NOT DESIGNATED FOR PUBLICATION

No. 118,977

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

CLETIS R. O'QUINN,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; CHRISTOPHER M. MAGANA, judge. Opinion filed November 8, 2019. Affirmed in part and dismissed in part.

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

Matt J. Maloney, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before STANDRIDGE, P.J., PIERRON and ATCHESON, JJ.

PER CURIAM: Following a jury trial, Cletis R. O'Quinn was convicted of one count each of aggravated kidnapping, aggravated sexual battery, and aggravated battery. All three counts were found to be acts of domestic violence. The district court sentenced O'Quinn to 620 months in prison and ordered him to pay $99 in restitution. O'Quinn now appeals, claiming that (1) the State violated his statutory and constitutional rights to a speedy trial, (2) his trial counsel was ineffective because he failed to contemporaneously object to evidence of prior sexual misconduct, (3) he is entitled to a remand for a *Van Cleave* hearing to determine whether his trial and posttrial counsel were ineffective for

failing to introduce into evidence an allegedly exculpatory DNA test from his prior convictions, (4) K.S.A. 2018 Supp. 60-455(d) violates sections 10 and 18 of the Kansas Constitution Bill of Rights, and (5) the district court erred when it ordered him to pay $99 in restitution. Finding no error, we affirm in part and dismiss in part.

FACTS

On September 4, 2015, the State charged O'Quinn with one count each of aggravated sexual battery and aggravated battery. The charges stemmed from an incident that occurred on June 16, 2015, and involved O'Quinn's girlfriend/roommate, P.S. At the time of the incident, O'Quinn was on lifetime parole for crimes he committed in 1989.

The district court issued a warrant for O'Quinn's arrest on September 4, 2015, the same day that the criminal charges were filed. The arrest warrant provided for an appearance bond of $75,000 and bond conditions to include pretrial services with an electronic monitoring device. Although there is no return of service reflected on the warrant itself, O'Quinn ultimately was arrested and taken into custody on March 19, 2016, a little over six months after the warrant was issued.

At the preliminary hearing, the district court found probable cause to believe O'Quinn committed the crimes as alleged in the complaint and, in addition, found probable cause to believe that he committed the crime of aggravated kidnapping. Following the hearing, the State amended the complaint to charge O'Quinn with that additional count for aggravated kidnapping. The State alleged all three counts involved crimes of domestic violence. O'Quinn pled not guilty, and the matter was set for jury trial on May 23, 2016. The trial was continued numerous times, however, and did not actually begin until almost a year later on March 27, 2017, approximately 18 months after O'Quinn was originally charged.

Before trial, the State filed a motion seeking to introduce evidence of prior bad acts and offenses of sexual misconduct committed by O'Quinn in the past. Specifically, the State sought to introduce evidence of O'Quinn's: (1) 1989 convictions for aggravated kidnapping, aggravated sexual battery, and aggravated battery; (2) a 2009 conviction for domestic battery involving P.S., the same victim as alleged in this case; and (3) involvement in incidents (including breaking and entering and tampering with a vehicle) that allegedly occurred at P.S.'s home in the weeks after the June 16, 2015 incident. O'Quinn objected to the State's motion, and a hearing was held on March 17, 2017. The district court granted the motion to the extent that the State would be permitted to introduce evidence of the 1989 convictions and the alleged breaking and entering that occurred after the June 16, 2015 incident. But the court denied the motion with regard to evidence of the 2009 domestic battery conviction and the alleged vehicle tampering, meaning the State would be prohibited from introducing that particular evidence at trial.

Before the jury was sworn, defense counsel filed a motion to dismiss the case with prejudice due to violations of O'Quinn's constitutional and statutory right to a speedy trial. The court held a hearing on the motion and denied the motion to dismiss.

At trial, P.S. testified that she met O'Quinn at Old Chicago Pizza in Wichita's Old Town district on June 16, 2015. At the time, P.S. and O'Quinn were in a relationship and living together, albeit in separate rooms, but were having difficulties. P.S. testified she agreed to meet O'Quinn at Old Chicago Pizza because he said he wanted to "talk." She listened to him all through dinner, where she admitted to having a few alcoholic drinks, while he tried to persuade her to get back together and to "make things work." But when O'Quinn suggested that they get a room at a nearby hotel as they were leaving, P.S. told him that she did not want to go and, in fact, did not want to continue her relationship with him. P.S. testified O'Quinn became angry and tried to grab her phone out of her hand, which caused the phone to fall on the street. P.S. tried to grab O'Quinn's phone out of his

pocket but was unsuccessful. P.S. then walked away, leaving her phone on the street. After making sure O'Quinn already had left in his truck, P.S. drove herself home.

When P.S. arrived home between 10 and 11 p.m., she found her broken phone sitting in a chair on her front porch. She picked it up and had just unlocked and opened her front door when she was pushed from behind and fell forward into her living room. The fall caused her phone, purse, and everything else in her hands to go flying. P.S. testified that, at first, she did not know who had attacked her but eventually recognized the attacker as O'Quinn when he began talking and turned her around. P.S. said O'Quinn was acting aggressively and calling her a "bitch" as he pulled her into his bedroom. Once he got her there, he threw P.S. onto the bed, choked her, ripped off her clothes, and masturbated in an attempt to obtain an erection. He attempted to have sexual intercourse with P.S. but was unable to obtain an erection. P.S. fought back and repeatedly told O'Quinn to stop. P.S. said she was able to escape the bedroom at one point, but O'Quinn prevented her from leaving the house. He eventually caught her again and dragged her back to the bedroom. Once there, he continued to choke her—to the point that she saw "stars"—and assaulted her until she fell off the bed. P.S. testified that, at this point, O'Quinn helped her up, helped her to use the restroom, and then laid her down on the couch in the living room. Rather than leave, however, O'Quinn laid down on another couch and remained in P.S.'s home until approximately 5 or 6 a.m. the next morning, when he eventually left. He returned later that morning to retrieve his work clothes, which P.S. handed to him through the door.

P.S. suffered severe bruising to her arm, neck, and chest as a result of the attack. P.S. did not immediately report the incident to police because she was afraid and did not want to cause trouble in her family. So P.S. wore long sleeve shirts to cover up the bruises.

On June 25, 2015, nine days after the attack, P.S. was sitting alone in her living room when she heard glass shatter in her basement. She looked down her basement stairs and saw O'Quinn coming up toward her. P.S. ran from the house to her daughter's house down the street, where she called the police.

Immediately after P.S. testified, the State called G.M., the woman whom O'Quinn had attacked and sexually assaulted in 1989. In 1989, G.M. was 20 years old and working at a convenience store in Wichita, Kansas. One night, when G.M. was working late and alone, O'Quinn entered the store and asked her where to find the restrooms. She told him but rather than move in the direction that G.M. indicated, O'Quinn remained where he was and tried to talk to G.M. while she was stocking shelves. G.M. was attempting to make it up to the front counter, where an emergency button was located, when O'Quinn grabbed her arm and started punching her in the face. He then called her a "bitch" and told her to "shut up" as he dragged her into the storage room at the back of the store. Once he got her there, he showed her a knife and pushed her into a cooler where he ripped off her pants and underwear and began masturbating in an attempt to obtain an erection. G.M. testified O'Quinn continued to masturbate as he straddled her and cut her neck with a knife. Fearing for her life, G.M. fought back and eventually was able to kick O'Quinn in the groin and run out of the room. But as she did so, O'Quinn slashed at her with the knife and cut the back of her leg from her buttocks down to her knee. G.M. identified O'Quinn as her attacker and, following a jury trial, he was convicted of aggravated kidnapping, aggravated sexual battery, and aggravated battery. The State introduced the 1989 convictions into evidence in this case, under K.S.A. 2018 Supp. 60-455(d), to demonstrate O'Quinn's propensity to commit violent acts of sexual misconduct.

The jury ultimately convicted O'Quinn of all three counts and found that each was an act of domestic violence. Before sentencing, O'Quinn filed a motion for a judgment of acquittal, a motion for a new trial, and a motion for a departure sentence. O'Quinn also filed a pro se motion alleging that, for a number of different reasons, his trial counsel,

Jama Mitchell, was ineffective. Recognizing the conflict that those claims created between O'Quinn and Mitchell, the district court continued sentencing, appointed new counsel, and set the matter for a hearing. At the hearing, O'Quinn testified about his grievances against Mitchell. Those grievances covered a wide variety of issues but, relevant here, largely centered on Mitchell's failure to contemporaneously object or otherwise challenge the evidence of O'Quinn's 1989 convictions when it was presented at trial. Mitchell also testified at the hearing. Mitchell explained that her decisions throughout the trial were strategic in nature. This included her decision to not contemporaneously object to or cross-examine G.M as a witness because Mitchell wanted to get G.M. off of the witness stand as quickly as possible.

After hearing the evidence, the district court found O'Quinn failed to establish ineffective assistance of counsel and denied his motion. The district court also denied O'Quinn's motion for a judgment of acquittal, motion for a new trial, and motion for a departure sentence. The district court then sentenced O'Quinn to 620 months in prison and ordered him to pay $99 in restitution to P.S. for the phone that was broken during the June 16, 2015 incident.

ANALYSIS

1. *Speedy trial*

a. *Statutory right*

O'Quinn argues he was deprived of his statutory right to a speedy trial because the State held him in custody based solely on the charges filed against him in this case and failed to bring him to trial within 150 days of his arraignment. Although the district court found no statutory speedy trial violation, appellate courts exercise unlimited review over a district court's legal rulings regarding alleged violations of a defendant's statutory right to a speedy trial. *State v. Vaughn*, 288 Kan. 140, 143, 200 P.3d 446 (2009).

Pursuant to K.S.A. 2018 Supp. 22-3402(a):

> "If any person charged with a crime and held in jail solely by reason thereof shall not be brought to trial within 150 days after such person's arraignment on the charge, such person shall be entitled to be discharged from further liability to be tried for the crime charged, unless the delay shall happen as a result of the application or fault of the defendant or a continuance shall be ordered by the court under subsection (e)."

Here, neither party disputes that more than 150 days attributable to the State elapsed between O'Quinn's arraignment on April 20, 2016, and the start of his trial on March 27, 2017. Instead, the question presented is whether O'Quinn was being held in jail solely by reason of the crimes charged in this case. See K.S.A. 2018 Supp. 22-3402(a).

At a hearing on the speedy trial issue before the district court, O'Quinn's parole officer, Ed Desir, testified that O'Quinn had been placed on lifetime parole after being released from the prison sentence he served for the 1989 convictions. Desir explained that the current charges pending against O'Quinn in this case necessarily triggered a duty on his part to charge O'Quinn with a violation of the conditions of his parole in the 1989 case and place a hold on him based on the alleged violation. Desir testified he went to the jail on April 1, 2016, about two weeks after O'Quinn was taken into custody in this case, and personally served O'Quinn with a written statement of charges and report of parole violation. Desir described the hold placed on O'Quinn as one grounded in "a [n]umber 2 laws" parole violation, meaning the parole violation charged and the resulting hold was based on the parolee's violation of a city, county, state or federal law.

O'Quinn testified at the hearing as well. O'Quinn conceded that Desir personally served him on April 1, 2016, with a written statement of charges and report of parole violation. But O'Quinn argued his detention for violation of parole in the 1989 case could not be taken into account for speedy trial purposes because it was entirely dependent on

the outcome of the current case. The district court disagreed, finding there was no statutory speedy right violation because O'Quinn was in custody on a parole hold and therefore was not being held solely on the current charges. The district court also found that the delay was not long enough to implicate O'Quinn's constitutional right to a speedy trial and, even if it was, O'Quinn failed to demonstrate the requisite prejudice necessary to justify a dismissal on that basis. The court denied the speedy trial motion to dismiss, and the case proceeded to trial.

On appeal, O'Quinn concedes that, as of April 1, 2016, he was being detained based on his parole violation. Nevertheless, O'Quinn argues it is improper for the district court to consider the parole hold as part of its statutory speedy trial analysis because his detention for the parole violation is entirely dependent on the outcome of the current case. But O'Quinn's argument is undermined by testimony at the hearing from his parole officer stating that, even if the current charges against O'Quinn were dismissed or he was acquitted, he would continue to be detained under the hold until the parole board made a final decision on whether to revoke parole. Based on these facts, we find O'Quinn was not being held in jail solely by reason of the crimes charged in this case.

Our finding in this regard is supported by our Supreme Court's decision in *State v. Hill*, 257 Kan. 774, 778, 895 P.2d 1238 (1995). In *Hill*, the defendant was held in custody awaiting trial on multiple counts of aggravated kidnapping, aggravated robbery, rape, aggravated burglary, and theft. The defendant was also subject to a parole hold based on his arrest for violations of state law. The defendant claimed his statutory speedy trial rights were violated. But our Supreme Court summarily rejected the defendant's claim, finding "that K.S.A. 22-3402 was inapplicable because the defendant was not being held in jail solely on the charges herein." 257 Kan. at 778.

O'Quinn attempts to distinguish the facts in his case by noting that, unlike *Hill*, he did not violate his parole by failing to report his arrest for state law violations; instead,

his hold was based on the underlying state law violations themselves. But O'Quinn's distinction is without a difference and is inconsistent with the language of the applicable statute, K.S.A. 2018 Supp. 22-3402. The legal proposition upon which the decision in *Hill* was based is clear: The statutory speedy trial provision set forth in K.S.A. 2018 Supp. 22-3402 does not apply when the defendant is being held in custody on the current charges and on a parole violation, even if the parole violation arises from the current charges. 257 Kan. at 778. This court is duty bound to follow Kansas Supreme Court precedent, unless there is some indication the court is departing from its previous position. *State v. Meyer*, 51 Kan. App. 2d 1066, 1072, 360 P.3d 467 (2015). We see no such indication. As the district court held, O'Quinn's statutory speedy trial right was not violated because O'Quinn was in custody on a parole hold and, therefore, was not being held solely on the current charges. See K.S.A. 2018 Supp. 22-3402(a).

b. *Constitutional right*

O'Quinn also argues he was deprived of his constitutional right to a speedy trial as guaranteed by both the Sixth Amendment to the United States Constitution and section 10 of the Kansas Constitution Bill of Rights. When a defendant raises a constitutional speedy trial claim, it is a question of law subject to de novo review. *State v. Rivera*, 277 Kan. 109, 113, 83 P.3d 169 (2004).

The Sixth Amendment and section 10 of the Kansas Constitution Bill of Rights guarantee a criminal defendant the right to a public and speedy trial.

> "The Sixth Amendment right to a speedy trial is . . . not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations. The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and

the presence of unresolved criminal charges." *United States v. MacDonald*, 456 U.S. 1, 8, 102 S. Ct. 1497, 71 L. Ed. 2d 696 (1982).

In *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), the United States Supreme Court announced a balancing test and identified factors for courts to consider in determining whether a defendant's Sixth Amendment right to a speedy trial has been violated. These factors include: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his or her right, and (4) prejudice to the defendant. 407 U.S. at 530. None of the factors are controlling in determining whether a defendant's constitutional right to a speedy trial has been violated, but the factors must be considered together with such other circumstances as may be relevant. 407 U.S. at 533. We discuss each factor in turn.

(1) *Length of delay*

The Supreme Court in *Barker* noted that the length of the delay in bringing a defendant to trial acts as a "triggering mechanism" for applying the remaining three factors. "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Barker*, 407 U.S. at 530. With regard to this particular factor, our Kansas Supreme Court has resisted setting rigid rules for what length of time is presumptively prejudicial, preferring to examine each delay in the context of the facts in that particular case. See *State v. Weaver*, 276 Kan. 504, 509, 78 P.3d 397 (2003) ("'[T]he delay in each case is analyzed according to its particular circumstances.'"). Accordingly, the "tolerable delay for an ordinary crime is less than for a complex one." 276 Kan. at 511.

The balancing test set forth in *Barker* considers the period of time from attachment of the protection until trial. See *State v. Davis*, 277 Kan. 309, 334, 85 P.3d 1164 (2004). Unlike the statutory speedy trial right, which attaches at arraignment, the constitutional

speedy trial right attaches at the formal charging or arrest, whichever occurs first. *Rivera*, 277 Kan. at 112.

In this case, O'Quinn originally was charged on September 4, 2015, with felony aggravated sexual battery (domestic violence offense) and felony aggravated battery (domestic violence offense). So O'Quinn's constitutional right to a speedy trial attached on September 4, 2015. His trial did not begin until March 27, 2017, which is 18 months after O'Quinn originally was charged.

The question presented is whether, under the particular circumstances presented in this case, the 18-month period of time between September 4, 2015, and March 27, 2017, is presumptively prejudicial. In considering this question, we note that the district court issued a warrant for O'Quinn's arrest on September 4, 2015, the same day that the charges were filed. The arrest warrant provided for an appearance bond of $75,000 and bond conditions to include pretrial services with an electronic monitoring device. The arrest warrant does not indicate a return of service. O'Quinn was arrested and taken into custody on March 19, 2016. O'Quinn made his first appearance on March 21, 2016, over six months after the charges were filed. Although we could parse out the circumstances surrounding the next 12-month delay between O'Quinn's first appearance and his trial, we find the 18-month delay in this case to be presumptively prejudicial, primarily because of the unexplained 6-month delay between when the case was filed and when the State scheduled O'Quinn for his first appearance on the charges. Accordingly, we move on to analyze the balance of the *Barker* factors.

(2) *Reason for delay*

Under the second *Barker* factor, O'Quinn argues that the State's requests to continue the trial were made in bad faith. In addressing this factor, courts considers "whether the government or the criminal defendant is more to blame" for the delay.

Doggett v. United States, 505 U.S. 647, 651, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992). Deliberate delay by the State "'to hamper the defense' weighs heavily against the prosecution." *Vermont v. Brillon*, 556 U.S. 81, 90, 129 S. Ct 1283, 173 L. Ed. 2d 231 (2009) (quoting *Barker*, 407 U.S. at 531).

The State's initial request to continue the trial was granted on September 19, 2016, without a record being taken. Relying on the absence of a record to establish otherwise, O'Quinn argues this court "should not assume that the State is continuing trial for a legitimate reason when it does so in a mysterious and unconstitutional manner." Significantly, it is the appellant's burden to designate a record that shows reversible error. *State v. Valdez*, 266 Kan. 774, 792, 977 P.2d 242 (1999). At the hearing on his motion to dismiss for violation of his speedy trial rights, O'Quinn had the opportunity to develop a record regarding the reason for the continuance at issue. He failed to do so, instead focusing on his parole hold and the prejudice he was enduring as a result of his detention. O'Quinn never suggested that the State's request for this continuance was made in bad faith. In the absence of evidence to the contrary, we will not assume bad faith on the State's part in this first request to continue the trial.

The State's second request to continue the trial was made because the prosecutor was looking into additional discovery material and was considering filing a K.S.A. 60-455 pretrial motion, which it decided to do several weeks later. In this instance, the district court expressly found that the State had a "good-faith basis" for requesting the continuance. On appeal, O'Quinn asserts the State "had no legitimate reason to wait that long" to file its K.S.A. 60-455 motion and suggests the State should have filed the motion during the multiple periods of time when he had requested the trial be continued. We are not persuaded by O'Quinn's argument.

The final continuance in the case was required based on O'Quinn's refusal to waive the potential conflict of interest discovered when the original prosecutor learned about

her father's prior representation of O'Quinn. But even if this portion of the delay is attributed to the State, the State was clearly acting in good faith when it informed defense counsel about the issue and then assigned a new prosecutor to the case.

We find nothing in the record to support O'Quinn's argument that the State's requests to continue the trial were made in bad faith. Rather, the record demonstrates that the State was actively preparing for trial, including tracking down the victim from a 27-year-old crime, even as O'Quinn himself requested multiple continuances. As such, this factor weighs against O'Quinn.

(3) *Assertion of right*

Regarding the third *Barker* factor, the record demonstrates that O'Quinn asserted his right to a speedy trial on numerous occasions beginning in September 2016. That he did so repeatedly and emphatically, both during trial proceedings and in letters and filings that he submitted to the district court, weighs in his favor.

(4) *Prejudice to the defendant*

Actual prejudice from delay can result from oppressive pretrial incarceration, the anxiety and concern of the accused, and the possibility that the defendant's defense will be impaired by dimming memories and loss of exculpatory evidence. *Doggett*, 505 U.S. at 654; *Barker*, 407 U.S. at 532. Under this fourth *Barker* factor, O'Quinn relies on all of these factors. At the hearing on the motion, O'Quinn testified that his incarceration "just gave me a lot of undue stress and anxiety." He complained that he was "here just on an allegation." O'Quinn noted that he had been diagnosed with an eye condition in 2013 and that "[t]hey take me to the doctor for that" every 90 days. O'Quinn said that he had not been able to prepare a defense because he had not been able to personally "go talk to anybody" or bring people to defense counsel's office to meet with counsel. Finally, he

claimed that he had lost "income, job, vehicle . . . and . . . a lot of friends because of this allegation."

O'Quinn's claims find little to no support in the record. First, O'Quinn was not arrested until 6 months after the charges were initially filed, meaning that he was only incarcerated for 12 of the 18 months between his charging and the beginning of his trial. O'Quinn's own testimony shows that he was receiving medical care and medication for his eye condition. Although he referred to his anxiety as severe, O'Quinn did not provide any specific examples of how his anxiety was more than any criminal defendant in his position, and his testimony suggests that the anxiety he was experiencing was based on his perception that he being held on only "an allegation" that he committed the crimes charged. Of course, the same is true for all defendants who are in custody awaiting trial. O'Quinn's claim that that he could not personally assist in his defense is likewise unavailing, as he never asserted that he was unable to provide counsel the names of witnesses with relevant information. Finally, O'Quinn offered no details regarding his lost job or vehicle; in any event, these are, again, circumstances that are common to all pretrial detainees. This factor does not weigh in favor of O'Quinn.

Viewed individually or collectively, the *Barker* factors do not support O'Quinn's claim that he was deprived of his constitutional right to a speedy trial.

2. *Ineffective assistance of counsel*

To prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish that (1) the performance of defense counsel was deficient under the totality of the circumstances and (2) prejudice, i.e., that there is a reasonable probability the jury would have reached a different result absent the deficient performance. *Sola-Morales v. State*, 300 Kan. 875, 882, 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]). If counsel has made a

strategic decision after making a thorough investigation of the law and the facts relevant to the realistically available options, then that strategic decision by counsel is virtually unchallengeable. Strategic decisions made after a less than comprehensive investigation are reasonable exactly to the extent a reasonable professional judgment supports the limitations on the investigation. *State v. Cheatham*, 296 Kan. 417, 437, 292 P.3d 318 (2013).

a. *K.S.A. 60-455 evidence*

O'Quinn argues that his trial counsel's performance was deficient because she failed to contemporaneously object when evidence of his 1989 convictions was introduced under K.S.A. 2018 Supp. 60-455(d). Where, as here, the district court conducted an evidentiary hearing on an ineffective assistance of counsel claim, an appellate court reviews the district court's factual findings under a substantial competent evidence standard and its legal conclusions based on those findings under a de novo standard. *State v. Butler*, 307 Kan. 831, 853, 416 P.3d 116 (2018).

Although deficient performance is the first component of ineffective assistance of counsel, we need not decide the issue of deficient performance here. This is because, even if true, O'Quinn has failed to demonstrate prejudice, i.e., a reasonable probability that the jury would have reached a different verdict if the alleged deficient performance had not occurred. See *Sola-Morales*, 300 Kan. at 882.

We begin our prejudice analysis by noting that, in the absence of a contemporaneous objection, we are precluded from reviewing a district court's decision regarding the introduction of evidence at trial. But that preclusion applies only to our review of whether the district court erred in allowing or disallowing evidence to be introduced. In the context of O'Quinn's claim here, we must decide whether there is a reasonable probability that the jury would have reached a different verdict had counsel

made a contemporaneous objection to the K.S.A. 60-455 evidence. To that end, we find it highly unlikely that the district court would have granted a contemporaneous objection when the State introduced the K.S.A. 2018 Supp. 60-455(d) evidence. The issue was fully litigated during a pretrial hearing, at the close of which the district court issued a well-reasoned ruling, on the record, that addressed each of the arguments O'Quinn raised.

Moreover, even if a contemporaneous objection had been made and granted, the direct evidence of the crimes committed by O'Quinn was substantial. There was extensive testimony from the alleged victim, as well as from police officers who corroborated key elements of the victim's account. In sum, we find no reasonable probability that the jury would have reached a different verdict if O'Quinn's trial counsel had contemporaneously objected to the admission of the K.S.A. 2018 Supp. 60-455(d) evidence. See *Sola-Morales*, 300 Kan. at 882.

b. *DNA evidence*

For the first time on appeal, O'Quinn argues his trial and posttrial counsel provided him ineffective assistance of counsel by refusing to introduce into evidence what O'Quinn believes to be exculpatory DNA evidence from his 1989 convictions. Some additional facts are necessary here. Following his jury trial convictions, O'Quinn filed a pro se motion asserting that the "semen stain collected at [the] scene" of G.M.'s 1989 sexual assault had been left by a man who had had a vasectomy. O'Quinn alleged that he had never had a vasectomy. The implication of these claims was that trial counsel had been ineffective by not bringing this to the jury's attention when evidence of the prior 1989 convictions were introduced at trial.

The district court appointed counsel to represent O'Quinn and then held an evidentiary hearing on the motion asserting ineffective assistance of trial counsel. O'Quinn testified that he had told his trial attorney that he had never had a vasectomy.

O'Quinn thought this was relevant to his current criminal case because a semen sample from his 1989 case had been left by a man who had had a vasectomy. Notwithstanding this alleged relevance, O'Quinn testified that trial counsel "blew if off." When trial counsel testified, she confirmed that O'Quinn had informed her of his belief that forensic testing excluded him as the person who had sexually assaulted G.M. in 1989. In response, trial counsel explained to O'Quinn that she was "not going to relitigate [the 1989] case."

After considering the testimony of O'Quinn and trial counsel, the district court concluded that O'Quinn's vasectomy claim was a "non-issue." On appeal, O'Quinn submits that his vasectomy-related ineffective assistance of counsel claim was only a "non-issue" because posttrial counsel failed to properly litigate it in district court. Specifically, O'Quinn argues posttrial counsel should have engaged in discovery to find the testing results before the hearing.

As a general rule, claims of ineffective assistance of counsel will not be heard for the first time on appeal. *Rowland v. State*, 289 Kan. 1076, 1084, 219 P.3d 1212 (2009). This is because the district court, which observed counsel's performance and is aware of the trial strategy employed, is in a much better position to consider the competence of counsel and should have the first opportunity to rule on the issue. *State v. Van Cleave*, 239 Kan. 117, 119-20, 716 P.2d 580 (1986). As such, when a defendant raises an ineffective assistance of counsel claim for the first time on direct appeal, appellate courts have three options: (1) Follow the general rule and refuse to address the issue, allowing the defendant to pursue relief through a K.S.A. 60-1507 motion; (2) rule on the merits in the "extremely rare" cases that there is a sufficient record to do so; or (3) remand the case for a *Van Cleave* hearing "so that facts relevant to determination of the legal issue may be developed and an evidentiary record established." *Rowland*, 289 Kan. at 1084; see *State v. Reed*, 302 Kan. 227, 233-34, 352 P.3d 530 (2015). Whether to remand a case for a *Van Cleave* hearing lies within the sound discretion of the appellate court. *Van Cleave*, 239 Kan. at 120.

> "In *Van Cleave*, we set guidelines for an appellate court to follow in exercising its discretion when deciding whether to remand a case for an evidentiary hearing. In that case, we noted an appellant's counsel must do more than simply read the cold record of the proceedings before the district court and then argue that he or she would have handled the case differently. We held that counsel must attempt to determine the circumstances under which trial counsel did—or did not—proceed as the appellate counsel believes preferable and conduct at least some investigation into the claimed ineffectiveness. We then noted: 'Except in the most unusual cases, [for an appellate counsel] to assert a claim of ineffective assistance of counsel without an independent inquiry and investigation apart from reading the record is questionable to say the least.' [Citations omitted.]" *State v. Levy*, 292 Kan. 379, 389, 253 P.3d 341 (2011).

In this case, O'Quinn is requesting a *Van Cleave* hearing to determine whether his trial and posttrial counsel provided ineffective assistance by refusing to engage in discovery to find and then introduce into evidence what O'Quinn believes to be DNA evidence that would exonerate him of his 1989 crimes of conviction. Although O'Quinn argues in his brief that the exculpatory testing results do seem to have a basis in fact, there is no factual evidence in the record to support this argument. Instead, the merits of O'Quinn's ineffective assistance of counsel claim rely entirely on appellate counsel's reading of the cold record and the allegation that things could have been done differently. That is not enough to satisfy the minimum requirements for a *Van Cleave* remand. See *State v. Levy*, 292 Kan. 379, 389, 253 P.3d 341 (2011). Accordingly, we will proceed to the merits of O'Quinn's claim.

The underlying premise of O'Quinn's ineffective assistance of counsel claim is that DNA evidence exists that would exonerate him of his 1989 crimes of conviction. But O'Quinn's claim of innocence based on this DNA evidence already has been litigated and found to be without merit. See *O'Quinn v. State*, No. 86,113, 2004 WL 1683103, at *3-4 (Kan. App. 2004) (unpublished opinion). In fact, the DNA report that O'Quinn relies on specifically concluded "that O'Quinn's 'claims of factual innocence in the sexual assault

of [G.M.] are not supported by [its] findings.'" 2004 WL 1683103, at *4. Therefore, not only is the DNA report irrelevant to the case at hand, but it is also not the exculpatory evidence that O'Quinn claims.

For the reasons stated above, we conclude trial and posttrial counsel did not provide deficient representation by refusing to introduce DNA evidence from his 1989 convictions. See *Sola-Morales*, 300 Kan. at 882.

3. *Constitutionality of K.S.A. 2018 Supp. 60-455(d)*

O'Quinn alleges K.S.A. 2018 Supp. 60-455(d) violates sections 10 and 18 of the Kansas Constitution Bill of Rights. The constitutionality of a statute is a question of law subject to unlimited review. Appellate courts presume that statutes are constitutional and must resolve all doubts in favor of a statute's validity. As such, if there is any reasonable construction that would maintain the Legislature's apparent intent, the court must interpret the statute in the way that makes it constitutional. *State v. Soto*, 299 Kan. 102, 121, 322 P.3d 334 (2014).

Section 10 provides:

> "In all prosecutions, the accused shall be allowed to appear and defend in person, or by counsel; to demand the nature and cause of the accusation against him; to meet the witness face to face, and to have compulsory process to compel the attendance of the witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed. No person shall be a witness against himself, or be twice put in jeopardy for the same offense."

Section 18 similarly provides that "[a]ll persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law." Historically, Kansas courts have analyzed the due process requirements of sections 10 and 18 as coextensive

with their federal counterparts. See *State v. Wilkinson*, 269 Kan. 603, 608-09, 9 P.3d 1 (2000) (applying same analysis to federal due process challenge as to section 18 challenge); *Murphy v. Nelson*, 260 Kan. 589, 597-98, 921 P.2d 1225 (1996) (declining to construe section 18 differently from federal due process protections and applying federal law to a section 18 challenge); see also *State v. Morris*, 255 Kan. 964, 981, 880 P.2d 1244 (1994); *State v. Busse*, 231 Kan. 108, 110, 642 P.2d 972 (1982); *State v. Haze*, 218 Kan. 60, 62, 542 P.2d 720 (1975); *State v. Hill*, 189 Kan. 403, 411-12, 369 P.2d 365 (1962) (analyzing various due process protections contained in section 10 in same way as federal due process protections).

In support of his challenge to K.S.A. 2018 Supp. 60-455(d), O'Quinn argues the statute unconstitutionally permitted the jury to consider evidence regarding his 1989 convictions to prove his propensity to commit the crimes charged in this case. Doing so, O'Quinn argues, diminishes the State's burden of proof and undermines the presumption of innocence concept that is fundamental to American criminal law jurisprudence.

But the Kansas Supreme Court recently rejected this same argument, holding that the historical "use of propensity evidence in Kansas, coupled with the procedural safeguard of weighing the probative against the prejudicial effect of the evidence, leads [to the conclusion] that . . . K.S.A. 2018 Supp. 60-455(d) does not violate federal constitutional protections." *State v. Boysaw*, 309 Kan. 526, 536, 439 P.3d 909 (2019). It then concluded that "[a]ny future challenge to the admission of propensity evidence under K.S.A. 2018 Supp. 60-455(d) that is based on state constitutional provisions will need to explain why this court should depart from its long history of coextensive analysis of rights under the two constitutions." 309 Kan. at 538. O'Quinn has provided no such explanation in this case. We are duty bound to follow Kansas Supreme Court precedent; therefore, we find O'Quinn's claim to be without merit. See *Meyer*, 51 Kan. App. 2d at 1072.

4. *Restitution*

At sentencing, the district court imposed a $99 restitution order to cover P.S.'s expenses for repairing or replacing a damaged cell phone. On appeal, O'Quinn challenges the order of restitution, claiming the evidence at trial establishes that O'Quinn damaged P.S.'s cell phone well before he engaged in the alleged conduct forming the basis for his aggravated battery, aggravated sexual battery, and aggravated kidnapping convictions.

As a general rule, issues not raised before the district court cannot be raised on appeal. *State v. Kelly*, 298 Kan. 965, 971, 318 P.3d 987 (2014); see *State v. Arnett*, 307 Kan. 648, 650-52, 413 P.3d 787 (2018). There are, however, several exceptions to the general rule, including to following:

> "(1) The newly asserted theory involves only a question of law arising on proved or admitted facts and is determinative of the case; (2) consideration of the theory is necessary to serve the ends of justice or to prevent the denial of fundamental rights; and (3) the district court is right for the wrong reason." *State v. Phillips*, 299 Kan. 479, 493, 325 P.3d 1095 (2014).

Regardless of which exception applies, it is incumbent on the appellant to explain why an issue that was not raised below should be considered for the first time on appeal. Supreme Court Rule 6.02(a)(5) (2019 Kan. S. Ct. R. 34).

Here, O'Quinn acknowledges that he is raising this issue for the first time on appeal but argues that an exception to the general rule applies, namely that the issue arises from proved or admitted facts and involves a question of law that is determinative of the case. Specifically, O'Quinn argues that the facts regarding the damage to the phone are undisputed and therefore the issue is merely a legal question regarding whether there is a causal link between those facts and the crimes of conviction. But O'Quinn's argument is undercut by the briefing in this matter, which reflects a material dispute between the

parties over the facts giving rise to the restitution order. O'Quinn denies that he attacked P.S. on June 16, 2015, and instead claims that the damages to the phone were exclusively caused by the altercation outside of Old Chicago Pizza. While the State acknowledges the phone was damaged before O'Quinn initiated the attack for which he was charged and convicted, it alleges that the phone was further damaged during that attack. In light of this factual discrepancy, we cannot say that the restitution issue arises from proven or admitted facts. Because it does not qualify as an exception to the general rule, we dismiss O'Quinn's challenge to the district court's order of restitution based on his failure to preserve the issue for appeal. See *State v. Gross*, 308 Kan. 1, 6, 417 P.3d 1049 (2018) (preservation rule is based on prudential, not jurisdictional, concerns).

Affirmed in part and dismissed in part.