NOT DESIGNATED FOR PUBLICATION

No. 122,960

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

DOUGLAS D. PETERMAN,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Hodgeman District Court; BRUCE T. GATTERMAN, judge. Opinion filed June 10, 2022. Affirmed.

Douglas D. Peterman, appellant pro se.

Steven J. Obermeier, assistant solicitor general, and *Derek Schmidt*, attorney general, for appellee.

Before SCHROEDER, P.J., GREEN and GARDNER, JJ.

PER CURIAM: Douglas D. Peterman appeals the denial of his K.S.A. 60-1507 motion by the district court after an evidentiary hearing, alleging multiple errors as explained below. Peterman was convicted of three counts of aggravated indecent liberties with a child. Another panel of our court affirmed in part and reversed in part Peterman's sentences and convictions. The district court summarily dismissed most of Peterman's claims and held an evidentiary hearing regarding certain allegations. Finding no error by the district court, we affirm.

FACTS

In October 2013, a jury convicted Douglas D. Peterman of three counts of aggravated indecent liberties with a child for acts committed against F.W. between 2010 and 2012. The district court sentenced Peterman to three concurrent hard 25 life sentences with lifetime electronic monitoring. Peterman appealed his convictions and sentences, and another panel of our court affirmed in part and reversed in part. *State v. Peterman*, No. 111,159, 2015 WL 8587505, at *16 (Kan. App. 2015) (unpublished opinion), *rev. denied* 305 Kan. 1256 (2017). In Peterman's direct appeal, the State stipulated the district court could not impose lifetime electronic monitoring upon conviction for off-grid sex crimes. The panel otherwise affirmed Peterman's convictions and sentences. The mandate was issued on February 24, 2017. The United States Supreme Court denied Peterman's petition for writ of certiorari on June 26, 2017. *Peterman v. State*, 137 S. Ct. 2311 (2017).

In April 2018, Peterman filed a pro se memorandum of fact and law in support of a motion to vacate or set aside judgment pursuant to K.S.A. 60-1507, consisting of 250 pages including exhibits. Relevant to this appeal, Peterman alleged his trial counsel should have called F.W.'s therapist, Becky Minor, as well as an expert witness on child complaining witnesses to testify at trial. Peterman alleged F.W. would talk to him about her therapy sessions and she had explained, even though Minor continued to ask whether Peterman abused her, she denied any abuse. Peterman contended in his K.S.A. 60-1507 motion that trial counsel specifically should have called Minor to testify about "whether or not [her notes] represented the truth, and whether [Minor's] practice was appropriate pursuant to *Finding Words*." Peterman asserted F.W. was suggestively interviewed and trial counsel should have produced an expert witness to diminish F.W.'s credibility as a child complaining witness who faced improper interviewing techniques.

Peterman also alleged ineffective assistance of trial counsel for failure to discover the State had seized hard drives and other digital storage devices from Peterman's workplace containing exculpatory photographs. Peterman contended his appellate counsel was also ineffective for failing to brief the issue about the State's failure to disclose it had recovered Peterman's hard drives.

The district court issued a memorandum decision and order in March 2019, summarily dismissing all but four of Peterman's claims. The district court determined it needed to conduct an evidentiary hearing over the following four allegations: (1) failure to investigate possible defenses and failure to marshal facts to the extent it inhibited trial counsel's ability to effectively cross-examine the State's witnesses; (2) failure of trial counsel to review the majority of evidence prior to trial; (3) failure of trial counsel to subpoena additional witnesses, specifically the victim's therapist; and (4) failure to retain an expert witness.

At the evidentiary hearing, Peterman called his trial counsel, a clinical forensic psychologist, and a criminal defense attorney to the stand. The State also called a forensic interviewing expert. The district judge took the case under advisement to allow him an opportunity to compare expert reports and review F.W.'s forensic interview transcript. The parties submitted proposed findings of fact and conclusions of law. The district court issued an extensive memorandum decision denying Peterman's K.S.A. 60-1507 motion based on the allegations and testimony presented at the evidentiary hearing and denying Peterman's request for a new trial. Additional facts are set forth as necessary.

ANALYSIS

We now turn to address the four issues Peterman briefed. Any issues not briefed are deemed waived and abandoned. *State v. Arnett*, 307 Kan. 648, 650, 413 P.3d 787 (2018).

Standard of Review

After a full evidentiary hearing on a K.S.A. 60-1507 motion, the district court must issue findings of fact and conclusions of law on all issues presented. K.S.A. 2020 Supp. 60-1507(b); Supreme Court Rule 183(j) (2022 Kan. S. Ct. R. at 242). An appellate court reviews the district court's findings of fact to determine whether they are supported by substantial competent evidence and are sufficient to support the district court's conclusions of law. Appellate review of the district court's ultimate conclusions of law is de novo. *Balbirnie v. State*, 311 Kan. 893, 897-98, 468 P.3d 334 (2020).

No Abuse of Discretion to Exclude Business Records Containing Third-Party Hearsay

Peterman argues the district court erred by not allowing business records from Youthville therapy into evidence at his K.S.A. 60-1507 hearing. Peterman contends the Youthville records established he did not abuse the victim and, by not allowing the records into evidence, his ability to present an adequate defense was diminished. The State asserts the district court did not abuse its discretion by excluding the Youthville records from evidence because those records contained multiple levels of hearsay. The State further responds, even if the district court abused its discretion, any error was harmless.

Standard of review

Appellate courts generally review a district court's admission or exclusion of hearsay statements for an abuse of discretion. *State v. Davey*, 306 Kan. 814, 820, 397 P.3d 1190 (2017). A district court abuses its discretion if its decision is based on an error of fact or law or is arbitrary, fanciful, or unreasonable. *State v. Frazier*, 311 Kan. 378, 381, 461 P.3d 43 (2020). Peterman bears the burden of showing such abuse of discretion. See *State v. Thomas*, 307 Kan. 733, 739, 415 P.3d 430 (2018). To the extent the legal

basis for the district court's action requires interpretation of K.S.A. 2020 Supp. 60-460, appellate review is unlimited. *Davey*, 306 Kan. at 820.

Hearsay

An out-of-court statement offered to prove the truth of the matter asserted is inadmissible as hearsay unless the statement qualifies under an exception. K.S.A. 2020 Supp. 60-460. One recognized exception is for business records, which states:

> "*Business entries and the like*. Writings offered as memoranda or records of acts, conditions or events to prove the facts stated therein, if the judge finds that: (1) They were made in the regular course of a business at or about the time of the act, condition or event recorded; and (2) the sources of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness.
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> "If the procedure specified by K.S.A. 60-245a(b), and amendments thereto, for providing business records has been complied with and no party has required the personal attendance of a custodian of the records or the production of the original records, the affidavit or declaration of the custodian shall be prima facie evidence that the records satisfy the requirements of this subsection." K.S.A. 2020 Supp. 60-460(m).

Peterman tried to admit Youthville business records from F.W.'s therapist into evidence during his K.S.A. 60-1507 evidentiary hearing under the business record hearsay exception. Peterman contends that F.W. told her therapist that Peterman never abused her and his trial counsel's failure to elicit such information during witness examinations at trial impaired his defense. The State does not contest the procedure in which the Youthville business records were obtained and produced, nor does it contest the fact the Youthville records qualify as business records. The State, however, contends F.W.'s statements within the Youthville business records were inadmissible because Peterman failed to establish an independent basis for the admissibility of such statements.

K.S.A. 60-463 states:

> "A statement within the scope of an exception to K.S.A. 60-460 shall not be inadmissible on the ground that it includes a statement by another declarant and is offered to prove the truth of the included statement if such included statement itself meets the requirements of an exception."

In *State v. Davis*, 2 Kan. App. 2d 698, 699, 587 P.2d 3 (1978), a panel of our court explained the double hearsay problem in the context of admitted business records:

> "Assuming appropriate foundation for admission of all or part of the hospital record in this case, the problem is that double hearsay is involved. The proffered evidence constitutes hearsay statements of hospital personnel reporting statements of the defendant. It was offered to prove the truth of such included statements. The business records exception, K.S.A. 60-460(M), renders admissible hearsay statements of hospital personnel but does not render admissible included hearsay statements absent admissibility of the included statements under some other exception to the rule. K.S.A. 60-463.
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> "'The mere fact that recordation of third party statements is routine, as in official reports or hospital records, is no guaranty of the truth of the statements themselves. In this situation there are two hearsay barriers. The exception for business entries removes one of the barriers, and the removal of the other must depend on whether there is an independent basis for admissibility of the included hearsay declarations under some other exception to the hearsay rule.' [Citation omitted.]"

Peterman did not proffer a hearsay exception to admit F.W.'s statements—claiming Peterman did not abuse her—into evidence during his evidentiary hearing or in his brief on appeal. Peterman's K.S.A. 60-1507 motion explains why he believed excluding F.W.'s statements noted within Youthville records diminished his defense, but his analysis ends without addressing the issue of double hearsay. At the evidentiary hearing, Peterman argued the district court should have admitted the Youthville business

records to establish interviewer bias from F.W.'s forensic interviewer. Peterman's K.S.A. 60-1507 counsel explained:

> "There is really one [therapy] session whose record in here is critical to, I think, several of the witnesses today in order to make them aware. And, that is, the Court may recall that Terri Trent [F.W.'s forensic interviewer] was a witness in the—in the trial of this matter, that she had been asked by Mr. Kepfield [Peterman's trial counsel] in regard to her prior contacts with the alleged victim before the forensic interview of that victim.
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> "One of these therapy notes indicates that Mrs. Trent was present and questioning the girl during her therapy session. And, apparently, the therapist permitted her to attend and asked direct—questions directly about Mr. Peterman.
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> "So, that is documented in the records of Youthville, and it's—it's a properly certified business record that was kept in the ordinary course of the Youthville business in providing therapy and taking notes of such appointments."

The district court responded: "I think about the only way we can proceed, then, is on an issue-by-issue basis for the Court to be able to determine the portion of the record that's being referred to and see if there is multiple hearsay within that record."

It appears, on appeal, Peterman fails to understand the district court's specific ruling. Instead, Peterman's argument focuses on the business record exception and does not address the double hearsay issue. Peterman, therefore, waives and abandons such argument on appeal. See *Arnett*, 307 Kan. at 650.

Peterman has not established the district court's decision to exclude F.W.'s statements as double hearsay was based on an error of fact or law or was otherwise arbitrary, fanciful, or unreasonable. Peterman has not met his burden to show the district court abused its discretion.

Harmless error

The State also argues any error in excluding F.W.'s statements as double hearsay was harmless. K.S.A. 2020 Supp. 60-261 requires the court to determine "whether there is a reasonable probability that the error affected the outcome of the trial in light of the entire record." *State v. Perez*, 306 Kan. 655, 666, 396 P.3d 78 (2017). The State has the burden to establish the exclusion of such evidence resulted in harmless error. See *State v. Lowery*, 308 Kan. 1183, 1236, 427 P.3d 865 (2018).

Peterman specifically tried to enter the September 14, 2011 Youthville business record into evidence "as it pertains to contact between the interviewer and the child nine months prior to this interview." Peterman wanted to establish interviewer bias because the forensic interviewer, Trent, had previous contact with F.W. and knew F.W.'s background before the interview. Dr. Robert Barnett, a clinical psychologist, testified the preferred method to conduct a forensic interview is with an interviewer who has minimal information about the child and the child's circumstances. However, Kelly Robbins, the executive director of two nonprofit child advocacy centers, explained the concept of a having an interviewer who does not know the child conduct an interview is not always possible in smaller communities.

While the district court sustained the State's double hearsay objection to F.W.'s statements, it allowed Dr. Barnett to review the September 14, 2011 Youthville record and testify that Trent was present and active during F.W.'s therapy session. Dr. Barnett then suggested there was interviewer bias or confirmatory bias as Trent performed a forensic interview on F.W. about nine months after the September 14, 2011, therapy session. Specifically, Dr. Barnett suggested, because Trent had prior contact and knowledge of F.W.'s circumstances, there was interviewer bias or confirmatory bias. Dr. Barnett explained interviewer bias or confirmatory bias can occur when a forensic interview is conducted by an interviewer who has a goal of confirming a certain point of

view or certain conclusion. The district court took judicial notice of the transcript of F.W.'s forensic interview.

At Peterman's jury trial, Kepfield cross-examined Trent about interviewer bias, specifically pointing out Trent's frequent contact with F.W.'s family and her contact with F.W. on September 14, 2011. Kepfield also cross-examined Sylvia DesLauriers, F.W.'s therapist after she was placed in foster care, about the term interviewer bias. DesLauriers admitted repeated questioning can be hard on children, especially if the child is interviewed repeatedly.

Peterman was able to elicit testimony about potential interviewer bias during both his jury trial and K.S.A. 60-1507 evidentiary hearing. Even if the district court did abuse its discretion in excluding the double hearsay, such error was harmless because Peterman has not shown how it would have changed the outcome of the trial.

Whether to Call or Not Call a Witness Is Trial Strategy for Trial Counsel After Reasonable Investigation

Peterman argues the district court erred in concluding trial counsel made a reasonable strategic decision not to call one of F.W.'s therapists—Minor—as a witness. Peterman also claims his trial counsel was ineffective for failing to retain or consult with an expert witness. The State asserts the evidence against Peterman was strong and, had Minor testified at trial, her testimony would have been cumulative. The State also argues Kepfield did not need to call an expert witness to attack F.W.'s forensic interview because the State did not enter the video of F.W.'s forensic interview into evidence at trial. With respect to both witnesses, the State argues Peterman has not shown he was prejudiced.

Discussion

A district court must set aside a movant's conviction if "there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack." K.S.A. 2020 Supp. 60-1507(b). The right to *effective* counsel is embodied in the Sixth Amendment to the United States Constitution and "plays a crucial role in the adversarial system." *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674(1984); see *Chamberlain v. State*, 236 Kan. 650, 656-57, 694 P.2d 468 (1985) (adopting *Strickland*). Ineffective assistance of counsel can be categorized into three subgroups, one of which is a claim that defense counsel's "'performance was so deficient that the defendant was denied a fair trial.'" *Sola-Morales v. State*, 300 Kan. 875, 882, 335 P.3d 1162 (2014). That is, "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

> "To prevail on a claim of ineffective assistance of trial counsel, a criminal defendant must establish (1) that 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, *reh. denied* 467 U.S. 1267 [1984])." *State v. Salary*, 309 Kan. 479, 483, 437 P.3d 953 (2019).

There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment. *Strickland*, 466 U.S. at 689. The burden is on the criminal defendant to establish counsel's representation fell below an objective standard of reasonableness viewed at the time of counsel's conduct. 466 U.S. at 687-88, 690. If the district court can dispose of a claim of ineffective assistance of counsel for lack of sufficient prejudice, the district court should do so. 466 U.S. at 697; *Edgar v. State*, 294 Kan. 828, 843, 283 P.3d 152 (2012).

If counsel made strategic decisions after making a thorough investigation of the law and facts relevant to the realistically available options, then counsel's decisions are virtually unchallengeable. *Strickland*, 466 U.S. at 690-91. While some aspects of a criminal case remain with the accused—such as what plea to enter, whether to waive a jury trial, or whether to testify—other aspects of a criminal case—such as what witnesses to call, whether and how to conduct cross-examination, and other strategic and tactical decisions—are left to the defense counsel. *Edgar*, 294 Kan. at 838-39. Simply invoking the word "'strategy'" does not protect "'the performance of a criminal defendant's lawyer from constitutional criticism.'" *Sola-Morales*, 300 Kan. at 887. The criminal defendant or movant claiming ineffective assistance of counsel bears the burden to prove trial counsel's alleged deficiencies did not result from strategy. 300 Kan. at 888.

Prejudice for failing to call F.W.'s therapist

Even if Kepfield's failure to call F.W.'s therapist as a witness or to hire an expert witness to consult with and to testify was deficient performance, Peterman was not prejudiced because the jury likely would have reached the same conclusion. The district court explained at Peterman's evidentiary hearing:

> "In addition to showing that Kepfield's claimed failures to investigate, review evidence, and subpoena witnesses fell below an objective standard of reasonableness, Peterman has the burden to show prejudice as a reasonable probability that the verdicts in his case would have been different had Kepfield conducted additional investigation and called additional witnesses. Even if additional witnesses cast some doubt on the credibility of the victim, the overall evidence in Peterman's case was strong. The victim presented herself well at trial, and the testimony and pictures of the 'My Fair Lady' play in Dodge City and the phone video of Peterman placing the victim's head in his lap were extremely probative.
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> "Kepfield maintained his defense theory throughout trial and put the State to its burden of proof. His examination of witnesses and decisions not to call certain witnesses fed into his defense theory and minimized the risk of accidental introduction of

unfavorable evidence. The fact that other experienced attorneys might disagree on best tactics or matters of strategy, or deliberate decisions based upon strategy does not establish ineffective assistance of counsel.

"Peterman never explains how further investigation, review of evidence, and subpoena of additional witnesses would likely have changed the jury verdict. Peterman does not know the subject matter of testimony that could have been provided by Minor or the victim's father, nor specifically how it might have been more favorable than prejudicial to his defense. He only states what Kepfield should have done, and fails to explain how Kepfield's acts or omissions fell outside the range of reasonable professional judgment. Even if Kepfield was ineffective, Peterman cannot establish Kepfield's performance prejudiced his defense. [Citation omitted.]"

The district court's findings of fact were supported by substantial competent evidence and are sufficient to support the district court's conclusions of law. At the evidentiary hearing, Kepfield testified the defense case came down to F.W.'s credibility as there was no physical evidence in this case. Kepfield subpoenaed the Kansas Department for Children and Families, formerly Social and Rehabilitation Services (SRS), records in search of evidence supporting a defense theory that F.W. made up the sexual abuse allegations against Peterman, but the records did not tend to support such theory. Kepfield explained he did not subpoena Minor "because, generally speaking, as a defense attorney, you know, S.R.S. people are not your friends." In fact, F.W.'s therapy records contain information regarding past sexual abuse from an uncle as well as concerns she was spending time with a registered sex offender—Peterman.

Kepfield called two witnesses, Peterman's son and a neighbor, to present a theory to the jury that Peterman was simply acting as a good neighbor to F.W.'s struggling family by providing food and necessities to F.W. and her siblings. Peterman claimed he gave F.W. more attention because she had more emotional needs than her sisters.

F.W. was eventually placed in foster care and was referred to a new therapist, DesLauriers. The State called DesLauriers to testify at trial. Though F.W. had previously denied sexual contact with Peterman, she disclosed to DesLauriers that Peterman had licked her vaginal area. DesLauriers testified F.W. was initially afraid to tell anyone what had happened. DesLauriers was unaware of Peterman before F.W. brought him up. DesLauriers explained it was not unusual for a child to disclose abuse after a period of time:

> "[Disclosure] usually occurs over a period of time, because kids generally tell a little bit to begin with and see how people react and see if it is safe. Because they've usually been told not to tell. And so they sometimes fear something bad is going to happen when they do. So, they usually tell a little bit and if nothing bad happens, nobody gets mad at them, shames them, disbelieves them, then they will share more over time as the opportunity arises."

Even if Minor had testified that F.W. denied abuse, the jury would have heard DesLauriers' testimony revealing it was not unusual for a child to deny abuse and later disclose there was sexual abuse. Over time, the child may continue to disclose more facts about the abuse. Minor's therapy records also noted Peterman was a registered sex offender with a federal possession of child pornography conviction, a fact Kepfield—to Peterman's benefit—successfully kept from the jury through a motion in limine. At the evidentiary hearing, Kepfield explained there was a danger of opening the door to Peterman's registered sex offender status and, if the jury heard such testimony, it would be detrimental to Peterman's defense. Peterman makes a conclusory argument it was safe to presume Minor's testimony could not have been overly harmful because Minor did not report sexual abuse of F.W., which Minor would be required to report if F.W. had disclosed such abuse. Peterman seemingly fails to understand the implications of the other more damaging evidence that could have been presented if Minor had been called to testify before the jury.

Substantial competent evidence supported the district court's findings of fact and sufficiently support the district court's conclusions of law. See *Balbirnie*, 311 Kan. at 897-98. Peterman failed to meet his burden establishing prejudice by Kepfield's decision not to call F.W.'s therapist as a witness at trial. The district court correctly disposed of Peterman's claim of ineffective assistance of counsel for lack of sufficient prejudice. See *Strickland*, 466 U.S. at 697.

Prejudice for failing to call an expert witness

Kepfield testified at the evidentiary hearing he had done 30 or more jury trials, including 4 or 5 Jessica's Law cases, and devoted 90 percent of his practice to criminal law. Kepfield testified he referred to a book called *Jeopardy in the Courtroom* as a guide in analyzing child testimony, reports of sexual abuse, and other problems in similar cases in preparation for Peterman's jury trial. Kepfield understood the guide to advise that children become less suggestible the older they become, and children over 10 years old become a lot harder to convince to concoct a wild story. F.W. was over the age of 10 at the time of the sexual abuse and trial. Kepfield viewed Trent's forensic interview of F.W. several times and made the strategic decision not to call an expert witness as he saw nothing obviously phony, strange, factually unlikely, or impossible in the interview. Kepfield explained to the district court:

> "[W]hat you're dealing with here is pretty much psychological evidence. What—ideally what you're trying to do is show that the victim is making this up and that there [are] things in her past that inclined her to make these things up, all right. Now, I looked at [F.W.'s forensic interview] video. Which, the video was not introduced into evidence by the State, and I wasn't gonna do it because that's not my job. But, the video did not send up any real flags to me. I mean, I'm not a psychologist, but I deal with psychology. And, every criminal defense lawyer. You do. You deal with it everyday. I can't make a diagnoses [*sic*]. But, I do know when I have enough in front of me to call somebody who can make a diagnosis, like Dr. Barnett, okay. I didn't see anything in there that really

> indicated that there was a—a detachment from reality, or that she was making all of this up. What I saw was, I think, an 11 or 12 year-old girl who had been abused by—allegedly abused by my client. And, it was, again, pretty mild. It's not the sort of thing—and, Mr. Peterman's story was that she was doing this to get back at him, because he was interfering with her boy—you know, he didn't want her dating this boy. And, that, just to me, didn't really ring true. . . . So, I didn't think—and what—all I could do was, you know, maybe bring in an expert to generally testify about these sorts of, you know, interviews, and talk about the Finding Words protocol and, you know, how it maybe, you know, isn't all that great—as great as the State says it is. But, that's really—in my mind, that wasn't going to persuade a jury."

Kepfield explained the video of F.W.'s forensic interview was not beneficial to the defense case, and he was not going to admit the video into evidence after the State chose not to enter it. In fact, Kepfield had never, in his experience as a criminal trial attorney, introduced a forensic interview into evidence as part of the defense case-in-chief.

Kepfield initially told the district court he might call an expert witness but eventually determined calling an expert was unnecessary in this case. Kepfield testified he had hired expert witnesses in the past to review forensic interviews, but, again, he presented evidence to the jury through cross-examination of the State's witnesses, particularly with respect to Trent, about interviewer bias. Kepfield noted there was a potential issue questioning Trent too much about interviewer bias because F.W. was asked multiple times whether anything happened with Peterman due to concern of his status as a registered sex offender. And, while Kepfield admitted he had no billing entries on Peterman's case between May and September preceding the October trial, he spent nearly the entire week before trial pouring over records and preparing for Peterman's case. Kepfield explained he was prepared for trial and, had he found more information in the week leading up to trial affecting his defense, he would have asked for a continuance.

The district court's findings of fact are supported by substantial competent evidence and are sufficient to support the district court's conclusions of law. See *Balbirnie*, 311 Kan. at 897-98. Peterman failed to meet his burden establishing he was prejudiced by Kepfield's decision not to retain and call an expert witness to the stand as part of the defense case-in-chief. See *Strickland*, 466 U.S. at 697.

No Brady *Violation Justifying an Evidentiary Hearing*

Peterman argues that prior to trial the State acquired a search warrant and obtained computer equipment and hard drives from his place of employment but did not inform Peterman of the warrant or the seized items. Peterman alleges his trial counsel was ineffective for failing to discover the search warrant or seized items and appellate counsel was ineffective for failing to raise the issue on direct appeal. Peterman is essentially alleging an intermingled claim of ineffective assistance of counsel, newly discovered evidence, and a *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), violation.

The State responds Peterman presumably had personal knowledge of the digital information contained on the hard drives and Peterman was not prejudiced by the State's failure to produce such evidence. The State's position is supported by Peterman's allegations in his K.S.A. 60-1507 motion. Peterman asserted the pictures on his hard drives were exculpatory and showed he took just as many pictures of his own children and F.W.'s siblings as he took of F.W. Peterman also explained he told Kepfield he had "evidence (photos and otherwise) that could likely bear on this case." Peterman also claimed Kepfield "should have immediately taken the proper steps to get that evidence 'into captivity.'" The State responds the digital information located on the hard drives was encrypted and unusable at trial, though the State hoped to later unencrypt the hard drives.

Standard of Review

The movant bears the burden to prove his K.S.A. 60-1507 motion warrants an evidentiary hearing by making more than conclusory contentions and stating an evidentiary basis in support of the claims. *Mundy v. State*, 307 Kan. 280, 304, 408 P.3d 965 (2018). In deciding whether an evidentiary hearing must be held, the district court generally must accept the factual allegations set out in the motion as true. See *Hogue v. Bruce*, 279 Kan. 848, 850, 113 P.3d 234 (2005). But the factual allegations must be specific, not mere conclusions. *Mundy*, 307 Kan. at 304. We have de novo review over a summary dismissal of a K.S.A. 60-1507 motion. *Bellamy v. State*, 285 Kan. 346, 354, 172 P.3d 10 (2007).

Discussion

In summarily dismissing Peterman's claim, the district court explained:

> "Peterman had personal knowledge of the existence of the hard drive and its contents. He has proffered his efforts to obtain the hard drive and his recollection of the contents. Peterman maintains that the hard drive was not encrypted, but it is clear from the comments by the State after the sentencing hearing occurred that it obtained no useful evidence because of the State's description of an encrypted hard drive.
>
> "The discussion of discovery occurring December 5, 2012, covered all evidence recovered by the State to that point. The Court ordered that if additional evidence became available, the State could bring it before the Court to determine its admissibility. From the comments offered by the State following the sentencing hearing, the evidence never became available due to its encryption, and the State could not conceal the content of the evidence from Peterman. Peterman offers no evidence to establish that the contents of the hard drive were not encrypted, and while he now maintains that information from the hard drive would have been beneficial to his case, he fails to show prejudice to the extent that the trial result would have been different."

The State cannot withhold favorable evidence to an accused "where the evidence is material either to guilt or to punishment, irrespective of the good faith or bath faith of the prosecution." *Brady*, 373 U.S. at 87. "[A] *Brady* violation is reviewed de novo with deference to a trial court's findings of fact, but the trial court's denial of the defendant's motion for new trial is reviewed under an abuse of discretion standard." *State v. Warrior*, 294 Kan. 484, 510, 277 P.3d 1111 (2012).

There are three elements of a *Brady* violation: "(1) '"The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching"'; (2) '"that evidence must have been suppressed by the State, either willfully or inadvertently"'; and (3) the evidence must be material so as to establish prejudice. [Citations omitted.]" *Warrior*, 294 Kan. at 506. If there is a reasonable probability the outcome of the proceeding would differ had the evidence been disclosed, the evidence is considered material. 294 Kan. at 507.

To establish the right to a new trial based upon newly discovered evidence, a criminal defendant must establish: (1) the newly proffered evidence could not have been produced at trial with reasonable diligence; and (2) the newly discovered evidence '"is of such materiality that it would be likely to produce a different result upon retrial.'" *State v. Dean*, 310 Kan. 848, 856, 450 P.3d 819 (2019).

Peterman asserts he "offered a highly detailed account of precisely how those photos would have been either exculpatory or impeaching." Peterman cites his K.S.A. 60-1507 motion in which he claimed the pictures on his hard drive would have showed the allegations that he took more pictures of F.W. than his own children or F.W.'s siblings were false. This not only supports the State's position Peterman had knowledge of the content on the hard drives, but also Peterman fails to acknowledge, based on his own contentions, the hard drives would tend to show he took numerous pictures of young children other than his own. And, while the State never turned the evidence over to

Peterman, he had personal knowledge of what was on the hard drives and could not be prejudiced by the State's actions because the hard drives were encrypted, and the State never had access to the digital information.

The evidence against Peterman was strong, and we observe no reasonable probability the outcome of the proceedings would have been different had the State turned over the encrypted hard drives to Peterman. In fact, on direct appeal, a panel of our court noted:

> "In addition to testimony regarding the three alleged incidents, the State also elicited testimony about the relationship between F.W. and Peterman. Specifically, F.W. testified that Peterman repeatedly told her when he gave her gifts that she was his girlfriend and would ask her to marry him.
>
> "F.W.'s sister, M.W., testified that she often observed Peterman doing this and that she found it strange. Both F.W and M.W. testified that even though Peterman also bought gifts for F.W.'s sisters, he never talked about marrying them. Moreover, the gifts he bought F.W. were sometimes bigger or more expensive than those he gave to her sisters.
>
> "DesLauriers testified about conduct that is considered to be 'grooming' by sexual perpetrators to gain the trust of a victim and a victim's family. She testified that sexual perpetrators might try to groom a child by spending time with them, buying them 'special gifts,' or doing fun things with them.
>
> "In addition, F.W testified that while driving with Peterman he sometimes asked her if she wanted to rest her head on his lap. On one occasion, M.W. took several videos of F.W. with her head on Peterman's lap while he drove. The videos were admitted into evidence over Peterman's objection.
>
> "Patricia Copeland—a patron who sat directly behind Peterman and F.W. during a production of 'My Fair Lady' in Dodge City—witnessed Peterman's interaction with F.W. and found it disturbing. Copeland observed that Peterman sat next to F.W., kept his arm around her for 'hours,' and both whispered into and kissed F.W.'s ear numerous times. Copeland testified that Peterman and F.W. gave the appearance of being boyfriend

and girlfriend. In fact, she thought that their interaction to be so disturbing that she took pictures and turned them into the police.

"Peterman testified in his own defense at trial. Although he admitted treating F.W. 'somewhat' differently than her sisters, Peterman claimed this was because she had emotional issues and needed more attention. He also admitted to calling F.W. his girlfriend but asserted he used the term as slang. In addition, Peterman admitted to teasing F.W. about marrying him as part of a running joke to prevent her from marrying her boyfriend. Peterman described his relationship with F.W. as a helpful family friend and told the jury that the alleged incidents of sexual abuse never happened. He also denied kissing F.W. on the ear during the play in Dodge City." *Peterman*, 2015 WL 8587505, at * 1-2.

Peterman has failed to show how the evidence from the encrypted hard drives held by the State would have changed the outcome of the trial. Because of the lack of prejudice, among other reasons, Peterman's claim that the State failed to turn over exculpatory evidence, which hindered his defense, fails.

Affirmed.