

NOT DESIGNATED FOR PUBLICATION

No. 124,279

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

NOAH DEMETRIUS REED,  
*Appellant,*

v.

STATE OF KANSAS,  
*Appellee.*

MEMORANDUM OPINION

Appeal from Sedgwick District Court; FAITH A.J. MAUGHAN, judge. Submitted without oral argument. Opinion filed November 3, 2023. Affirmed.

*Kristen B. Patty*, of Wichita, for appellant, and *Noah Demetrius Reed*, appellant pro se.

*Matt J. Maloney*, assistant district attorney, *Marc Bennett*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before HILL, P.J., HURST, J., and TIMOTHY G. LAHEY, S.J.

PER CURIAM: Noah Demetrius Reed appeals the district court's denial of his K.S.A. 60-1507 motion, contending that his appellate counsel was ineffective for failing to challenge the district court's denial of Reed's self-defense immunity motion. We find no error by the district court and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 2016, the State charged Reed with several crimes, including attempted first-degree murder. Because Reed maintained that he acted out of self-defense, his attorney

filed a pretrial motion under Kansas' self-defense immunity statute. K.S.A. 2016 Supp. 21-5231. The district court held an evidentiary hearing on the motion in accord with the then-prevailing standard by viewing evidence in the light most favorable to the State. See e.g., *State v. Evans*, 51 Kan. App. 2d 1043, 1050, 360 P.3d 1086 (2015), *rev'd* 305 Kan. 1072, 389 P.3d 1278 (2017); *State v. Hardy*, 51 Kan. App. 2d 296, 304, 347 P.3d 222 (2015), *rev'd* 305 Kan. 1001, 390 P.3d 30 (2017). After the district court denied Reed's immunity motion, Reed proceeded to a jury trial where he asserted the same self-defense claim he advanced in his pretrial motion. The jury rejected Reed's self-defense claim, and he was convicted of the lesser included offense of attempted second-degree murder, criminal threat, and aggravated kidnapping.

After the verdict, but before sentencing, the Kansas Supreme Court decided *State v. Hardy*, 305 Kan. 1001, 390 P.3d 30 (2017), clarifying that a district court considering a defendant's pretrial motion for dismissal under Kansas' self-defense immunity statute should view the evidence without deference to the State rather than in a light most favorable to the State. In conjunction with Reed's motion for new trial, and based on *Hardy*, the district court reconsidered Reed's immunity motion but still denied it.

Reed's conviction was affirmed on direct appeal. *State v. Reed*, No. 117,718, 2018 WL 4839660 (Kan. App. 2018) (unpublished opinion), *rev. denied* 310 Kan. 1069 (2019). Reed then filed the present K.S.A. 60-1507 motion asking this court to reverse his convictions or remand to the district court for an evidentiary hearing. He contends that his direct appeal attorney was ineffective for failing to argue that the district court erred in denying his immunity motion post-*Hardy*. The district court initially dismissed Reed's motion without any type of hearing, but in response to Reed's motion for clarification, the court appointed counsel for Reed and set the matter for hearing. Following the hearing, in which Reed testified, the court reaffirmed its earlier denial of Reed's K.S.A. 60-1507 motion, finding that his claims lacked merit. In this appeal, Reed argues that the district court erred in dismissing his ineffective-assistance-of-counsel claim in which he asserts

his direct appeal attorney was ineffective for failing to argue that the district court erred in denying his immunity motion post-*Hardy*.

In 2016, the State charged Reed with one count each of attempted first-degree murder, aggravated burglary, attempted rape, criminal threat, and aggravated kidnapping. Reed maintained that these charges arose from an act of self-defense, so his attorney asked the court to dismiss the first two counts against him under Kansas' self-defense immunity statute, K.S.A. 2016 Supp. 21-5231. The self-defense immunity statute provides that a person who is justified in using deadly force in self-defense is entitled to immunity from prosecution. Procedurally, as *Hardy* explains, it is the court's function to prevent cases in which self-defense is justified from going to trial, as a defendant has a right against continued prosecution if the State cannot establish probable cause that the defendant did not use statutorily justified force. See *State v. Phillips*, 312 Kan. 643, 659, 479 P.3d 176 (2021).

*The initial self-defense immunity hearing.*

Reed's immunity motion explained his understanding of what happened in R.D.'s apartment the morning she was stabbed multiple times. The night before the incident, Reed arrived at R.D.'s apartment to sell marijuana to R.D.'s neighbor. Reed and R.D. consumed alcohol and marijuana in R.D.'s apartment, disrobed, and went to bed. Early the next morning, Reed claimed he was robbed by R.D. and two unknown males. The motion claimed Reed fought off the two males, driving them from the apartment. And, according to the motion, Reed barricaded the apartment door with a couch to prevent the males from reentering, believing he was in imminent danger of death or great bodily injury.

The evidence in the immunity hearing included testimony from three police officers, one police sergeant, and Reed. The State admitted several exhibits, including

photos of Reed's injuries, video footage, and the preliminary hearing transcript where R.D. testified that Reed stabbed her and was attacking her.

Officer Zachary Gehring testified that when he arrived on the scene, he heard R.D. yelling, "Help me," from inside. Officer Aric St. Vrain repeatedly attempted to get someone to answer the door, and when that failed, he worked to forcibly enter the apartment—which was difficult because the door was barricaded on the inside with a couch. According to Officer Gehring, Reed said he was hit in the head with a vase and robbed, while R.D. stated that Reed stabbed her and was going to rape her. Officer St. Vrain testified that he did not hear a disturbance until knocking on R.D.'s door when he heard a female—later identified as R.D.—yelling for help and a "glass breaking as if there was a disturbance inside."

Reed testified that he vaguely remembered the morning of the incident and that he was drunk and high at the time. Reed recalled that after R.D. woke him up, he was hit in the head with a vase and attacked by R.D. and two males. Reed later added new details to his story, including that he was punched and hit with a bat and other objects. According to Reed, R.D. came at him with a knife, but he did not remember stabbing her. And Reed testified that he had to "fight off whoever [he] had to fight off so [he] could be ok." When Reed was asked if he acted in self-defense, he stated, "Yes, but it is not—I'm not saying that I'm—no. I don't know. It happened so fast. I am not—no."

The parties contested how the court should view the immunity evidence. At the time of the immunity hearing, the district court followed the rule established by our court in self-defense immunity hearings by weighing conflicting evidence in the light most favorable to the State. See *Hardy*, 51 Kan. App. 2d at 304 ("The district court must view the evidence in a light favoring the State."); *Evans*, 51 Kan. App. 2d at 1050. Viewing the evidence in the light most favorable to the State, the district court found probable cause that Reed "acted without legal justification in the use of force." In doing so, the court

noted that it reviewed the preliminary transcript, the State's photographs, *Miranda* statements, and the testimony of the officers and Reed.

Reed proceeded to trial and did not abandon his self-defense claim—Reed presented his self-defense claim to the jury, and the jury received self-defense instructions. Reed's attorney told the jury that "[t]his case is about a person who acted in self-defense. Mr. Reed was defending himself in this situation." And when Reed was asked if he acted in self-defense, Reed replied much as he did at the immunity hearing: "Yes, but it is not—I'm not saying that I'm—no. I don't know. It happened so fast."

On February 24, 2017, the jury found Reed guilty of the lesser included offense of attempted second-degree murder, criminal threat, and aggravated kidnapping, rejecting the contention that he acted in self-defense. The jury acquitted Reed of attempted rape.

On March 10, 2017—before Reed was sentenced—the Kansas Supreme Court reversed the Court of Appeal's decision in *Hardy*, clarifying the standard a district court should apply when reviewing an immunity motion. In *Hardy*, the court held that a district court "must consider the totality of the circumstances, weigh the evidence before it without deference to the State, and determine whether the State has carried its burden to establish probable cause that the defendant's use of force was not statutorily justified." 305 Kan. 1001, Syl. ¶ 1. Thus, the Supreme Court in *Hardy* instructed that the district court should have considered the evidence at Reed's immunity hearing without deference to the State. 305 Kan. 1001, Syl. ¶ 1.

Twelve days after the Supreme Court opinion was filed in *Hardy*, Reed filed a motion for a new trial and judgment of acquittal. The motion referenced his attorney's pretrial motion for immunity, but it did not mention the Kansas Supreme Court's opinion in *Hardy*. Still, Reed's attorney extensively addressed *Hardy* at the motion hearing after the State included the case in its response.

At the hearing on Reed's motion for a new trial and judgment of acquittal, the parties both agreed that because the Supreme Court's *Hardy* ruling was released after Reed's initial immunity hearing, the court should reconsider Reed's immunity request using the new standard from *Hardy* and enter an appropriate ruling.

After continuing sentencing to reconsider the evidence from the pretrial immunity hearing, the district court again denied Reed's immunity motion, stating:

"Viewing the evidence that was presented at the pretrial motions in light of the Supreme Court decision of *Hardy*, I have consider[ed] the totality of the circumstances and I have weighed the evidence before me without deference to the State, and based on that evidence, specifically Officer Gehring's testimony and Officer St. Vrain's testimony, and also Mr. Reed's testimony at the hearing, I find that . . . Reed's use of force was not . . . statutorily justified."

The district court then sentenced Reed to 685 months' imprisonment and 36 months of postrelease supervision. Reed appealed his convictions through his appellate defender Korey A. Kaul, arguing that the district court erred by refusing to dismiss one of the jurors and that the prosecutor misstated evidence during closing argument. On appeal, this court affirmed Reed's convictions. *Reed*, 2018 WL 4839660.

Reed next filed a pro se K.S.A. 60-1507 motion—which is the subject of this appeal—on May 28, 2020. Woven throughout his motion, Reed argues that his direct appeal counsel was ineffective for failing to argue that the district court erred by denying Reed's self-defense immunity motion under *Hardy*. Reed set forth several other claims in his K.S.A. 60-1507 motion, which he abandons on appeal.

The district court summarily denied Reed's K.S.A. 60-1507 motion, but in response to Reed's motion for clarification on the district court ruling, the court appointed

counsel for Reed and held a hearing on the motion in which Reed testified. After considering Reed's testimony at the motion hearing, the district court again denied Reed's K.S.A. 60-1507 motion.

Reed appeals.

#### ANALYSIS

A district court may resolve a K.S.A. 60-1507 motion in one of three ways: (1) summarily deny it because the motion, files, and case records show that the movant is not entitled to relief; (2) hold a preliminary hearing because the motion, files, and case records show that a substantial issue exists. The court may deny the motion after the preliminary hearing if there is no substantial issue; or (3) hold an evidentiary hearing because the preliminary hearing, motion, files, and case records show that there is a substantial issue justifying the hearing. *Beauclair v. State*, 308 Kan. 284, 293, 419 P.3d 1180 (2018).

A district court has discretion to determine whether a K.S.A. 60-1507 motion raises a substantial claim before granting a full evidentiary hearing. *Lujan v. State*, 270 Kan. 163, 170, 14 P.3d 424 (2000); see Supreme Court Rule 183(h) (2023 Kan. S. Ct. R. at 244). If a K.S.A. 60-1507 motion presents no substantial questions, a court is not required to hold an evidentiary hearing because there are no new facts to develop. *Moncla v. State*, 285 Kan. 826, 830, 176 P.3d 954 (2008).

Here, the parties disagree about what option the district court used to dismiss Reed's motion. Reed argues that his K.S.A. 60-1507 motion was denied without an evidentiary hearing. But the State claims that the hearing on Reed's motion for clarification was an evidentiary hearing. Our review of the record shows that the hearing on Reed's motion for clarification was more like a preliminary hearing. Reed was the

only testifying witness, and the purpose of the hearing was to clarify the claims Reed raised in his pro se K.S.A. 60-1507 motion, not to develop facts for his arguments. Thus, we conclude Reed's motion was denied after a preliminary hearing rather than following a full evidentiary hearing. Consequently, in reviewing the decision of the district court, this court exercises unlimited review over any legal conclusions while deferring to a district court's findings of fact. *Bellamy v. State*, 285 Kan. 346, 353-54, 172 P.3d 10 (2007). In doing so, this court must determine whether the district court was correct to dismiss the motion because "the motion, files, and records of the case conclusively show that the movant is entitled to no relief." *Beauclair*, 308 Kan. at 293.

To obtain an evidentiary hearing, a K.S.A. 60-1507 motion must allege more than conclusory claims with no avenue to relief. *Trotter v. State*, 288 Kan. 112, 131-32, 200 P.3d 1236 (2009). "[I]t is incumbent upon the movant to show that a triable issue of fact already exists and is identifiable at the time of the motion." *Stewart v. State*, 310 Kan. 39, 54-55, 444 P.3d 955 (2019). Such facts may include factual background, names of witnesses, or other information showing an entitlement to relief. *Swenson v. State*, 284 Kan. 931, 938, 169 P.3d 298 (2007).

The Sixth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, guarantees the accused a right to effective assistance of counsel in all criminal prosecutions. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). And the test courts use to determine whether an attorney's performance is ineffective has two prongs. The movant must establish (1) that their counsel's performance was deficient and (2) that the deficiency prejudiced them and deprived them of a fair trial. 466 U.S. at 687; *Chamberlain v. State*, 236 Kan. 650, Syl. ¶ 3, 694 P.2d 468 (1985) (adopting *Strickland* in Kansas).



The first prong of the ineffective-assistance-of-counsel test requires a movant to show that the attorney's representation "'fell below an objective standard of reasonableness.'" *Khalil-Alsalaami v. State*, 313 Kan. 472, 485, 486 P.3d 1216 (2021) (quoting *Strickland*, 466 U.S. at 688). And there is a strong presumption that counsel's performance falls within this wide range of reasonable performance. 466 U.S. at 689.

Under the second prong, a movant must show "'a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different'" considering the totality of the evidence before the judge or jury. *Edgar v. State*, 294 Kan. 828, 838, 283 P.3d 152 (2012); *Chamberlain*, 236 Kan. at 655. "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Edgar*, 294 Kan. at 838.

*Reed fails to show that his direct appeal attorney was deficient.*

In its order denying Reed's K.S.A. 60-1507 motion, the district court found that "[n]either trial counsel, nor, appellate counsel was ineffective in their representation of movant." Our review of the record shows that this is a correct conclusion.

Under Kansas law, a direct appeal attorney is not automatically ineffective for failing to raise a particular issue on appeal. *Laymon v. State*, 280 Kan. 430, 439, 122 P.3d 326 (2005). Rather, an appellate attorney should only raise issues that have merit:

"In an appeal from a criminal conviction, appellate counsel should carefully consider the issues, and those that are weak or without merit, as well as those which could result in nothing more than harmless error, should not be included as issues on appeal. Likewise, the fact that the defendant requests such an issue or issues to be raised does not require appellate counsel to include them. Conscientious counsel should only raise issues on appeal which, in the exercise of reasonable professional judgment, have merit." *Baker v. State*, 243 Kan. 1, 10, 755 P.2d 493 (1988).

Thus, because an attorney need not raise every conceivable issue, Reed must prove why his attorney's omission of the *Hardy* issue was deficient.

In *Hardy*, our Supreme Court instructed that, when reviewing a self-defense immunity motion under K.S.A. 2016 Supp. 21-5231, a district court must "consider the totality of the circumstances, weigh the evidence before it without deference to the State, and determine whether the State has carried its burden to establish probable cause that the defendant's use of force was not statutorily justified." 305 Kan. 1001, Syl. ¶ 1. For the State to meet this burden, it must show probable cause that an ordinary, prudent person could reasonably believe that "(1) [t]he defendant did not honestly believe the use of force was necessary under the circumstances or (2) a reasonable person would not believe the use of force was necessary under the circumstances." *State v. Trotter*, No. 120,158, 2022 WL 2112212, at \*3 (Kan. App.) (unpublished opinion), *rev. denied* 316 Kan. 763 (2022); see K.S.A. 2022 Supp. 21-5222.

*Hardy* also held that an appellate court should apply a bifurcated standard of review when considering immunity motions on appeal—appellate courts should review a district court's findings of fact only for substantial competent evidence and review a district court's conclusion of law *de novo*. 305 Kan. 1001, Syl. ¶ 5. Substantial competent evidence is evidence which "possesses both relevance and substance," providing a "substantial basis in fact from which the issues can reasonably be resolved." *State v. Macomber*, 309 Kan. 907, 916, 441 P.3d 479 (2019).

In contending that his appellate counsel was ineffective, Reed claims the omitted argument about self-defense immunity was "significant and obvious," "clearly stronger" than the ones the attorney did raise, and "so obviously valid that any competent lawyer would have raised it." Beyond these conclusory statements, Reed does not engage in any analysis explaining why his direct appeal attorney's omission of the *Hardy* issue fell

below an objective standard of reasonableness. Reed identifies no factual or legal error by the district court which runs afoul of *Hardy*, and we discern none in our review of the record. The district court appropriately applied the then-prevailing legal standard in the initial immunity hearing. And after the *Hardy* decision came down, and before sentencing, the district court reevaluated the evidence in light of the *Hardy* decision. Again, Reed points to no error in the court's application of *Hardy*. We fail to understand how Reed's appellate counsel would discern an "obviously valid argument" that even Reed does not identify.

When a party fails to adequately brief an issue, we deem it waived and abandoned. *State v. Arnett*, 307 Kan. 648, 650, 413 P.3d 787 (2018). Reed fails to present any analysis suggesting how or why his appellate attorney was constitutionally deficient, and he does not suggest how or why the district court's ruling was erroneous. Thus, we find his argument that his counsel was deficient is waived and abandoned. But even if we attempt to address this issue on the merits, Reed's claim fails. Considering that the district court undertook a second review of Reed's immunity motion post-*Hardy*, Reed has not shown that it was objectively unreasonable for his direct appeal attorney to omit a claim of error involving the self-defense immunity hearing.

Furthermore, the district court's decision was supported by substantial competent evidence and was sufficient to support the conclusion that the State met its burden to establish probable cause that Reed's use of force was not statutorily justified. *Hardy*, 305 Kan. 1001, Syl. ¶ 5. The State came forth with photos showing that Reed's injuries were largely inconsistent with his testimony, R.D.'s preliminary hearing testimony implicating Reed, and the officers' testimony stating that they heard R.D. yelling for help while they were attempting to enter the barricaded apartment door. Meanwhile, Reed could not recall the details of the incident and refused to admit that he stabbed R.D., which did not square with his argument that he stabbed R.D. in self-defense. Reed was not insistent that he acted in self-defense and gave equivocal answers when asked if he did, such as "Yes,

but it is not—I'm not saying that I'm—no. I don't know. It happened so fast. I am not—no." Substantial competent evidence supported that the State met its burden to establish probable cause that Reed's use of force was not lawful.

*Reed fails to show that he was prejudiced by his attorney's performance.*

Even if Reed's direct appeal attorney were deficient for omitting the *Hardy* issue, the district court did not err by denying Reed's K.S.A. 60-1507 motion because he was not prejudiced by it. The only argument Reed makes for why he was prejudiced is that had his attorney included the *Hardy* issue on direct appeal, his convictions "likely would have been reversed." But Reed provides no factual or legal analysis explaining why his convictions would have been reversed.

There is no reasonable probability that the proceedings would have resulted differently had the issue been argued on direct appeal for at least two reasons: First, as explained above, the district court applied the correct standard when, before sentencing, it reconsidered Reed's immunity request under *Hardy* and made factual findings supported by the evidence. Second, "even if the district court erred in all aspects of the immunity ruling, the error was harmless." *State v. Ultreras*, 296 Kan. 828, 845, 295 P.3d 1020 (2013).

In *Ultreras*, our Supreme Court held that when a district court rules on an immunity motion using an erroneous standard and burden of proof, an error may be harmless if there is no reasonable probability that it affected the outcome of the trial. 296 Kan. 828, Syl. ¶ 3. The *Ultreras* court found that even though the district court committed error in the immunity ruling, the error was harmless because—as in Reed's case—the jury received a self-defense instruction, heard the full litigation of the self-defense issue, and still entered a guilty verdict. 296 Kan. at 845.

And relying in part on *Ultreras*, a panel of this court reached a similar conclusion in *State v. Steele*, No. 118,245, 2019 WL 1087257, at \*3 (Kan. App.) (unpublished opinion), *rev. denied* 310 Kan. 1070 (2019). There, Steele argued on direct appeal that the district court erred by failing to apply the *Hardy* standard to his renewed immunity motion. Like Reed, Steel filed an immunity motion under K.S.A. 2016 Supp. 21-5231 pre-*Hardy*, and then asked the court to reconsider the motion post-*Hardy* after the jury announced its verdict but before he was sentenced. The panel rejected Steele's argument because (1) the district court applied *Hardy* to Steele's renewed immunity motion, and (2) any error was harmless considering the jury returned a guilty verdict even though it received a self-defense instruction. *Steele*, 2019 WL 1087257, at \*3.

*Ultreras* and *Steele* show that even if Reed's direct appeal attorney would have raised the *Hardy* issue, the outcome of his appeal would have been the same.

Since *Ultreras*, our Supreme Court has clarified that "where the evidence presented at the immunity hearing does not align with the trial evidence, a statutory harmless error analysis is not appropriate." *Phillips*, 312 Kan. at 660. *Phillips* recognized one potential harm from an error in a self-defense immunity hearing is that a defendant continues to be prosecuted. 312 Kan. at 659 (Kansas affords a statutory right to be free from continued prosecution if the State fails to establish probable cause that the defendant's use of force was not statutorily justified based on the evidence presented at the immunity hearing.). So, if evidence at the immunity hearing does not align with that presented at trial, the trial verdict may not support the conclusion that an error in the immunity hearing was harmless. 312 Kan. at 659-60.

But Reed does not argue that the evidence presented at the immunity hearing differed from that presented at trial. In fact, he admits that he testified during the immunity hearing "much as he later would during trial." Thus, *Phillips* does not change the analysis in Reed's case.

The district court did not err when it denied Reed's K.S.A. 60-1507 motion after holding a preliminary hearing because Reed's motion and the record show that he is not entitled to relief.

Affirmed.