving prejudice, and '"[w]hen there are blanks in the record, appellate courts do not fill them in by making assumptions favoring the party claiming error in the district court."'" (Quoting *State v. Morgan*, No. 109,099, 2014 WL 5609935, at *8 [Kan. App. 2014] [unpublished opinion]).

Without knowing what the potential new expert's testimony would have been, we cannot determine what effect it would have had on the outcome of the trial. Our court has held over and over that "[m]ere speculation that a witness' testimony could have possibly changed the outcome of the jury verdict is not sufficient to satisfy the prejudice prong of the *Strickland* test." *Netherland*, 2022 WL 2904051, at *4 (citing *Mullins v. State*, 30 Kan. App. 2d 711, 719, 46 P.3d 1222 [2002]). See *State v. Gardner*, 272 Kan. 706, 708, 36 P.3d 229 (2001)]; see also *Morgan*, 2014 WL 5609935, at *8 (applying second *Strickland* prong and finding this court cannot base judgment on speculation).

Banks also relies on his own conclusory testimony at his K.S.A. 60-1507 hearing—where he claims that had the handwriting issue been presented to the jury, "[i]t would have gave reasonable doubt," which would have resulted in a not guilty verdict. Yet his argument ignores the district court's finding that the handwriting issue *was* presented to the jury.

Even though no defense handwriting expert was offered, as the district court noted, Gilmour testified at the K.S.A. 60-1507 hearing that she argued the jury could use its common sense and common knowledge and experience to determine the handwriting did not belong to Banks. Gilmour elicited testimony from Banks' ex that the handwriting on the basement wall was not Banks' typical handwriting. In closing, Gilmour argued that the State failed to present evidence, whether through handwriting analysis or otherwise, that the handwriting on the wall belonged to Banks. And Banks has not shown additional evidence on this issue—even if it could have been secured—would have changed the outcome of his trial.

Lastly, Banks fails to show how the speculative testimony from an unidentified witness would overcome the overwhelming evidence of his guilt. Banks eventually admitted he was at the crime scene, and both his changing story and self-inflicted harm when confronted by law enforcement evidenced his guilt. His statements to Stiles, his

cellmate, and his new girlfriend were also incriminating. Given this record, we cannot find Banks has shown a reasonable probability that the jury's verdict would have been different had Brown tried to locate a certified handwriting expert to replace Odenbaugh when he learned of her lack of certification.

Affirmed.