NOT DESIGNATED FOR PUBLICATION

No. 125,615

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

ROBERT LEE DICKERSON,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Wyandotte District Court; MICHAEL A. RUSSELL, judge. Opinion filed August 4, 2023. Affirmed.

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

Kayla Roehler, deputy district attorney, *Mark A. Dupree Sr.*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before WARNER, P.J., COBLE and PICKERING, JJ.

PER CURIAM: Robert Lee Dickerson brings this appeal after the Wyandotte County District Court denied his K.S.A. 60-1507 motion. At the evidentiary hearing on that motion, Dickerson argued that his trial counsel's performance was deficient because he failed to review the State's video exhibit containing the forensic interview of the child victim before publication to the jury. The district court held that trial counsel's performance was deficient, but it did not prejudice Dickerson. After review, we find the district court correctly denied Dickerson's motion and affirm the district court.

FACTUAL AND PROCEDURAL BACKGROUND

The facts of Dickerson's underlying criminal case are fully set forth in Dickerson's direct appeal to another panel of this court. *State v. Dickerson*, No. 116,628, 2018 WL 5851444, at *1-3 (Kan. App. 2018) (unpublished opinion). Relevant to this appeal, Dickerson was charged with aggravated indecent liberties with a child and criminal sodomy for acts committed between March 1, 2014, and Memorial Day 2014. During the jury trial, a video of a forensic interview with the victim was shown to the jury. The jury found Dickerson guilty of aggravated indecent liberties with a child but not guilty of criminal sodomy. On appeal, the panel affirmed Dickerson's conviction. 2018 WL 5851444, at *9. The Supreme Court denied review.

Dickerson filed a timely K.S.A. 60-1507 motion. The district court appointed counsel, who then filed an amended motion that made four claims:

- Trial counsel was ineffective for failing to consult an independent expert to rebut or assist in the cross-examination of the State's expert witness;
- trial counsel was ineffective for failing to subpoena and independently obtain Facebook records of the complaining witness;
- trial counsel did not adequately prepare for trial; and
- trial counsel was ineffective for failing to subpoena and obtain Dickerson's phone records for use at trial to place the State's evidence in the proper context.

The district court held a preliminary hearing and considered Dickerson's amended motion. At that hearing. Dickerson agreed that the claims going forward would be only those in the amended motion. The district court then granted an evidentiary hearing on those issues.

At the evidentiary hearing, Dickerson's K.S.A. 60-1507 counsel raised an additional issue—trial counsel apparently did not review State's Exhibit 22, a copy of the Sunflower House interview with C.B., before it was published to the jury. This issue had been previously raised in a motion for new trial filed by counsel appointed after trial counsel had withdrawn. The district court ruled that there was no request for a mistrial when the video was played for the jury, nor any request for admonition, and thereby denied the motion.

In the Sunflower House interview, C.B. commented that Dickerson may have videotaped her and her young female friends changing clothes. At the evidentiary hearing, Dickerson's 60-1507 counsel played the Sunflower House interview by following the audio portion with video:

> "And whenever one night me and my friends stayed the night at Bob's house . . . . We all stayed the night at his house. . . . And he told us girls, he was like, 'Well, I'm turning off the cameras, duh-duh-duh-duh-duh, so you guys like can get dressed and everything like in the mornings and stuff, and we were just going to bed.' And so we were like, 'Okay, thanks.' You know.
>
> "And so he said he turned off the cameras. Next morning all of us girls got up, got dressed in the living room. And to come to find out, he never turned off the cameras."

Dickerson's 60-1507 counsel contended that the insinuation from C.B.'s Sunflower House interview statement was that by using cameras that were not turned off—as he had initially told C.B.—Dickerson had attempted a potential crime against the girls (breach of privacy) and may even have a sexual predilection for young girls. The State countered that trial counsel's inadvertent mistake did not rise to the level of prejudice. That is, the jury would not have rendered a different verdict but for that mistake.

Following the hearing, counsel for the parties to the 60-1507 motion filed proposed findings of fact and conclusions of law with the district court. Dickerson also

filed pro se proposed findings of fact and conclusions of law. Dickerson's 60-1507 counsel argued multiple issues related to trial counsel's ineffectiveness. As to prejudice, he merely stated in conclusory fashion: "[T]here is a 'reasonable probability that, without counsel's unprofessional errors, the result would have been different.[']"

In its 41-page written ruling, the district court found that "trial counsel's mistake in failing to watch Exhibit 22 before it was published and realizing that an unredacted portion of it was potentially prejudicial to the [movant] constitutes deficient performance." It further found that "trial counsel's decision not to request a mistrial was a strategic decision based on his belief that the admission of the testimony did not prejudice the [movant] nor warranted a mistrial." In ruling that there was no showing that the jury was prejudiced, the district court stated:

> "After considering the totality of the circumstances, the court finds the portion of the exhibit the jury heard did not prejudice the [movant] and there is not a reasonable probability that it affected the outcome of the trial in that it would have been different if trial counsel had reviewed and asked that the exhibit be redacted to remove the victim talking about the camera. The court finds reviewing of Exhibit A does not show that the victim believed that the [movant] was watching them undress only they discovered that he did not turn off the video. The court further finds such testimony would not constitute a potential violation of K.S.A. 60-455.
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> "Moreover, the [movant] and his counsel wanted to introduce evidence that the [movant] and his wife were using the camera to observe the relationship of S.S. and C.B. Moreover, the fact that the jury never viewed the exhibit during its deliberations shows that the exhibit had no impact on the jury's decision and it is unclear that the[jurors] were exposed to more than a few seconds."

For all remaining claims, the district court ruled against Dickerson.

Dickerson appeals.

THE DISTRICT COURT CORRECTLY DENIED DICKERSON'S K.S.A. 60-1507 MOTION

Dickerson is the only party that appealed the district court's ruling. The State did not cross-appeal the district court's finding that trial counsel's performance was deficient. With neither party challenging the district court's finding that trial counsel's performance was deficient, the only issue on appeal before us is whether the district court's legal conclusion that the trial counsel's deficient performance did not prejudice Dickerson was correct. Dickerson argues this trial error was prejudicial.

When the district court conducts an evidentiary hearing on claims of ineffective assistance of counsel, the appellate courts review the district court's factual findings using a substantial competent evidence standard. Appellate courts review the district court's legal conclusions based on those facts applying a de novo standard of review. *Khalil-Alsalaami v. State*, 313 Kan. 472, 486, 486 P.3d 1216 (2021).

Claims of ineffective assistance of trial counsel are analyzed under the two-prong test articulated in *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674, *reh. denied* 467 U.S. 1267 (1984), and adopted by the 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. If successful, "'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. [Citations omitted.]'" *Khalil-Alsalaami*, 313 Kan. at 485.

For the first prong, the district court found trial counsel's performance deficient, which the State did not cross-appeal. See *Lumry v. State*, 305 Kan. 545, 555, 385 P.3d 479 (2016) (failure to cross-appeal district court's adverse ruling is jurisdictional bar to considering issue on appeal). Therefore, for purposes of this appeal, the district court's finding of deficient performance under the first prong is conclusive.

Next, we move to the second prong. Here, Dickerson must show that trial counsel's deficient performance was prejudicial. To establish prejudice, he must show "with reasonable probability that the deficient performance affected the outcome of the proceedings, based on the totality of the evidence." *Khalil-Alsalaami*, 313 Kan. at 486. A reasonable probability means a probability that sufficiently undermines confidence in the outcome. 313 Kan. at 486. In other words, Dickerson must show there is a probability that sufficiently undermines confidence that the jury would have returned the same verdict despite the trial counsel's error.

To support his argument that the district court erred in ruling that there was no prejudice due to trial counsel's deficient performance, Dickerson relies on the split verdict in support of his prejudice argument. At trial, the jury found Dickerson guilty on the aggravated indecent liberties charge and not guilty on the criminal sodomy charge. Given this split verdict, Dickerson argues, there was a question in the minds of the jury regarding the victim's credibility. Dickerson's entire theory of defense at trial was that C.B. had fabricated her story. But Dickerson fails to explain how a split verdict helps him prove that counsel's deficient performance was prejudicial to him. Further, a jury verdict in which a defendant is convicted of one offense but acquitted of another does not necessarily mean the jury had doubts about the complaining victim's claims. See *State v. Lopez*, 126 Idaho 831, 835, 892 P.2d 898 (Ct. App. 1995) (noting reasonable doubt as to one detail of victim's testimony did not require jury to disbelieve rest of her testimony).

Moreover, the United States Supreme Court has warned appellate courts about not drawing inferences from seemingly inconsistent verdicts in a criminal case. See *United States v. Powell*, 469 U.S. 57, 64-67, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984) (listing reasons for avoiding drawing inferences from split verdict). A panel of this court has also cautioned that "reading the tea leaves" of a jury's mixed verdicts on multiple counts against a defendant "is fraught with inexactitude and guesstimating as a general exercise, especially given the breadth of considerations that may influence deliberations in any

particular case." *State v. Payne*, No. 119,083, 2019 WL 4551642, at *9 (Kan. App. 2019) (unpublished opinion); see *State v. Hargrove*, 48 Kan. App. 2d 522, 559-60, 293 P.3d 787 (2013).

The unredacted portion from State's Exhibit 22 would not have constituted a K.S.A. 60-455 violation.

Dickerson challenges the district court's specific ruling that the unredacted testimony on State's Exhibit 22 would not constitute a potential violation of K.S.A. 2022 Supp. 60-455. In general terms, K.S.A. 2022 Supp. 60-455(d) allows evidence of a "defendant's commission of another act or offense of sexual misconduct" to be considered at trial.

Dickerson argues that the conduct described in the video constitutes the crime of breach of privacy. He further argues that breach of privacy is not a crime of "sexual misconduct," and, as such, it would not be admissible under K.S.A. 2022 Supp. 60-455(d). Dickerson states that this evidence was inadmissible under K.S.A. 2022 Supp. 60-455, and its publication to the jury was prejudicial enough that it would have changed the outcome of his trial. This argument, however, is not supported with legal authority or any analysis explaining why counsel's deficient performance was prejudicial.

The State does not assert that breach of privacy in this case would be considered "sexual misconduct," and, thus, its admission would be allowable under K.S.A. 2022 Supp. 60-455(d). Instead, the State contends that Dickerson's conduct, as described by C.B. in State's Exhibit 22, did not constitute the crime of breach of privacy and thus would not be barred from admission by K.S.A. 2022 Supp. 60-455(a)'s general restriction of prior crimes evidence.

Whether the conduct described in the video exhibit is admissible under K.S.A. 2022 Supp. 60-455 is irrelevant. Because even if inadmissible under K.S.A. 2022 Supp. 60-455, its admission was not so prejudicial to Dickerson in the totality of the circumstances that the jury would have rendered a different verdict had C.B.'s statement been redacted. For the aggravated indecent liberties conviction, Dickerson has not established a reasonable probability that the jury would have returned a not guilty verdict if defense counsel had reviewed State's Exhibit 22 before it was published and redacted C.B.'s statement about Dickerson's cameras.

Dickerson presents no factual arguments to rebut the district court's conclusion that redacting C.B.'s statement about the cameras being kept on would not have changed the outcome. Dickerson's argument is conclusory. As a result, he has failed to show reversible error. See *Edgar v. State*, 294 Kan. 828, 845, 283 P.3d 152 (2012) (noting in K.S.A. 60-1507 motion, defendant has "burden to establish a reasonable probability that a 'not guilty' verdict would have resulted" but for defense counsel's deficient conduct).

Our review of the record, moreover, confirms that the district court did not err in ruling that Dickerson failed to meet his burden. The district court and the parties at trial agreed that it would be best not to send State's Exhibit 22 to the jury room. The district court found that if the jury wanted to review the video, then the jury could review it in the courtroom so that the parties could control the portion of the exhibit that would be played. During its deliberations, the jury never asked to view the exhibit. Nor did the jury specifically ask about the exhibit. The only two questions asked by the jury were if it could have Dickerson's testimony read back to it and what would happen if the jurors could not reach a verdict. The State did not mention the video in its opening or closing statements to the jury. The evidence Dickerson complains of lasted a couple of seconds in a four-day trial.

To be clear, the testimony from the Sunflower House interview was *not* that Dickerson watched young girls undress. It was simply that he did not turn off the camera. The State presented substantial evidence to support the jury's decision independent of the challenged evidence. In light of these facts, the de novo review of the motion, files, and records of the case is enough to conclude that Dickerson failed to establish a reasonable probability that, but for trial counsel's error, he would have been found not guilty of aggravated indecent liberties with a child. We therefore affirm the district court's denial of Dickerson's K.S.A. 60-1507 motion.

Affirmed.